DELHI ITAT (BAR) REPORTS – FEBRUARY 2019

1. **All India Fine Arts and Crafts Society v. ADIT(E) (ITA No. 1449/D/13) (14.02.19) (ITAT, Delhi)**

SECTION 2(15) – PROVISO – MERELY BECAUSE FEE IS BEING COLLECTED WOULD NOT MAKE AN INSTITUTION NON-CHARITABLE – DOMINANT ACTIVITY IS TO BE SEEN – THE OBJECT OF PROMOTION OF ART, CRAFT AND CULTURE FOR INDIAN ARTIST WOULD BE CHARITABLE IN NATURE U/S 2(15) OF THE ACT.

Held, the Hon'ble Delhi High Court has held that merely because a fee or some other consideration is collected or received by an institution, it would not loose its character of having been established for a charitable purpose. Undisputedly, in the present case the dominant activity of the assessee society is not business trade or commerce but its activities are for the promotion of art, craft and culture for the Indian artists in India. The Assessing Officer has himself reproduced the main objectives of the assessee (All India Fine Arts & Crafts Society) society as per the Memorandum of Association in his assessment order and they are: (i) fostering and developing fine and applied arts in India to promote appreciation by means of publications, lectures, Conferences, Demonstration, Exhibition etc.;(ii) organizing and establishing a national art gallery in New Delhi; (iii) organizing art exhibitions and societies in India and abroad; (iv) acting as Central Organization of Arts and Crafts in India etc. It is also undisputed that the assessee society has carried out activities in the form of annual art exhibitions, camps for senior and junior artists, providing maintenance to aged artists etc. It is also not the department's case that any part of surplus was diverted from the society and applied for any personal benefit of any member or office bearer of the society. Therefore, it can be safely concluded that the dominant activity of the assessee society is not business, trade or commerce and, accordingly, any incidental or ancillary activity like hiring out of art gallery or selling paintings would not also fall within the categories of trade, commerce or business. **[Para 5.1]**

2. **Process-Cuim-Product Development Centre v. Addl CIT (ITA No. 3401 TO 3403/D/17) (04/02/2019) (ITAT, Delhi)**

SECTION 2(15) READ WITH SECTION 10(23C)(iiib) – MEANING OF WORD 'EDUCATION' WITHIN THE DEFINITION OF CHARTIABLE PURPOSE UNDER SECTION 2(15) - IMPARTING OF TRAINING FOR PRODUCTION OF SUPPORT GOODS AND LEISURE TIME EQUIPMENTS FALL WITHIN THE MEANING OF "EDUCATION" CONTAINED UNDER SECTION 2(15) – DECISION OF SUPREME COURT IN THE CASE OF "SOLE TRUSTEE LOCAL SHIKSHA TRUST EXAMINED AND APPLIED – EXEMPTION UNDER SECTION 10(23C)(iiib) IS INDEPENDENT OF REGISTRATION UNDER SECTION 12A OF THE ACT – SINCE THE ACTIVITIES OF

THE ASSESSEE SOCIETY FALL WITHIN THE MEANING OF CHARTIABLE PURPOSE UNDER SECTION 2(15), IT WAS ENTITLED TO EXEMPTION UNDER SECTION 10(23)(C)(iiib) NOTWITHSTANDING REGISTRATION UNDER SECTION 12A.

Held, Though the main objects of the assessee society are divided into 8 objects but all are interconnected with each other so as to impart the best available trainings to the students to develop new products / business of sport goods and leisure time equipments. We are of the considered view that when the training imparted tothe students is not to produce goods of world standard by making necessary marketing research and by identifying products for domestic and export market, such training would be of no use and the students who have been given training would not be in a position to get placement in the sport goods and leisure time equipments industry. Moreover the entire emphasis is laid by our Government on "skill development" by departing from age old system of imparting academic education and training not as per requirement of the industry. … Furthermore, when we examine the audited income and expenditure account of the assessee society it shows that substantial income is from training courses and there is a miniscule income from job receipts. When the assessee society is admittedly getting raw material from the various industries to produce the sport goods for them and the job charges paid by them are again used for running the training institute it can not be said by any stretch of imagination that assessee society is not being run for education / training purpose. Particularly, there is no case of the Revenue that the main objects of the assessee society is profit making rather declining the exemption on the sole ground that the assessee institution is not existing solely for educational purposes. So, we are constrained to record that the word 'education' is to be given wide interpretation which includes training and developing the knowledge, skill, mind and character of the students by normal schooling…. So, we are of the considered view that assessee society is engaged in imparting training to the students in manufacturing the sport goods and leisure equipments without any profit motive.**[Paras15, 16, 17]**

3. Siddhartha Jain vs. ITO (ITA No.4459/DEL/2017) (28.01.2019)(ITAT, Delhi)

SECTION 10(38) – PENNY STOCK - SOURCE OF THE CREDIT APPEARING IN THE BANK ACCOUNT IS FROM SALE OF SHARES, THEN WITHOUT ANY CONTRARY MATERIAL TO SHOW THAT SUCH CREDIT IN THE BANK ACCOUNT IS BOGUS OR NON-GENUINE, THEN SAID CREDIT CANNOT BE DEEMED TO BE INCOME OF THE ASSESSEE - GENERAL *MODUS OPERANDI* OF THE ENTRY PROVIDERS CANNOT BE THE BASIS FOR MAKING THE ADDITION IN ABSENCE OF ANY SPECIFIC INFORMATION OR MATERIAL.

Held, once the nature of transaction is dealing in shares and source of the credit appearing in the bank account is from sale of shares, then without any contrary material to show that such credit in the bank account is bogus or non-genuine, then said credit cannot be deemed to be income of the assesse. Though such a phenomenal rise of the shares in a span of 18 months do raises lot of suspicion, but howsoever strong suspicion may be, there has to be some kind of an evidence or information that assesse was involved in some kind of bogus or sham transaction, either by himself or through some entry provider. There is no whisper in the assessment order or appellate order that

any action has been taken by SEBI against M/s. KappacPharma or they have been found to be rigging the price in the stock exchange. Once a listed share which is regularly traded in the recognized stock exchange at quoted price and the sale of share is recorded in the stock exchange and sale proceeds of the said share has been credited in the bank account, then source of credit stands proved. Simply because the price of the scrip has risen manifold cannot *per se* be the ground to hold that credit in bank account of the assessee is unexplained. If there is some undisclosed or unexplained money which has been routed through some suspicious channel then that has to be some evidence or trail brought on record so as to nail the assesse. General *modus operandi* of the entry providers cannot be the basis for making the addition in each and every case in absence of any specific information or material that such person is beneficiary of accommodation entry or any kind of scam or is part of that *modus operandi*. Her no such material or information has been found against the assesse. Accordingly, in absence of any contrary material on record, I do not find any reason to sustain the addition and the same is directed to be deleted. [Para 9]

4. M/s TATA Community Initiatives Trust v. CIT (ITA No. 4219/D/15) (29/01/2019) (ITAT, Delhi)

SECTION 12AA - NO POWER WITH THE CIT (EXEMPTIONS) TO QUALIFY TRUST AS "GENERAL PUBLIC UTILITY TRUST" OR FOR ANY OTHER ACTIVITY FALLING WITHIN THE DEFINITION OF "CHARITABLE TRUST" UNDER SECTION 2(15) OF THE ACT – CIT (E) ONLY EMPOWER TO GRANT REGISTRATION OR REFUSE REGISTRATION OF THE TRUST UNDER SECTION 12A – REGISTRATION CERTIFICATE GRANTED WHILE QUALIFYING THE TRUST AS "GENERAL PUBLIC UTILITY TRUST" WAS BEYOND JURISDICTION AND THEREFORE THE ORDER OF THE CIT WAS MODIFIED.

Held, From the above, it is clear that Section 12AA(1)(b) provides that if the Principal Commissioner or Commissioner is satisfied about the object of the trust and the genuineness of its activities, he shall pass an order in writing registering the trust and if not so satisfied, pass an order refusing to register the trust. Thus, the power of the CIT is to register or to refuse the registration of the trust. He is not supposed to qualify the trust as "general public utility trust". From the definition of "charitable purpose" in Section 2(15), we find that following activities fall within the ambit of "charitable purpose" …. It is for the Assessing Officer to examine every year after considering the activities of the trust whether they fall within any of the above clauses of charitable activities. The CIT is not supposed to specify while registering the trust the activities which can or would be performed by the trust. In view of the above, we direct that the trust would be granted registration under Section 12AA of the Act without any qualification. … In the result, the appeal of the assessee is allowed as above.**[Paras 6, 7, 8]**

5. Luthra & Luthra Law Offices vs ACIT (ITA No.5349/Del/2015) (12.02.2019) (ITAT, Delhi)

SECTION 40(b)(v) – SALARY PAID TO PARTNERS AS PER PROFIT SHARING RATIO – THE REQUIREMENT OF CBDT CIRCULAR NO. 739 DATED 25/03/1996 STOOD SATISFIED - CIT vs. VAISH ASSOCIATES (2015) 63 TAXMANN.COM 90 (Delhi) FOLLOWED.

The contention of the Assessing Officer is that the CBDT in circular No. 739 dated 25/03/1996 has clarified the position of the salary/remuneration paid to partners as provided u/s 40(b)(v) of the Act. The Ld. Assessing Officer observed that the remuneration to the partners should either be quantified or manner of the quantification should be specified. [Para 9]

According to Assessing Officer in above clause of the partnership which is reproduced in para 7 of this order, the remuneration has neither been quantified nor manner of quantification has been specified. However in our opinion, the finding of the Ld. Assessing Officer as well as Ld. CIT(A) on this issue is not correct. The partnership deed has specified that the amount of remuneration allowable u/s 40(b)(v) would be the amount of remuneration paid to the partners and same would be shared in their profit-sharing ratio in that year. The profit-sharing ratio of the partners has been specified as 2/3rd (Sh Rajiv K Luthra) and 1/3rd (ShMohitSaraf). The assessee accordingly paid total remuneration of Rs. 45,00,000/-in the profit sharing ratio to both the partners. In our view, the clause of the partnership deed satisfies the requirement of the CBDT circular (supra) and there is no violation on the part of the assessee in this regard. [Para 10]

In view of the aforesaid discussion and, respectfully following the decision of the Hon'ble Delhi High Court in the case of Vaish Associates (supra), we set aside the finding of the lower authorities on the issue in dispute and direct the Assessing Officer to delete the disallowance. All the grounds of appeal of the assessee are accordingly allowed. [Para 15]

6. Unitech Ltd. v. DCIT (ITA No. 6585/D/15) (12.02.19)(ITAT, Delhi)

I. SECTION 45 - BUSINESS INCOME V. CAPITAL GAIN – TRANSFER OF SHARES OF WHOLLY OWNED COMPANIES HOLDING LAND – THE SALE OF SHARES WOULD NOT RESULT IN TRANSFER OF UNDERLYING ASSET AS THE SAME REMAINS WITH THE COMPANY – THE AO WAS NOT JUSTIFIED IN TREATING CAPITAL GAIN ARISING FROM SALE OF SHARES AS BUSINESS INCOME.

II. SECTION 92B- SHARE APPLICATION MONEY PAID TO AE CANNOT BE TREATED AS NOTIONAL LOAN FOR THE PURPOSE OF MAKING TRANSFER PRICING ADJUSTMENT ON ACCOUNT OF INTEREST.

I. Held, we have heard the rival submissions and also the material referred to before us. The sole reason for treating the sale of shares of subsidiary company as business income by the Revenue is that, assessee company is engaged in an organised manner to do business of real estate and have acquired 100% shares in its subsidiary companies who in turn were owning land. Thus, assessee is selling land held by these companies through transfer of shares and what has been received by the assessee company is sale price of land and therefore, there is direct nexus with trading activity of the assessee company. According to AO, these transactions have been carried out in a manner which indicates systematic and organised activity with profit motive, therefore, it becomes a

business profit and not capital gain. However, from the perusal of the documents referred to by the Ld. Counsel, it is seen that shares of these companies were acquired way back in financial year 2005-06 and 2007-08 and the shares in the subsidiary companies were always shown as investment in the books of account and in the balance sheets. What has been transferred and sold by the assessee are the shares held in the subsidiary companies and not the land owned by the subsidiaries. It is trite law that the shareholders subscribe to the shares of the company and not the underlying asset and by transfer of shares the underlying asset of the company does not get transferred as the asset remains with the company. Here in this case, at the time of purchase of shares they were recorded and classified under the head 'investment' in the books of accounts and was also reflected as such in the audited financial statements from year to year and never these shares have been treated as tradable or stock-in-trade, as the investment schedule was grouped under the head 'non-trade' investment. If investments are held by a company for earning income by way of interest, or dividend or for appreciation of capital or for any other benefits then it cannot be treated as stock in trade. The shares of the subsidiaries have been valued at cost and not of the cost of market price whichever is lower, which is normally done in case of stock-in-trade. Here the department has sought to adopt "look through approach" holding that it is not the subsidiary but the assessee which is the owner of the land and hence the transaction is of sale of land, disregarding the substance of the transaction as here what has been transferred is shares of subsidiary company and not the land. For disregarding an apparent transaction there has to be some information or material on record to digress from 'looking at' the transactions and sans any material, such a recharacterization of transaction by 'look through' approach is purely hypothetical, based on surmise and presumption which cannot be permitted. If right from day one, assessee has classified the shares as investment and intention was always to treat it as an investment, then sale of such investment ostensibly would be assessed as a capital gain and not business income. **[Para 14]**

Further the guide line issued by the CBDT, clearly lays down that, what has to be seen is, firstly, the objective of acquiring the shares, that is, whether it has been treated as investment or to enjoy income there from or to make profit by buying and selling shares in short run; secondly, the period of which shares have been held, that is, whether the shares are held for more than three years; thirdly, whether there is frequency of transactions in a particular share; and lastly, the treatment and classification given in the books of accounts has to be given significance. If we apply the said guidelines, then all the factors indicate that intention was never to trade in shares. Here the revenue's stand that there was trading of under lying assets of the subsidiary companies, cannot be upheld in law as shareholder does not have right to assets of the company but only share in profit. The company alone can with the approval of board of directors sell its assets. Thus, we do not find any reason as to why sale of shares is treated as trading in land so as to be taxed as business income in the hands of the assessee. Hence, in view of our discussion made above, we hold that income from sale of shares cannot be taxed as business income but has to taxed as capital gain. **[Para 15]**

II. Held, we have heard the rival submissions and also perused the relevant finding given in the impugned orders. First of all, we have to see, whether on a plain reading of section 92B (1) such a transaction falls within the purview of income arising from international transaction which is condition precedent for application of transfer pricing provision under chapter X. The transaction of subscribing of share application money is always on capital account and would become taxable

to the extent it impacts the income. It is only income which is to be adjusted to the arm's length price and not tax on capital receipt. AO has recharacterized the share application money as a loan simply because during the year the shares have been not allotted. Such recharacterization first of all, cannot be made unless there is an intention of the parties or there is any arrangement, understanding or action in concert. If any money has been advanced for acquisition of shares which is a capital asset, same cannot be treated as capital financing unless the parties have intended or agreed to convert the same. Such an intention has to be gathered from any agreement or arrangement or understanding. If parties have treated it to be share application money for subscription of shares, then onus is upon the AO to prove it contrary that it is an international transaction. Here AO has drawn presumption on the ground that there was delay in allotment of shares, hence it is an international transaction of capital financing. Such a presumption cannot change the character of transaction. **[Para 25]**

Even otherwise also, the charge of income has to be first seen in terms of section 4 and 5 and the income which can be brought to tax has been defined under u/s 2(24) of the Act. Share application money for subscription of shares is for acquisition of capital asset and money received by the company is a capital receipt. A capital receipt is not an income under section 2(24) unless it is chargeable to tax as capital gains under Section 45. It is for this reason that under section 2(24)(vi) the Legislature has expressly stated, that income shall include any capital gains chargeable under section 45. Otherwise, a capital receipt is not reckoned as income. This issue of recharacterization of share application money into loan has been considered at length by the Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd. vs UOI (Supra), wherein Hon'ble High Court after detail discussion has concluded that provisions of chapter X are not applicable to international transaction of issuance of equity shares. Here in this case it has been brought on record that the shares have been allotted to the assessee company in the subsequent year; and therefore, such shares ostensibly fall into capital account that cannot be treated as capital financing which needs to be benchmarked for the purpose of determining the ALP by imputing any kind of interest. TPO/ AO cannot disregard any apparent transaction and substitute it by recharacterizing the said transaction without anymaterial or exceptional circumstances that the assessee has tried to conceal the real transaction. Investment made in shares or applying for the shares cannot be given different colour so as to expand the scope of transfer pricing adjustment by recharacterizing it as interest free loan. Thus, we are unable to uphold the contention of the department that share application money pending allotment should be recharacterized as loan till the period it is allotted after a reasonable time. Accordingly, the adjustment made by the TPO is directed to be deleted. **[Para 26]**

7. Dr. Rajinder Kumar Gupta v. ACIT (ITA No. 4089/D/15)(31.01.19)(ITAT, Delhi)

SECTION 54 – THE INVESTMENT IN NEW HOUSE SHOULD NOT NECESSARILY BE OUT OF SALE PROCEEDS OF OLD HOUSE – WHERE SUBSTANTIAL INVESTMENT

IN NEW HOUSE IS MADE WITHIN TIME LIMIT PRESCRIBED U/S SECTION 54 – THE CLAIM OF EXEMPTION CANNOT BE DENIED MERELY BECAUSE COMPLETE AMOUNT WAS NOT INVESTED WITHIN 3 YEARS.

Held, In CIT vs H.K. Kapoor (supra), the Hon'ble Allahabad High Court held in unequivocal terms that in view of the decision of the Karnataka High Court in the case of CIT vs. J.R. Subramanya Bhat (1987) 165 ITR 571, the capital gains arising from the sale of the old house to the extent it got invested in the construction of the new house would be exempt u/s 54 of the Act and Section 54 does not lay down that the construction of the new house must taken after the sale of the old residential house or that the sale proceeds of the old residential house must be used for the construction of the new residential house. Besides this, the law is fairly settled on this aspect that for acquiring the new house, it is not necessary that the assessee must utilize only the sale proceeds of the old house. By respectfully following this line of decision of the higher fora, we hold that the authorities below are not correct in refusing to accept the claim of the assessee to deduct such part of amount which was invested in the construction activity of the new house earlier to the sale of the old house. **[Para 11]**

Now turning to the other limb of the contention of the authorities below that the assessee did not acquire the property within three years from the date of the sale of the old house, the fact remains that there is no dispute that except the sum of Rs.22,91,382/-, the entire sale consideration for the new house was invested on or earlier to 23.3.2011 i.e. within 3 years from the date of the sale of the old house. This amounts to substantial compliance with the provisions of Section 54 as has been held by the Hon'ble Madhya Pradesh High Court in the case of Smt. Shashi Verma (supra), Hon'ble Delhi High Court in the case of Satish Chandra (supra) and in the case of SambandamUdaykumar (supra) besides the decisions of the Chandigarh and Mumbai Benches of the Tribunal in the cases of Bhavna Cuccria and Kishore H. Galaiya (supra). By respectfully following the ratio of the said decisions, we do not find any substance in the objection taken by the authorities below to disallow the claim for deduction u/s 54 of the Act. **[Para 12]**

8. Samco Alloys (India) Pvt. Ltd. Vs ACIT (ITA No. 2372/Del/2016) (12.02.2019)(ITAT, Delhi)

SECTION 68 – NO ADDITION OF UNSECURED LOAN – WHERE CREDITORS ARE INCOME TAX ASSESSEE - LOW INCOME OF THE CREDITOR WOULD NOT BE A GROUND TO DOUBT THE CREDITWORTHINESS OF THE CREDITORS - ALL THE CREDITS ARE TAKEN THROUGH BANKING CHANNEL - FIVE OF THE CREDITORS HAVE ALSO RESPONDED DIRECTLY TO THE AO IN RESPONSE TO THE SUMMONS U/S 131 OF THE ACT AND HAVE CONFIRMED THE TRANSACTION.

Held, In this case, it was considered that low income of the creditor would not be a ground to doubt the Creditworthiness of the creditors. Similar views have been taken by ITAT Delhi 'E' Bench in the case of ACIT vs. Smt. Meenu Chauhan (supra) in which also it was held that "the majority of the creditors are Income tax assessees, but they have not returned substantial income that does not mean that they are not creditworthy. The Departmental appeal was dismissed". In the case of DCIT

vs. M/s Landmark Exim Pvt. Ltd. (supra) similar views have been taken in favour of the assessee. [Para 10]

Considering the facts of the case in the light of the above decisions, it is clear that assessee filed confirmation from all the creditors before A.O. All the credits are taken through banking channel. The assessee filed their ledger account with their bank statements. Five of the creditors have also responded directly to the AO in response to the summons u/s 131 of the Act and have confirmed the transaction with the assessee, supported by the affidavits and the documentary evidences. It is well settled law that Department cannot ask the assessee to prove source of the source. In the cases of three creditors at Sl. No. 1, 3, 4, there were cheques cleared through banking channel before giving loan to the assessee. In the case of creditors mentioned at Sl. No. 5, 6 & 7, they have declared income from other sources and paid the taxes. Therefore, all these creditors were having sufficient bank balances in their bank accounts for giving credit to the assessee. [Para 11]

9. DCIT vs. M/S Mahesh Wood Products (P) LTD. (ITA No. 4873 TO 4875/Del/2014)(21.02.2019)(ITAT, Delhi)

SECTION 68 –NOTHING ON RECORD THAT THE ASSESSEE WAS EVER CONFRONTED WITH THE INSPECTOR'S REPORT BASED ON WHICH THE ADVERSE VIEW WAS FINALLY TAKEN BY THE REVENUE - THE REVENUE HAS ALSO NOT COMMENTED ON THE REPLIES RECEIVED BY POST - THERE IS NOTHING ON RECORD TO SUGGEST THAT THE FINDING OF THE REVENUE THAT THE SHARE APPLICANT COMPANIES COULD NOT BE FOUND AT THE GIVEN ADDRESSES, WAS CONFRONTED TO THE ASSESSE - LOVELY EXPORTS 216 CTR 195 (SC) APPLIED

We find that the addition in dispute is based on two facts i.e. first inability of the assessee to produce the Directors of the applicant companies, and second on account of absence of the applicant companies at the given addresses. We note that the case of the assessee is that it was provided with adequate opportunity to establish the transactions and it was not confronted with even the Inspector's report stating that he said companies were not found. From the facts of the case, it appears that the assessee was required to establish the transactions and to produce the Directors/Principal Officers of those companies vide order-sheet entry dated 30.11.2011. Subsequently, summons were directly issued by the revenue to the share applicant companies on 16.12.2011 for compliance on 21.12.2011 and physical verification was also carried out by the revenue through the Inspector. Thus, the entire process of verification of share capital and framing of the assessment was completed in a period of last month before the proceeding was barred by limitation on 31.12.2011. Since the notice u/s 153A of the Act initiating the scrutiny proceeding was issued much earlier on 13.04.2010, the inescapable conclusion that can be reached is that the assessment was completed in a hurried manner, and therefore the defence of the assessee that it was not provided adequate opportunity appears correct. Further, we do not find from the record that the assessee was ever confronted with the Inspector's report based on which the adverse view was finally taken by the revenue. The revenue has also not commented on the replies received by post. Principles of natural justice are applicable to tax proceedings and, therefore, non-supply of the Inspector's report and failure to comment on the replies received from the parties adversely

affected the right of the assessee to be heard. In these circumstances, the assessee cannot be prevented from adducing evidence in its favour. The revenue has also not rebutted or assailed the evidence filed. Therefore, Ld. CIT(A) has rightly admitted the additional evidences produced by the assessee under Rule 46A of the IT Rules. We further note from the evidence filed that the share applications were received through banking channel. All share applicant companies are duly assessed to tax and are existing companies with annual returns filed under the Companies Act also. The summons / notices issued by the revenue had been duly served on these parties, and their failure to respond to the summons merely cast the onus on the assessee to establish the transactions. The assessee filed copies of share application forms received from the share applicant companies, bank statements evidencing the receipt of share application money, and PAN details of the applicant companies. Thus, the primary onus stood discharged by the assessee. Therefore, it cannot be concluded that these parties are non-existent or that the share application money received was bogus. There is nothing on record to suggest that the finding of the revenue that the share applicant companies could not be found at the given addresses, was confronted to the assessee. The issue of share premium raised by the revenue in the assessment order to doubt the genuineness of share capital raised also cannot be held against the assessee as the assessee was never required to explain or justify this matter. No evidence was found in the search to establish that the share capital raised was not genuine. Hence, we note that the case laws cited by the Ld. DR are on distinguished facts, therefore, are not applicable. However, our aforesaid view is fortified by the judgment of Hon'ble Supreme Court in the case of Lovely Exports 216 CTR 195 (SC).

10. Rathi Ceramics Pvt. Ltd. v. ITO (ITA No. 4540/Del/2014) (04.02.2019) (ITAT, Del)

SECTION 68 – SHARE CAPITAL – "TARUN GOYAL" – PRIMARY DOCUMENTS FURNISHED BY ASSESSEE – NO ENQUIRY BY AO – EVIDENCES FURNISHED NOT REBUTTED – ADDITION DELETED.

Assessment was reopened under section 147 of the Act on the basis of a report received from Investigation Wing regarding share capital of Rs.50,00,000/- being received from the two companies of Mr. Tarun Goyal -During original assessment u/s 143(3) assessee had filed confirmation bank Financial Stock statement, ITR and Audited Financial Stock statement of both share holder companies - Assessment thereafter was completed under section 143(3) of the Act by the AO vide order dated 27.12.2007 meaning thereby the AO has accepted the contention of the assessee. - Thereafter case was reopened by issue of notice u/s 148 of the Act - After reopening of assessment the AO has not made any further inquiry and after making a reference to the report received from investigation wing, the AO has not stated anything particular to the assessee. AO has also not commented adversely on any of the document available on record regarding these two companies. In view of these facts, the document submitted by the assessee were not rebutted by the AO.
Held, following NDR Promoters Pvt. Ltd (ITA 49/2018 order dated 17.01.2019) that the present case falls in the other category as the assessment order is silent about the documents available on record in support of the share capital received by the appellant company. No adverse observations or comment about the document available on record and submitted by the assessee in support of the share capital received by it in the original assessment proceedings on the basis of which assessment order dated 27.12.2007 was passed under section 143(3) of the Act.

Further held, AO having got the information from the investigation win, the least he could do to make inquiry from the shareholders, the details of which were already on the record. {Fair Finvest Ltd.357 ITR 146 (Del) followed}

11. Manoj Sharma v. ITO (ITA No. 4342/D/18) (28/01/19)(ITAT, Delhi)

SECTION 69C - BOGUS PURCHASES – WHEN THE ASSESSING OFFICER HAS NOT DISPUTED THE GROSS PROFIT OR QUANTITATIVE DETAILS OF STOCK – PURCHASES RECORDED IN THE BOOKS CANNOT BE DISALLOWED ON THE GROUND OF BOGUS PURCHASES – ALLEGATION OF BOGUS BILLS CAN ONLY LEAD TO ESTIMATION OF GP IN ABSENCE OF ANY DISPUTE WITH REGARD TO QUANTITATIVE DETAILS – DISALLOWANCE DELETED.

Held, Once the quantity of opening stock and purchases on the debit side; and sales and closing stock in the credit side in the books of account has been accepted, then to hold that the some quantity of purchases recorded in the books are unexplained or outside books of account, is very difficult proposition to accept. Because, the quantitative details of stock, purchases, sales have not been discarded or any defect has been found, then purchases as debited in the books of accounts cannot be added u/s 69C. Here in this case, even balancing figure of the gross profit shown by the assessee has not disturbed. Even if it is to be accepted that the purchases made from the three parties were in the nature of accommodation entries, then it has to be seen, firstly, whether these purchases have been made outside books or does not matches with the quantitative tally; or secondly, whether such bills have been obtained merely to suppress the gross profit. Ostensibly, the first reason is lacking here in this case as discussed above; and in so far as the second reasoning is concerned, one has to examine, if purchases have been made through cheques, the source of which are from the books of accounts and if later on, cash has been received in lieu of such cheque but no purchases have been made, then clearly there would be a difference in quantitative tally of purchases as well as in the stock and such a discrepancy has been found then purchases can be held to be bogus. But here in this case no such difference in the quantitative tally has been found. Further, if assessee after receiving the cash in lieu of the cheque has made purchases from the grey market for getting the same quantity of material in cash from some different vender, then at the most it could be a case of the suppressing of gross profit. In other words, assessee has debited higher amount for the purchase which in fact has purchased the same material and quantity at a lesser amount, thereby suppressing the gross profit. Under these circumstances any addition at all which could be made, is by enhancing the Gross Profit on such purchases. Nowhere there is a finding or whisper either by the AO or CIT (A) that the gross profit shown by the assessee during the year was less as compared to earlier or subsequent years or there is any material to show that gross profit has been low during the year. If all the entries in the trading account including the quantitative tally of purchases, opening stock, sales and closing stock are found to be correct and no discrepancy has been found, then no addition on account of unexplained purchases can be made, because nowhere it has been found that assessee has made purchases outside the books. The entire finding of the Ld. CIT (A) hinges upon the fact that there was material indicating purchase under consideration are bogus without even appreciating that if the source of purchases are from the books and through account payee cheque, then how such purchases can be treated as un accounted. Since gross profit rate and gross profit has been accepted including the trading account then no

such addition can be made. In the result on merits addition made by the AO is deleted and consequently assessee's appeal is allowed. **[Para 10]**

12. Bharat Bhushan Jain Charitable Trust vs CIT(E) (ITA No.750/Del/2018)(12.02.2019)(ITAT, Delhi)

SECTION 80G – ONCE ASSESSEE HAS BEEN GRANTING REGISTRATION UNDER SECTION 12A OF THE INCOME TAX ACT, 1961 - THERE WAS NO BASIS FOR LD. CIT(E) TO REJECT THE APPLICATION UNDER SECTION 80G(5) OF THE INCOME TAX ACT, 1961 - BHARAT VIKAS PARISHAD MAHARANA PRATAP NYAS, GURGAON, HARYANA VS., CIT(EXEMPTIONS) (HQ.), CHANDIGARH IN ITA.NO.6487/DEL./2018 FOLLOWED

Held, after considering the rival submissions, we are of the view that impugned order cannot be sustained in law. It is not in dispute that assessee has been granting registration under section 12A of the Income Tax Act, 1961,vide Order Dated 28th December, 2017, meaning thereby, Ld.CIT(E) was satisfied about the charitable activities carried-out by the assessee and the objects of the assese are charitable in nature. The Ld. CIT(E) has not disputed that assessee has satisfied the conditions of Section 80G(5)of the Income Tax, 1961. It is also not in dispute that assessee has carried-out some of the charitable activities in furtherance to its objects. Therefore, there was no basis for Ld. CIT(E) to reject the application under section 80G(5) of the Income Tax Act, 1961. We may note that the ITAT, Delhi A-Bench, Delhi in the case of Bharat Vikas Parishad Maharana Pratap Nyas, Gurgaon, Haryana vs., CIT(Exemptions) (Hq.), Chandigarh in ITA.No.6487/Del./2018 vide order Dated 6th February 2019 on similar circumstances has allowed the exemption/ approval under Section 80G(5) of the Income Tax Act, 1961. [Para 5]

13. M/s Saraswati Dyanamics vs ACIT (ITA No.3997/Del/2015) (20.02.2019) (ITAT, Delhi)

SECTION 80IC - COMPLETING THE SUBSTANTIAL EXPANSION FOR THE PURPOSE OF CLAIMING BENEFIT U/S 80IC FOR THE FIRST TIME SHALL BE READ IN THE CONTEXT OF THE PROVISO AS A WHOLE AND IT SHALL MEAN THAT THE COMPLETING OF SUBSTANTIAL EXPANSION WOULD BE EQUIVALENT TO THE COMMENCEMENT OF THE OPERATION

Held, In this context, it is necessary to examine the expression "initial assessment year" and "substantial expansion". Clause (v) of sub section (8) thereof defines "initial assessment year" to mean, "Initial assessment year" means the assessment year relevant to the previous year in which the undertaking or the enterprise begins to manufacture or produce articles or things, or commences operation or completes substantial expansion; whereas clause (ix) defines "Substantial expansion" means increase in the investment in the plant and machinery by at least fifty per cent of the book value of plant and machinery (before taking depreciation in any year), as on the first day of the previous year in which the substantial expansion is undertaken. [Para 9]

Now coming to the application of Section 80IC to the facts of the present case, it is an admitted fact that the assessee consistently has been mentioning the initial assessment year in Form 10CCB of Column 9 for claiming deduction as AY 2006-07. The date of substantial expansion was mentioned as 31.3.2005 at column No.25(d)(i) i.e. the last day of the FY2004-05. The very purpose of Section 80IC is to provide special provision in respect of certain undertakings and enterprise in special category status and itis a beneficial provision. If we accept the contention of the revenue that since the expansion took place on 31.3.2005, the initial assessment year for claiming deduction u/s 80IC would fall to be 2005-06, in a way Revenue is negating the benefit that was allowed by the statute u/s 80IC to the category of the undertakings which completed the substantial expansion by the last date of the financial year, the simple reason being there is no possibility of commencement of business in that financial year or to claim the benefit of the same. Certainly, it shall not be the way of interpretation of a beneficial provision of the statute. Statute shall not be read to have been taking away the expressly rendering benefit in an indirect way, and any interpretation which attributes redundancy to the wisdom of legislature shall not ordinarily be countenanced.[Para 11]

Further, as we have observed the initial assessment year means the assessment year relevant to the previous year in which the undertaking or an enterprise begins to manufacture or to produce articles or things or commences operations or completes substantial expansion. Here the completion of substantial expansion has to be read with reference to the expression in the company of which this particular expression happens to be. Having regard to the facts and circumstances of the case, we are of the considered opinion that completing the substantial expansion for the purpose of claiming benefit u/s 80IC for the first time shall be read in the context of the proviso as a whole and it shall mean that the completing of substantial expansion would be equivalent to the commencement of the operation.[Para 13]

With this view of the matter, we are of the considered opinion that undertaking of substantial expansion would be complete only when substantial expansion is capable of producing the desired results. We, therefore, find it difficult to agree with the interpretation given by the authorities below. [Para 14]

14. ITO v. Excel Pack Ltd. (ITA No. 5994/D/14) (18/02/2019) (ITAT, Delhi)

SECTION 80IC - WHERE ELIGIBILITY OF CLAIM OF DEDUCTION UNDER SECTION 80IC STOOD ACCEPTED IN THE INITIAL ASSESSMENT YEAR, THE SAME CANNOT BE DISTURBED IN THE SUCCEEDING YEAR(S) – DECISION OF DELHI HIGH COURT IN THE CASE OF INTERNATIONAL TRACTORS LIMITED: 297 CTR 197 FOLLOWED.

Held, We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. There is no dispute that the industrial unit was set up on 26.10.2006 and, therefore, the initial assessment year in which deduction u/s 80IC of the Act was claimed was assessment year 2007-08. Subsequently, the claim of deduction was also considered and allowed in assessment years 2008-09 and 2009-10. The assessment orders are placed in the paper book. … In our considered opinion, the claim of deduction in the subsequent assessment year comprising

of block of years in which the assessee is entitled for deduction cannot be disturbed unless the claim for initial year is disturbed. Our this view is fortified by the decision of the Hon'ble High Court of Delhi in the case of International Tractors Ltd 297 CTR 119. … We further find that while allowing the claim of deduction u/s 80IC of the Act, the first appellate authority has considered the Board Circular issued by the Government of India, Ministry of Finance, Department of Revenue in which the Board has considered the classification of aluminium foil laminated on both sides with plastic films would be under Chapter heading 7607 instead of Chapter heading 3920. … Considering the facts of the case from all angles, we do not find any error or infirmity in the finding of the ld. CIT(A).**[Paras12, 13, 14, 15]**

15. ITO v. Rudra Woodpack P. Ltd. (ITA No. 71/D/16)(07.02.19)(ITAT, Delhi)

SECTION 80IC – DEDUCTION IN RESPECT PROFIT DERIVED FROM MANUFACTURING UNIT – ASSEMBLING OF WOODEN PLANKS IN ORDER TO CREATE CRATES – AO TREATING THE ACTIVITY AS SIMPLE ASSEMBLING - THE WOODEN CRATES WERE IDENTIFIED AS DISTINCT PRODUCT BY CENTRAL EXCISE AND VAT ACT – THE ASSESSEE WAS GRANTED EXEMPTION BY CENTRAL EXCISE- THE ACTIVITY OF CREATION OF WOODEN CRATES TANTAMOUNT TO MANUFACTURING ACTIVITY U/S 2(29BA) OF THE ACT – TWO DEPARTMENTS OF GOVERNMENT CANNOT TAKE INCONSISTENT AND CONTRARY VIEW – DEDUCTION U/S 80IC ALLOWED.

Held, We have heard the rival submissions and perused the material on record and case laws cited by the parties. We find that the original products used by the assessee are wooden planks, evafoam, thermocol, adhesive tape/ pheumatic, stapler pins, and nails. The final product obtained in the process by the assessee is wooden crates which are a distinct and separate article different from all the products that go into it manufacture and recognized as a distinct product by Central Excise and VAT classification which has assigned the product a specific HS Code and serial no. respectively in the Central Excise and VAT Schedules. It is further seen that as per Uttrakhand VAT Act, 2005, wooden crates were recognized as a distinct product and item. Similarly the assessee has been registered as manufacture with District Industries Centre and registered as a factory under the Factories Act. Further the assessee has been granted exemption from Excise Duty and has availed exemption from duty which is only granted to manufacturing units. Thus as per the term defined by Section 2 (29BA) of the Act would be any activity that results in the creation of an article for object that is new and distinct from the raw material that go into its manufacture and having a different name, character , use and / or integral structure. It cannot be denied that the wooden crates are completely distinct from the planks, nails, fevicol foam etc. that are used to make them and have a use of their own. The Ld. CIT(A) has supported his view by placing the reliance on the decision of Hon'ble Supreme Court in the case of Aspinwal & Co. Ltd. vs. CIT, 251 ITR 323 (2001) SC. [Para 12]

Thus, in the light of ratio laid down in above decision. The change brought in wooden planks by hand by the labours using small cutters would amount as manufacture a product, which is obtained as wooden crates by the assessee. Similarly the Hon'ble Supreme Court in the case of Orcle Software India Ltd. (2010) 187 taxmann. 275 SC held that if an operation / process renders a commodity for article fit for use for which it is otherwise not fit for operation / process falls within

the meaning of word 'manufacture'. In the case of assessee wooden crates are different from the planks per se and the planks are only one of the many products that go into the manufacturing the wooden crates. Since, the wooden crates stand apart as a distinct commodity from the items that go into making them, the making of the wooden crates amounts to manufacture within the meaning of the Supreme Court decision in the case of Aspinwal & Co. Ltd. (supra). The Ld. Counsel has placed reliance on the decision of Mobile Communication India Pvt. Ltd. (supra) wherein it was observed that it is the well settled legal position as laid down by the Court of appeal in England in Moouat vs. Betts Motors Ltd. 1958 (3) All ER 402, that two Departments of the Government cannot in law adopt contrary or inconsistent stands or raise inconsistent contentions or act at a cross purposes. Therefore when the 4 departments of the Government has considered the assessee as a manufacturing unit therefore, the other department of the Government cannot take a contrary view or stand inconsistent with the view taken by the other departments of the Government. [Para 13]

Coming to the observation of the Ld. AO that the activities of the assessee are purely assembling of wooden planks with nail into wooden crates and if nails are removed it will cut its original shape as it was before used. However, we find that the original commodity used by the assessee as raw material are a wooden sleepers / planks which are go into sizes to according to the orders placed with the assessee then the cut two sizes wooden planks are subject to smoothening use of planting machine then the planks are treated to fix the evafoam and thermocol to make the material carried in the crates jerk resistant then the planks are stapler and nail are used industrial nails and staplers, therefore, the result of the process is wooden crates which is distinct from the wooden slippers planks being original commodity. Therefore, the end project is result of manufacturing activity which amounts change in the original articles. Hence, it cannot be treated as mere assembling of wooden planks even the Hon'ble Supreme Court in the case of Oracle Software India Ltd. (supra) held that if an operation / process renders a commodity or article fit for use for which it is otherwise not fit, operation / process falls within the meaning of word manufacture. [Para 14]

16. Polyplex Corporation Ltd v. ACIT (ITA Nos 4347 to 4350 /Del/2016) (24.01.2019)(ITAT, Delhi)

SECTION 90 - DTAA BETWEEN INDIA & THAILAND - ARTICLE 23–CREDIT OF TAX PAID IN THAILAND

Assessee included in ROI Dividend Income of Rs 68,81,05,808/- earned from M/s Polyplex (Thailand) Public Limited Company, and as per Article 23 of DTAA between Indian & Thailand r/w/s 90(2) of Income Tax Act, assessee claimed that it was eligible for tax rebate of 10% on the said income – AO rejected the claim for credit of tax – CIT(A) upheld addition - By virtue of Investment Promotion Act B.E, tax on income is exempt u/s 31 in the hands of Thailand company and u/s 34 in assessee's hands. Assessee claims that, for years under consideration, it is entitled to claim sparing of foreign tax payable in Thailand, due to exemption available to assessee as per Investment Promotion Act B.E, under Article 23(3) of DTAA between India and Thailand, as credit against Indian Tax payable in respect of such profits or income against tax payable in India on the dividend income.

ITAT held -

(a) concept of 'tax sparing credit' shall be applicable to an assessee, only if dividend received by assessee is taxable in the hands of assessee as per "Thai tax laws" and exemption is available to assessee either as per the 'Revenue Code of Thailand' or as per 'Investment Promotion Act B.E, in order to avail credit of such taxes spared in Thailand as mentioned Article 23.
(b) From a co-joint reading of taxability of dividend income under Thailand Revenue Code, which has been exempted as per Investment Promotion Act, it is clear that exemption is available to assessee on dividend received from its subsidiary in Thailand, which would have been otherwise taxable as per Thailand Revenue Code @ 10%.
(c) Assessee was not liable to pay any tax in Thailand by virtue of exemption granted as per Investment Promotion Act, and therefore assessee would be entitled to credit of such taxes deemed to have been payable in Thailand under article 23 (3) of DTAA between India and Thailand. From the records, it is noted that assessee has sought credit at 10% on dividend received by it from its Thailand subsidiary, which is the tax that would have been otherwise payable by assessee in Thailand as per section 70 of Thailand Revenue Code.

17. Fujitsu India Pvt. Ltd.v. DCIT (ITA No. 1981/D/15) (18/02/2019) (ITAT, Delhi)

SECTION 92CA – TRANSFER PRICING / INTERNATIONAL TRANSACTION – ASSESSEE COMPANY ENGAGED INTO VARIOUS BUSINESSES INSIDE AND OUTSIDE INDIA, FOR WHICH REVENUES AND EXPENSES WERE SEGRAGATED IN THE BOOKS INTO DOMESTIC AND INTERNATIONAL SEGMENT – WHERE SEPARATE INTERNATIONAL BUSINESS SEGMENT IS AVAILABLE, TRANSFER PRICING ANALYSIS NEEDS TO BE CARRIED OUT ON THE BASIS OF SEGMENT PROFITABILITY INSTEAD OF AGGREGATION INTERNATIONAL AND DOMESTIC SEGMENT OF THE COMPANY AS A WHOLE – RE-CLASSIFICATION OF IT SERVICES WITH LIMITED RISK ASSUMPTION, INTO ITeS ENABLE SERVICES WAS HELD TO BE WITHOUT ANY VALID BASIS.

Held, We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee company during the course of assessment proceedings, submitted the segmental bifurcation of its revenues and expenses into different operating segments (Trading, Provision of Market Support Services and IT services) which were further bifurcated into domestic and international segment. But the TPO has not taken into account the same while passing the order and rejected the economic analysis undertaken by the assessee company for international transactions pertaining to provision of IT services which is without any concrete reason. In fact, the TPO has taken Provision of IT services and payment for receipt of IT services in totality which are separately submitted by the assessee in respect of the segmental bifurcation of its revenues and expenses into different operating segments. To compute the arm’s length price of the aforementioned transaction, the segment profitability of the assessee company needs to be taken into consideration as against aggregation of international and domestic segment of the

assessee company. Thus, in the present case the arm's lengthprice of the related party transactions of the assessee company has to be computed with its AE's on segmental basis and not that of profitability of the entire segment which include both AE and non AE transaction. This submission of the Assessee is well formed and is accepted as the assessee company has given all the information relating to international segment and domestic segment with the related party sales transaction of the assessee company with its AE's. Besides that the TPO has also re-characterized the assessee's limited risk IT services as ITeS, thereby rejecting the functional analysis as documented in the Transfer Pricing Documentation. The TPO while re-characterizing the IT services as IT enabled Services has not given any finding or reasons as to why the same is done. Thus, on both account that is aggregation of international and domestic segments pertaining to IT segment and the re-characterization of the IT services as IT enabled Services, the issues need to be addressed by the TPO after taking into account all the relevant evidence provided by the assessee company during the assessment proceedings which the TPO failed to take into account. Therefore, it will be appropriate to remand back the entire Transfer pricing issue to the file of the TPO/AO. Needless to say, the assessee be given due opportunity of hearing by following principles of natural justice. Thus, Ground Nos. 3 to 16 are allowed for statistical purpose.**[Para 9]**

18. ACIT v. M/s Asis Plywood Pvt. Ltd.(ITA No. 2144/D/15) (28/01/2019) (ITAT, Delhi)

SECTION 148 (S. K. JAIN) – RE-ASSESSMENT PROCEEDINGS UNDER SECTION 147 INITIATED BY AO ON BASIS OF REPORT FROM INVESTIGATION WING THAT ASSESSEE RECEIVED ACCOMODATION ENTRY FROM SHRI S.K. JAIN – NOTICE UNDER SECTION 148 ISSUED WITH BORROWED SATISFACTION ON INFORMATION RECEIVED FROM INVESTIGATION WING WITHOUT INDEPENDENT APPLICATION OF MIND – DECISION OF DELHI HIGH COURT IN THE CASE OF RMG POLY VINAYL (I) LTD. FOLLOWED – PROCEEDINGS UNDER SECTION 147 QUASHED.

Held,We have heard the rival submissions and perused the material available on record. We have also gone through the reasons recorded by the Assessing Officer in this regard. Section147 of the Act empowers the assessing officer to initiate proceedings under that section to assess or reassess any income of the assessee that escapes assessment. The powers to initiate proceedings under section 147 of the Act are, however, not unfettered and unrestricted. In order to initiate proceedings under section 147, the assessing officer has to comply with the provisions of sections 148 to 153 of the Act. Under the scheme of the Act, the assessing officer can initiate proceedings under section 147 of the Act only if he has "reasons to believe" that any income of the assessee has escaped assessment. In terms of section 148 of the Act, the assessing officer is required to recordthe reasons on the basis of which proceedings under section 147of the Act are initiated. The reasons recorded must show application of mind by the assessing officer to come to the belief that any income of the assessee had escaped assessment, and thus the reasons act as the stepping stone in initiation of proceedings under section 147 of the Act. The validity or otherwise of the proceedings initiated under section 147 is adjudged on the basis of such reasons recorded. The reasons recorded must, therefore, show application of mind by the assessing officer. If the reasons recorded are vague or ambiguous,the proceedings initiated under section 147 of the Act are liable to be held as invalid and bad in law. … A perusal of the reasons shows that the Assessing Officer has clearly borrowed

the information received from the Investigation Wing but he has not carried out any verification to test the veracity of the information which has been passed by the Investigation Wing. Thus, he has proceeded to form an opinion on the basis of borrowed reasons and there is no independent application of mind. It is also seen in the assessment order that the Assessing Officer had duly noted that the original return of income was filed on 22.02.2007 but has noted in the reasons that the assessee had not filed any return of income. Thus, the Assessing Officer has contradicted himself by admitting that the return was filed and then saying that it was not filed. Thus, this establishes that notice u/s 148 vis-à-vis the reasons recorded is devoid of any application of mind…. An identical issue arise before the Hon'ble Delhi High Court in the case of Principal CIT vs. RMG Polyvinyl (I) Ltd. reported in(2017) 83 taxmann.com 348 (Del) and the Hon'ble Delhi HighCourt upheld the order of the ITAT holding that the reopening of the assessment u/s 147 was bad in law. …. In the instant case before us also, the facts are identical and, therefore, respectfully following the ratio of the judgment as laid down by the Hon'ble Delhi High Court in the case of Principal CIT vs. RMG Polyvinyl (I) Ltd. (supra), we uphold the findings of the Ld. CIT (A) in holding that the initiation of reassessment proceedings in the instant case was bad in law and not sustainable. Accordingly, we dismiss the grounds raised by the department….. In the result, the appeal of the department stands dismissed..**[Paras5, 5.1, 5.2, 5.3, 6]**

19. Mohan Aggarwal vs ACIT (ITA No.2497/Del/2018) (31.01.2019) (ITAT, Delhi)

SECTION 148 – CLIENT CODE MODIFICATION - WE FIND THE ASSESSING OFFICER, ON THE BASIS OF THE INFORMATION RECEIVED IN THE SHAPE OF THE REPORT OF THE INVESTIGATION WING OF AHEMDABAD, REOPENED THE ASSESSMENT U/S 147 OF THE IT ACT ON THE GROUND THAT ASSESSEE HAS MISUSED THE FACILITY OF CLIENT CODE MODIFICATION - THE ASSESSING OFFICER HAS NOT CONDUCTED ANY ENQUIRY ON THE SAME – REOPENING LIABLE TO BE QUASHED

Held, we have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the Assessing Officer, on the basis of the information received in the shape of the report of the Investigation Wing of Ahemdabad, reopened the assessment u/s 147 of the IT Act on the ground that assessee has misused the facility of client code modification provided to stockbrokers to avail contrived loss of Rs.31,90,855/- There is no dispute to the fact that the assessee in the instant case has traded at the stock exchange through the broker M/s. Gaurav Investment and Consultancy Private Limited. There is also no dispute to the fact that the Assessing Officer during the course of assessment proceedings has called for certain information from the said broker who has replied to the queries raised by the Assessing Officer in response to notice u/s 133 (6) of the IT Act and there is no allegation by the Assessing Officer in his findings that there was any connivance between the assessee and the broker. [Para 10]

Since in the instant case action has been taken us/ 147 of the IT Act after completion of the assessment u/s 153 A/ 143 (3) on the basis of report of the Investigation Wing and the Assessing Officer has not conducted any enquiry on the same, therefore, respectively following the decisions

of the Tribunal cited(supra) I hold that reassessment proceedings initiated in the instant case are notin accordance with law. Accordingly the same is quashed. [Para 12]

20. M/s. Key Components (P) Ltd. vs ITO (ITA No.366/Del/2016) (12.02.2019)(ITAT, Delhi)

SECTION 148 - TOTAL NON-APPLICATION OF MIND ON THE PART OF THE A.O. WHILE RECORDING THE REASONS FOR REOPENING OF THE ASSESSMENT. - RECORDED INCORRECT AMOUNT WHICH ESCAPED ASSESSMENT - HIS CONCLUSION WAS MERELY BASED ON OBSERVATIONS AND INFORMATION RECEIVED FROM DIT (INV.), NEW DELHI, WHICH IS NOT BROUGHT ON RECORD - ASSUMPTION OF JURISDICTION UNDER SECTION 147/148 OF THE I.T. ACT, 1961, IS BAD AND ILLEGAL

Held, considering the above discussion, it is clear that there is a total non-application of mind on the part of the A.O. while recording the reasons for reopening of the assessment. He has recorded incorrect amount which escaped assessment. His conclusion was merely based on observations and information received from DIT (Inv.), New Delhi, which is not brought on record and his conclusion is merely based on doubts because he was not sure whether transaction in question is genuine or not. Therefore, the decisions relied upon by the Learned Counsel for the Assessee squarely apply to the facts and circumstances of the case. The decisions relied upon by the Ld. D.R. would not support the case of the Revenue. Since, there is a total lack of mind while recording the reasons for reopening of the assessment, therefore, assumption of jurisdiction under section 147/148 of the I.T. Act, 1961, is bad and illegal. [Para 6.3]

21. MAS Metals & Components Pvt. Ltd vs ITO (ITA No.4263/Del/2018) (26.02.2019) (ITAT, Delhi)

SECTION 148 - IT IS FOR THE ASSESSING OFFICER HAVING JURISDICTION OVER THE ASSESSEE TO ISSUE NOTICE U/S 148 AFTER RECORDING REASONS - THE CIT(A) COULD HAVE AT BEST FORWARDED THE INFORMATION TO THEASSESSING OFFICER OR THE CONCERNED CIT BUT COULD NOT HAVE DIRECTED THE ASSESSINGOFFICER TO ISSUE NOTICE U/S 148 OF THE ACT.

Held, I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I have also considered the various decisions relied on by the ld. counsel for the assessee which are placed on the paper book. Admittedly, the assessee in the instant case is regularly assessed to tax at New Delhi and therefore, ITO Ward 2(2), Noida does not have jurisdiction of the assessee. Therefore, he could not have issued notice u/s 148 of the Act to the assessee and such action of the Assessing Officer being in excess of his jurisdiction, the entire order is liable to be quashed. The ld.CIT(A) has rightly quashed the order so passed by the Assessing Officer of Noida. However, while doing so, the ld.CIT(A) has given a direction to the Assessing Officer having jurisdiction over the assessee to issue notice u/s 148 which, in my opinion, in the facts and circumstances of the case is not proper. It is for the Assessing Officer

having jurisdiction over the assessee to issue notice u/s 148 after recording reasons. The ld.CIT(A) could have at best forwarded the information to the Assessing Officer or the concerned CIT but could not have directed the Assessing Officer to issue notice u/s 148 of the Act. Since the Assessing Officer, being a subordinate officer of the CIT(A), is bound to follow the direction of his superior authority, therefore, it will cause undue hardship to the assessee for no fault committed by it. If the proposition laid down by CIT(A) is accepted, it will create havoc and any officer sitting anywhere in the country can pass an order against any assessee and the CIT(A) will direct the Assessing Officer having jurisdiction over the assessee to reopen the case. This is definitely not the intention of the statute and the law does not permit the officer to do something indirectly which he cannot do directly. In this view of the matter, the direction of the CIT(A) to the Assessing Officer for issue of notice u/s 148 of the Act being not in accordance with the law is liable to be quashed. Accordingly, the direction of the CIT(A) to the Assessing Officer to issue notice u/s148 is quashed. The grounds raised by the assessee are accordingly allowed. [Para 8]

22. Pankaj Sharma v. DCIT (ITA No. 3556-57/D/15) (08.02.2019) (ITAT, Delhi)

SECTION 153 – TIME LIMIT FOR PASSING OF ASSESSMENT ORDER – ORDER DISPATCHED ON 01.04.2003 WHEREAS LIMITATION EXPIRED ON 31.03.2003 – ASSESSMENT ORDER HELD TO BE TIME BARRED.

Held, we have heard both the parties and perused the relevant records especially the documentary evidences filed by the assessee in the Paper Book as mentioned above and the Written Submissions filed by both the parties, especially the Written Submissions of the Ld. CIT(DR) and we are of the considered view that in this case the Assessing Officer has passed the assessment order on 28.03.2013 and according to the evidence of the postal authority which we have reproduced under para no. 5.1 at page no. 14 & 15 of this order. We are also of the view that the assessment order dated 28.03.2013 has been dispatched on 01.04.2013. Therefore, keeping in view of the order dated 27.09.2018 passed by the ITAT, Cuttack Bench in IT(S)A No. 44 to 46/CTK/2016 (AYrs. 2004-05 to 2006-07) & Ors. in the case of Sri Trinadh Chowdary vs. ACIT, Corporate Circle 1(2), Bhubaneswar & Ors. reproduced above, we are of the considered view that assessment in dispute is time barred, hence, respectfully following the ITAT, Cuttack Bench decision in the case of Sri Trinadh Chowdary vs. ACIT (Supra), we set aside the assessment order and allow the ground no. 1 raised by the assessee.**[Para 5.3]**

23. Consulting Engineering Services India Pvt. Ltd. v. ACIT (ITA No. 1443 & 1734/Del/2014) (05.02.2019)(ITAT, Delhi)

SECTION 153 – LIMITATION FOR PASSING ASSESSMENT ORDER – SPECIAL AUDIT U/S 142(2A) - WHETHER VALIDITY OF REFERENCE MADE FOR SPECIAL AUDIT CAN BE EXAMINED IN APPEAL BEFORE ITAT.

Return was filed on 30.09.2008, the time period for completion of assessment u/s 153(1) without TP reference was 31.12.2010. Since a reference was made to the TPO, the time period for completion of assessment u/s 153(4) was 31.12.2011 - AO did not apply his mind and

mechanically adopted the figure of A.Y. 2009-10 and passed the order u/s 142(2A) of the Act for A.Y.2009-10 without realizing that he is dealing with A.Y. 2008-09.

Held {following Unitech Ltd. ITA No. 5180/DEL/2013, M/s Jyoti Traders in ITSS Nos.60 to 62/MUM/2008 and ITSS 110-112/MUM/2008, AlidharaTexpro Engineering (P) Ltd. 332 ITR 115(Guj), NilkanthConcastPvt. Ltd. 48 ITR (Trib) 264 (Del)} *"whether assessment order framed u/s 143(3) is passed within the period of limitation period prescribed under the Act or not. In our considered opinion, for coming to such a conclusion, we can examine whether the order passed u/s 142(2A) of the Act is in accordance with law or not. It is true that the order passed u/s 142(2A) of the Act is not appealable but when an assessment order is challenged, then the different aspect, which are integral to the process and ultimate completion of the amount can be challenged in appeal and since the ground before us is challenged for assessment being barred by limitation, we are well within our rights to consider all material aspects which were considered while framing the assessment order u/s 143(3) of the Act."* – Assessment quashed.

24. Shri Awanindra Singh & ors v. DCIT (ITA No. .300/Del/2001 & 5449/DEL/2004, ITA NOS.405/DEL/2001 & 5615/DEL/2004, ITA NOS.5452/DEL/2004 & 5453/DEL/2004)(08.02.2019)(ITAT, Delhi)

SECTION 153 - LIMITATION FOR COMPLETION OF ASSESSMENT – ORIGINAL ASSESSMENT SET ASIDE BY CIT(A) – SECTION 153(2A) – WHETHER IN RESPECT OF THE ORDER OF THE LEARNED CIT(A) DATED 27TH NOVEMBER, 2000, THE OLD PROVISIONS OF SECTION 153(2A) WOULD BE APPLICABLE OR THE NEW PROVISION AS AMENDED BY THE FINANCE ACT, 2001 WOULD BE APPLICABLE.

CIT(A) set aside the order of the AO dated 29th March, 2000 vide his order dated 27th November, 2000. The set aside assessment was completed u/s 250/143(3) on 31st March, 2003 - Prior to amendment in Section 153(2A), set aside assessment was to be completed within the period of two years from the end of the financial year in which the relevant order was received. However, Section 153(2A) was amended by the Finance Act, 2001, and as per the amended provision, the set aside assessment is to be completed within one year from the end of the financial year in which the order of set aside was passed - Amended provision itself and on the notes of clauses, it is clarified by the Government that the period of two years would continue to be applicable for the orders passed before 1st day of April, 2000 and, in such cases, order of fresh assessment may be made at any time up to 31st March, 2002 – Department claimed that amendment in Section 153(2A) was made by the Finance Act, 2001 with effect from 1st June, 2001 and, therefore, the amended provision would be applicable only in respect of the order of the CIT(A) passed after 1st June, 2001.
Held :

(a) Old provision of Section 153(2A) would be applicable in respect of cases where the order of set aside is received by the Commissioner before the 1st day of April, 2000. By necessary implication, it has to be held that when the order of set aside under Section 250 by the CIT(A) is received by the Commissioner or the Chief Commissioner after the 1st day of April, 2000, the new provision would be applicable.
(b) Existing time limit i.e., the period of limitation of two years would be applicable only where the appellate or revisionary order setting aside an assessment is received or

passed before 1st April, 2000. If the contentionof the Revenue that the amended provisionof section 153(2A) would be applicable in respect of the cases where the appellate or revisionary order is received or passed after 1st June, 2001, there was no necessity of proviso to Section 153(2A) and the said proviso would become redundant.

(c) The legislature has taken a conscious decision to reduce the period of two years for making reassessment of set aside matters to one year. They have also consciously provided that the old provisions of two years would be applicable where such order of set aside was passed or received on or before 1st April, 2000. Thus, to our mind, there is no doubt that where the order of set aside is passed by the CIT(A) under Section 250 after 1st day of April, 2000, the new provision of Section 153(2A) providing the time limit of one year would be applicable.

(d) Bhan Textile P. Ltd. 300 ITR 176 (Del) followed

SECTION 147 – REASONS TO BELIEVE – REASONS RECORDED BY WRONGLY NOTING THAT ROI NOT FILED – RECORD OF FINDING OF ESCAPEMENT OF INCOME WHICH IS IMMEDIATELY QUALIFIED WITH THE WORDS "WHICH NEEDS TO BE EXAMINED" – RE-OPENING QUASHED

Held ;

(a) AO has sought the approval of the competent authority, it has been mentioned "Kind approval is sought in these cases to issue notices u/s 148 of I.T. Act as no return of income has been filed for these years". From a perusal of the assessment order, we find that the AO on the first page first paragraph of the assessment order for assessment year 1996-97 has mentioned the assessee filed return of income on 24.09.1996 declaring total loss of Rs.10,457/-. Thus, the assessee had filed the returns for assessment year 1996-97 and 1997-98 much before the recording of reasons for reopening of assessment. The reasons for reopening of assessment were recorded on 31st July, 2002 while the return for assessment year 1996-97 was filed on 24th September, 1996 and for assessment year 1997-98 on 28th November, 1997. Therefore, the main premise on the basis of which the AO sought the approval of the competent authority for issue of notice u/s 148 is found to be incorrect.

(b) AO has mentioned "it is noticed that such share application money worth Rs.98.50 lacs and Rs.76.50 lacs were received from various persons during AY 96-97 & 97-98 respectively which "*needs to be examined*". AO is not clear whether the income has escaped assessment or whether the share subscription money needs to be examined. It means his satisfaction for escapement of income is doubtful.

(c) Time limit for issuing notice u/s 143(2) has elapsed and therefore, for examination of share capital, the notice under Section 148 was issued. Ved and Co. reported in 302 ITR 328(Del) followed and held that Jurisdictional High Court would be squarely applicable to the facts of the assessee's case.

Even after reopening, the AO made addition on substantive basis in the case of Shri Awanindra Singh and in the case of the assessee only, protective addition was made. Therefore, when the Revenue is of the opinion that the cash which assessee claimed to have received from issue of shares never belonged to it, he could not have formed an opinion that there is escapement of income in the hands of the assessee.

25. DCIT v. Kohli Realtors P. Ltd. (ITA No. 2395/D/19)(08.02.2019)(ITAT, Delhi)

SECTION 153A – THERE WAS NO WARRANT OF AUTHORIZATION IN THE NAME OF THE ASSESSEE – MERELY BECAUSE ASSESSEE PREMISES WAS COVERED UNDER SEARCH, NO ASSESSMENT U/S 153A COULD BE FRAMED IN ABSENCE OF VALID SEARCH U/S 132– THE AO HAVING FAILED TO COMPLY WITH PROCEDURE U/S 153C – THE ASSESSMENT ORDER HELD TO BE INVALID

Held, Ld. CIT (A) in impugned order has very categorically recorded as under:

> " 15. In the instant case it is quite clear that there is no warrant of authorization in the case of the asessee company. Therefore, irrespective of the fact that the premises covered may also have been its office, it cannot be proceeded against under section 153A. It is seen that : asessee has specifically questioned the validity of the proceedings under section 153A while filling the return in response to the notice under that section. In the remand AO has submitted that in fact, the jurisdiction under section 153A had been assumed under the provisions of section 153C. However, no evidence of the same has been furnished before the undersigned either in the form of satisfaction being recorded under section 153C or a copy of the notice where it could be seen that it had been issued under section 153C. In fact the satisfaction that the case has been taken up under section 153C is not found recorded anywhere in the assessment order either. It s quite clearly mentioned that the notice was issued under section 153A(1)(a) of the Act. Furthermore, it has been recorded that certain papers were found and seized from the residence of the assesse (which is a company). No where it is stated that papers were found from the residence of the Directors of the company at Shalimar Bagh or during the search of the premises at B- 44 and that these papers belong to the asessee company justifying the initiation of proceedings under section 153C. In the circumstances, it can safely be assumed that the reference to section 153C, is an afterthought in the event of the failure to explain the assessment under section 153A read with section 143(3) of the Act. Furthermore, it is clear that the prescribed procedure has not been followed for initiation of the proceedings under section 153C. Finally, it is seen that the assessee has raised the issue of validity of notice under section 153A(1)(a) the very first instance while filing the return . Hence, such defect cannot even be cured by the provisions of section 292B of the Act. In the circumstances, after considering the facts of the case and the relevant case laws on the subject, I am constrained to hold that the assessment under section 153A(1)(b) read with section 143(3) of the Act is void ab initio. Accordingly the same is liable to be quashed."

7.2. Ld. CIT DR has not been able to produce anything contrary to aforestated findings of Ld.CIT (A) in order to deviate from aforestated view. We are therefore inclined to uphold order passed by Ld. CIT (A). **[Para 7.1 & 7.2]**

26. Shri Meer Hassan vs ITO (ITA No.1571/Del./2015)(Dated: 28.02.2019)(ITAT, Delhi)

SECTION – 153C - PROVISIONS CONTAINED U/S 153C ARE APPLICABLE IN THIS CASE TO INITIATE ASSESSMENT PROCEEDINGS ON THE BASIS OF SEIZED

MATERIAL SEIZED IN CASE OF SOME THIRD PARTY, NOTICE ISSUED U/S 148 OF THE ACT AND SUBSEQUENT ASSESSMENT FRAMED U/S 147 OF THE ACT IS VOID AB INITIO AND AS SUCH, ASSESSMENT FRAMED U/S 147/143(3) OF THE ACT IS LIABLE TO BE QUASHED.

Held, In the instant case, undisputedly, originally assessment proceedings were initiated against the present assessees u/s 153Cread with section 153A of the Act which was completed vide order dated 30.12.2011 but the same were annulled by ld. CIT (A) vide order dated 28.08.2012 on the ground that proper course in this case was to initiate proceedings u/s 147 of the Act and make assessment accordingly. The said assessment u/s 153C read with section 153A was completed on the basis of some seized material/document LP-103 A-1 pages 30, which is a memorandum of understanding alleged to have been entered into between the assessees and M/s. R.B. Enterprises. [Para 17]

So, we are of the considered view that when provisions contained u/s 153C are applicable in this case to initiate assessment proceedings on the basis of seized material seized in case of some third party, notice issued u/s 148 of the Act and subsequent assessment framed u/s 147 of the Act is void ab initio and as such, assessment framed u/s 147/143(3) of the Act is liable to be quashed. [Para 18]

Following the mandate of section 153C and orders passed by the coordinate Bench of the Tribunal in cases of Rajat Shubra Chatterji vs. ACIT and ITO vs. Arun Kumar Kapoor (supra), we are of the considered view that assessment framed in this case u/s147/143 (3) of the Act on the basis of incriminating material unearthed in case of a third party is not sustainable, hence ordered to be quashed without entering into the merits of the case. So, other grounds of appeal raised by the assessee have become infructuous. [Para 21]

27. E.I. DuPont India P. Ltd v. DCIT (ITA No. 386 & 387/Del/2016) (24.01.2019)(ITAT, Delhi)

SECTION 201(1A) – CALCULATION OF INTEREST – "MONTH" WHETHER "BRITISH CALENDAR MONTH" OR PERIOD OF 30 DAYS

Held, TDS deducted on 31.03.2013, due date for deposit of TDS was 31.04.2013 whereas actually TDS was deposited on 02.05.2013 - AO calculated interest as per British calendar for the three months of March, April and May – CIT(A) upheld AO's computation – ITAT following Arvind Mills Ltd (2011) 16 Taxmann.com 291(Guj), NavayugaQuazigund Expressway 39 ITD 612 (Hyd) and ONGC ITA nos. 1955 to 1965/Ahd/2015 held that term '*month'* must be given the ordinary sense of the term i.e. 30 days of period and not the British calendar month as defined u/s 3(35) of the General Clauses Act and such a definition under the General Clauses Act.

28. Hari Mohan Sharma vs ACIT (ITA No. 2953/Del/2018) (31/01/2019) (ITAT, Delhi)

SECTION 251 - FOR THE PURPOSE OF ENHANCEMENT OF INCOME BY CIT (A), IT IS NECESSARY THAT EITHER THE MATTER SHOULD BE RAISED IN THE APPEAL BY THE ASSESSEE OR EVEN OTHERWISE THE MATTER SHOULD LD HAVE BEEN CONSIDERED AND DETERMINED IN THE COURSE OF ASSESSMENT PROCEEDINGS - HENCE, ENHANCEMENT U/S 251 (1) (A) OF THE ACT IS PROHIBITED ON THE ISSUES WHICH HAVE NOT AT ALL BEEN CONSIDERED BY THE AO DURING ASSESSMENT PROCEEDINGS.

Held, On the basis of the above decision following remedial matrix as per thelaw is as under :-

Sr No	Situation	Remedial Measures under the Income tax Act
a	Assessing Officer may accept the return of income without making any addition or disallowance ; or	U/s 147 of the act subject to limitations contained therein
b	the assessment is framed and the Assessing Officer makes certain addition or disallowance and in making such additions or disallowances, he deals with such item or items of income in the body of order of assessment but he under assessed such sums ;	U/s 251 (1) (a) where the Assessing Officer had dealt with the issue in the assessment and was the subject-matter of appeal
c	AO makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income	U/s 263 of the act
d	where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry	u/s 147 of the act
e	where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the Revenue,	U/s 263 of the act
f	where an item of income which ought to have been taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary for computation of income	u/s 147 of the act

[Para 16]

The principle culled out from the above judicial precedents clearly shows that words "enhance the assessment" are confined to the assessment reached through a particular process. It cannot be

extended to the amount which ought to have been computed. There being other provisions which allow escaped income from new sources to be taxed after following a certain prescribed procedure. **So long as a certain item of income had been considered and examined by the Assessing Officer from the point of view of its assessability and so long as the CIT(A) does not travel beyond the record of the year, there has never been any doubt as to his powers of redoing the categorization and bringing the assessment within the true description of the law**. [Para 19]

In the facts of the present case only issue considered and discussed by the assessing officer is with respect to the act was also rejected relying up on the decision of the Honourable Supreme court. The issue of verification of capital gain was not the issue which was at all dealt with by the assessing officer, or even a question of verification made by ld AO. There was no inquiry made by the ld AO on the issue of capital gain shown by the assessee. The ld AO has not at all considered the issue of sales consideration received by the assessee on sale of house as an issue of dispute before him. Therefore according to us, ld CIT (A) could not have made enhancement on the issue holding that capital gain shown by the assessee itself is not in accordance with the law and given a finding that no capital gain has accrued to the assessee. [Para 20]

29. Giesecke & Devrient India Pvt Ltd.v. Dy. DCIT (ITA No.3864/D/15) (28/01/2019) (ITAT, Delhi)

SECTION 271(1)(C) – PENALTY ON TRANSFER PRICING ADJUSTMENT MADE ON ACCOUNT OF ADOPTION OF MULTIPLE YEAR DATA BY THE ASSESSEE FOR COMPUTING ARMS LENGTH PRICE – LAW PRIOR TO 2007 WAS DEBATABLE AS TO USE OF MULTIPLE YEAR DATA OR CURRENT YEAR DATA FOR ADOPTING COMPARABLES – NO ISSUE AS TO THE SELECTION OF COMPARABLE COMPANIES BETWEEN ASSESSEE AND REVENUE; ONLY ISSUE WAS WITH RESPECT TO THE MARGINS OF SUCH COMPARABLES ON THE BASIS OF MULTIPLE YEAR DATA OR CURRENT YEAR DATA – NO PENALTY FOR FURNISHING INACCURATE PARTICUARLS OF INCOME LEVIABLE IN EXPLANATION 1 OR EXPLANATION 7 TO SECTION 271(1)(C) OF THE ACT.

Held,We have given thoughtful consideration to the orders of the authorities below. It is true that the adjustment on account of provision of software services and purchase of raw material for sim card assembly was upheld by the Tribunal. Facts on record show that there is no quarrel in so far as comparables are concerned. In fact, the TPO has accepted the bench marking done by the assessee. It is true that the assessee has used multiple year data in computing the ALP. The TPO/Assessing Officer has held that such action by the assessee is contrary to the provisions of the Act and would tantamount to furnishing of inaccurate particulars of income. In our understanding of the law, prior to 2007, there was a legal debate as to whether multiple year data can be used or current year data has to be used. In our considered opinion, this being a debatable issue at that point when the assessee filed its return of income, adoption of multiple year data for arriving at ALP is a bonafide exercise. Therefore, it cannot be said that the assessee has not done TP exercise in good faith and with due diligence. …Another reason for making the adjustments was that the assessee had claimed capacity utilisation which was denied by the TPO/CIT(A)/ITAT.

The difference in level of capacity utilisation is an accepted principle though denied in the case of the assessee but then the same cannot tantamount to filing TP report without good faith and due diligence….. Considering the TP documentation of the assessee in totality, we are of the considered opinion that neither Explanation 1 as applied by the Assessing Officer nor Explanation 7 as applied by the CIT(A) to section 271(1)(c) of the Act apply. We, therefore, do not find any merit in the penalty so levied and we, accordingly, direct the Assessing Officer to delete the same.**[Paras10, 11, 12]**

30. Sh. Amardeep Dalal v. ACIT (ITA No. 3541/D/15) (14.02.19)(ITAT, Delhi)

SECTION 271AAA – NO PENALTY IN ABSENCE OF ISSUANCE OF SPECIFIC NOTICE U/S 271AAA – THE ENTIRE PROCEEDINGS BECOMES VITIATED DUE TO NON ADHERENCE OF PROVISIONS OF SECTION 271AAA(4) OF THE ACT.

Held, In the present case, though the A.O. issued show cause notice on 26th March, 2014, but, the A.O. mentioned therein the contents which are relevant to penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961. The A.O. did not issue any notice to the assessee for levy of the penalty under section 271AAA of the Income Tax Act, 1961. Thus, no reasonable opportunity of being heard have been given to the assessee before levy of the penalty under section 271AAA of the Income Tax Act, 1961 and the assessee has also not been heard with reference to penalty proceedings under section 271AAA of the Income Tax Act, 1961. Since, assessee was not made aware as to under which provisions the penalty shall have to be levied against the assessee, there is no question of giving reasonable opportunity of being heard to the assessee or to hear the assessee before levy of the penalty. Due to the above, the entire penalty proceedings are vitiated and as such liable to be quashed. We, accordingly, set aside the orders of the authorities below and quash the penalty proceedings. **[Para 4.1]**

31. Shri Neeraj Goel, vs. ACIT (ITA No.5952/Del./2017) (28.02.2019) (ITAT, Delhi)

S. 292C - PRESUMPTION ARISES U/S 292C BUT THE PRESUMPTION IS REBUTTABLE ONE WHERE DOCUMENT IS UNNAMED, UNSIGNED, VAGUE & AMBIGUOUS ONE AND IT IS NOT PROVED ON RECORD ALSO THAT IF THE SAME IS IN THE HANDWRITING OF THE ASSESSEE.

Held, It is the case of the assessee that he is Director in one of the Bindal group of companies, namely, Neeraj Papers Marketing Ltd. and numerous persons keep visiting his residence and he was having no control on the visitors and the documents they carry and seized document was not found from the control and possession of the assessee. Moreover, no money, bullion or investment wasfound during the search and seizure operation to corroborate thedocument in question. [Para 12]

In view of what has been discussed above, we are of the considered view that addition made on the basis of unnamed, unsigned, undated, vague and ambiguous document without anyfurther

corroboration is not sustainable in the eyes of law. Moreover, AO has not brought on record any material to prove that the assessee was in conscious possession of document in question. [Para 15]

Furthermore, the assessee has also categorically denied that the seized document belongs to him. So, when the seized document does not bear the name of the assessee not it is in the handwriting of the assessee nor does it explain the purpose of making and receiving the payment, rather it is silent as to the names of payers and payees qua the amount mentioned therein nor does it disclose that the payment was made by cheque or cash, addition cannot be made merely by invoking the deeming provisions without collecting any corroborative evidence. So presumption attached to the seized document, A-1, stands rebutted. Consequently, additions made by the AO and confirmed by the ld.CIT (A) is not sustainable, hence ordered to be deleted. Resultantly, all the appeals filed by the assessee are allowed. [Para 16]

32. DCIT v. Jatra Ruchi Cosmetics (India) P. ltd. (ITA No. 5877/D/15)(20.02.19)(ITAT, Delhi)

DIFFERENCE BETWEEN SETTING UP AND COMMENCEMENT OF BUSINESS – MERELY INCORPORATION OF COMPANY DOES NOT MEAN THAT BUSINESS HAS COMMENCED SO AS TO ALLOW THE CLAIM OF EXPENSES – BUSINESS IS SAID TO BE COMMENCED ONCE THE COMPANY STARTS INITIAL ACTIVITIES SUCH AS ENTERING INTO CONTRACTS AND ENGAGING KEY PERSONNEL.

Held, On careful consideration of the order of the ld CIT(A), it is apparent that though the assessee is incorporated on 28th July 2009, it undertook the activities of appointment of key personnel , obtaining the office space on rent, conducting market research and also the training programme. On appreciation of these facts the ld CIT(A) after considering the judicial precedents, including the decision of the Hon'ble Delhi High Court, has held that the business of the assessee was set up during the year, allowed the claim of the assessee. Though we are of the view that merely incorporation of company does not satisfy the requirement of setting up of the business but the business activities must have commenced during the previous year. Setting up of the business starts as soon as the company starts entering into the various contracts for its business activities. On careful consideration of finding of the ld CIT(A), we do not find any merit in the appeal of the revenue. **[Para 8]**

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