# DELHI ITAT (BAR) REPORTS – MARCH 2019

**1 Brisk Infrastructure & Developers Pvt. Ltd.( ITA No. 3690/Del/2014) (Dated: 26.02.2019) (ITAT, Delhi)**

**SECTION 2(1A) – AGRICULTURAL INCOME- INSPECTOR'S ADVERSE REPORT ON EXAMINATION OF SARPANCH AND HUSBAND OF THE LESSOR DOES NOT CONSTITUTE SUFFICIENT EVIDENCE TO TREAT AGRICULTURAL INCOME AS INCOME FROM UNDISLCOSED SOURCES.**

6.1 …….On being asked, the assessee company filed details of land, that the assessee company used for cultivation along with names, addresses of farmers from whom the lands were taken on lease for agricultural purposes along with Mastiput Tehsil, Khata No. area etc. It also submitted copies of lease deed executed on December 15, 2008 with the 136 farmers. The assessee company also submitted copies of ownership documents in respect of Lessors and also stated that Land Rent/Cess/Revenue tax etc was to be paid by the lessor as per the Land Lease Agreement (Clause No.6). The AO, however, issued commission to the concerned Authorities at Orissa & got an enquiry report, conducted by the local Income Tax Office at Jeypora, Orissa, based on ITO/ITI report where the local enquiries at Village Mastiput reveal that two persons having confirmed that the no such cultivation activity was undertaken by the appellant company. One of them happened to be Sarpanch Sh. JeenabandhuJani of the Village Mastiput, who has however furnished a certificate dated 28.12.2011 through the assessee company before the AO, stating that various vegetables like Gobi, Brinjal, Shimla Mirch& tomato etc are being grown in the Village Mastiput& its surrounding areas for so many years & one company named Brisk Agro Farms did cultivate vegetables in the village Mastiput. Hence, not such credence can be given to his statement. The other person who the Inspector of Income Tax, met with Mr. BiswasionTakri S/o Sh. D.N. Iswardan, who happened to be the husband of Mrs. D.N. Badaseba, who stated that Mrs. D.N. Badaseba (Spouse), Mrs. D.N. Subasini Lily, Mrs. D.N. Chandrika Ratnavati Estana& Mrs. D.N. Christina Lulsi are four sister who are having approximately fifty acres of land as agricultural property, through having their own respective families, however, have been cultivating the lands jointly & that they have not signed any agreement with any company or outsider. However, the I.T.I recorded the statement of the husband of Mrs. D.N. Badnseba & what precluded him from recording statement of the lessor herself is not clever. In any case, even Mrs. D.N. Badaseba has herself furnished a duly sworn affidavit to the effect that she did execute lease deed agreement dated 15.12.2008 with the assessee company & received a sum of Rs.24,905/- vide cheque No.217116 which could not be controverted by the Assessing Officer. Therefore, the statement given by Mr. BiswasionTakri is not reliable & moreover, there might be confusion in his mind as the assessee under took cultivation in the F.Y. 2008-09, while the statement of the two persons were recorded by ITI in the F.Y. 2011- 12 i.e. after approximately three years. ……….

6.1.1 …The action of the Assessing Officer was also not justified merely on Inspector's Report regarding non conduct of agricultural operations by the assessee company in the year under appeal, as the contents of the said report have been effectively controverted by the assessee company and which has not been out rightly rejected by the AO. Therefore, addition on account of 'Agricultural Receipts' as has been treated by the AO as 'Income

from Undisclosed Sources' was found to be based on unsubstantiated material on record and therefore, cannot be sustained, particularly when the assessee has filed the relevant details with evidence before the AO in an effective manner. Therefore, Ld. CIT(A) has rightly accepted the plea of the assessee and directed the AO to delete the addition of Rs.7,16,28,089/- on account of his treating such income as 'Income from Undisclosed Sources', which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute.

**2. DCIT v. Wood Stock School (ITA No.3838/D/14) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 2(15) / SECTION 11 - AGREEMENT WITH THE CATERER TO PROVIDE FOOD AND CATERING SERVICES TO THE ASSESSEE SOCIETY ENGAGED IN THE ACTIVITY OF IMPARTING EDUCATION THROUGH BOARDING SCHOOL IS INTEGRAL PART OF SUCH ACTIVITY, WHICH CANNOT BE SAID TO BE COMMERCIAL IN NATURE – VENDOR WAS ALSO FOUND TO BE NOT CONNECTED WITH THE ASSESSEE SOCIETY – ASSESSEE HAD HIRED A HOTEL TO PROVIDE BOARDING AND LODGING FACILITY TO STUDENTS – ALTHOUGH THE PROPERTY WAS HOTEL, BUT IT WAS NOT DENIED THAT THE SAME WAS NOT USED FOR PROVIDING RESIDENTIAL TO ONLY STUDENTS – THUS, THE SAME FORMED INTEGRAL PART OF THE CHARITABLE ACTIVITY OF THE ASSESSEE SOCIETY.**

Held, We have carefully considered rival contention and perused orders of lower authorities. Assessee is running a boarding school and teachers training College. It is a society registered under societies registration act as well as granted registration u/s 12 A of The act. Its main objects are promotion of Christian education according to ideals and essential beliefs held in common by different societies represented on general body of society and education to be given to youth of sexes as well as Americans and Europeans, Anglo Indians and Indian Christians. It is also maintaining a school as a non-profit Christian minority institution in order to provide and promote education, which is Christian, international and internationally accredited. It is also serving children of all nationalities, communities, and religions. It is maintaining a lodging and boarding school in Mussoorie. School entered into agreement with Marsh enterprises a partnership firm, which is engaged in business of developing and operating foodservice facilities including restaurants, providing food, and catering services. Assessee society wanted to upgrade its foodservice department to offer a high level of quality catering services and therefore it has entered into an agreement with Mars catering services. School was to provide above facilities at four different places, including a hotel, which is used as a hostel by the society, and obligation of Mars catering services is mentioned in clause 5 of agreement entered into between societies as well as Mars Catering services dated 17/07/2007. According to this agreement, INR 3,780,000/- at rate of INR 315,000/- for each month was to be provided by school to Mars catering services. In terms of above agreement, as on 01/04/2009 there was a credit balance of INR 1,039,000 in account of Mars catering services private limited in books of account of assessee. Along with that after giving

further credit for services rendered as well as towards reimbursement of expenses incurred, total credit stood at INR 7 198470 including opening balance to credit of above company. Out of that 6819789/– was paid and still there is a credit balance of INR 3 78681/- outstanding as payable by society to Mars catering services. The ld Ao disallowed the above sum holding that such advances is for the benefit of Mar catering services and it is not for the object of trust assesse. Looking at the activity of the school, it is a boarding school and teachers training college. No doubt, it has hired a hostel for accommodation of student, which is a hotel. However, it is not doubted that such hotel is not used by assessee is a hostel. Catering services were part of the boarding and lodging activity of students of assessee society who were staying in that hostel along with other locations. It is not case of revenue that Mars enterprises were any way associated with assessee society except in status of a service provider. None of shareholders of Mars services is in any way connected with assessee society. It is also not case of revenue that whatever is paid by society assessee to Mars enterprises is excessive or is not in terms of agreement. Furthermore, it is not denied by assessing officer that assessee society is providing lodging and boarding facilities to students of school. It is also not case that in impugned property, which is incidentally a hotel but not denied to have been used for any other purpose other than a hostel, is occupied by assessee society for residential facilities of students. It is imperative that for students residing in that impugned hostel are required to provide catering facilities. For provision of services, assessee has engaged Mars catering services, which is also part of Mars enterprises. There is an agreement also of assignment of original agreement from Mars enterprise to Mars catering services private limited. Expenditure has been incurred by assessee only for purpose of educational facilities to be given to student of lodging and boarding for staying in Mussoorie and studying in the assessee society. It is not denied or can be disputed that assessee is providing education to students and lodging and boarding facilities are incidental to education. No violation of section 13 has been pointed out by learned AO. In view of this, it cannot be said that expenditure incurred by assessee is not for purpose of education. For all these considerations as stated above learned CIT – A has deleted addition. Merely because some celebrities are holding shareholding in one of entities to which assessee society has engaged for provision of services does not make any difference in allowance or disallowance of a particular expenditure for object of society. Further, merely because a hotel is rented by assessee society for using, as a hostel for student, does not make any difference, as far as student of the society exclusively uses the same. These facts do not exclude assessee from provision of section 2 (15) of the act. It is also not the case of AO that assessee is carrying on business activity, which is tainted with profit motives and is not an educational activity. The LD AO in this appeal does not dispute further repair expenditure of such hotel used as hostel by assessee. Hence, we do not find any infirmity in order of learned CIT – An in disallowing above claim. In result, ground number 1 of appeal of learned assessing officer is dismissed. **[Para 8]**

**3. Madhulika Makkar v. DCIT (ITA No. 6938/D/17)(15.03.2019)(ITAT, Delhi)**

**SECTION 2(22)(e) – DEEMED DIVIDEND - TRADE ADVANCE CANNOT BE TREATED AS LOAN FOR THE PURPOSE OF INVOKING PROVISIONS OF**

**SECTION 2(22)(e) IRRESPECTIVE OF TREATMENT IN THE BOOKS OF ACCOUNT – CBDT CIRCULAR NO. 19/2017 APPLIED – ADDITION DELETED.**

Held, I find merit in the above arguments advanced by the ld. counsel for the assessee. The CBDT vide Circular No.19/2017 dated 12th June, 2017 issued the circular to the extent that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. The Hon'ble Delhi High Court in the case of Creative Dyeing and Printing Pvt. Ltd. (supra) has held that amounts advanced for business transaction do not fall within the definition of deemed dividend u/s 2(22)(e) of the IT Act. The Hon'ble Delhi High Court in the case of CIT vs. Arvind Kumar Jain (supra) has held that amount received by the assessee shareholder from a company as a result of trading transaction could not be regarded as deemed dividend merely because it had been shown as unsecured loan in assessee's books of account. The various other decisions relied on by the ld. counsel for the assessee also supports his case. Since the ld.CIT(A) has given a finding that the amount received by the assessee are trade advances for which substantial relief has already been granted and the Revenue was not in appeal before the same, therefore, for the balance trade advance also the provisions of section 2(22)(e), in my opinion, is not applicable. **[Para 9]**

4. **Shri Vinod Kumar Chugh v. ITO (ITA No.2595/D/15) (Dated 18/03/2019) (ITAT, Delhi)**

**SECTION 2(47)(v) READ WITH SECTION 45 AND 50C – YEAR OF TRANSFER IN CASE OF AGREEMENT TO SELL, WITHOUT EXECUTING REGISTERED SALE DEED – THE ASSESSEE HAD PURCHASED PROPERTY VIDE AGREEMENT TO SELL DATED 22.06.1987 ALONG WITH OBTAINING GPA IN ITS FAVOUR FROM THE SELLER – THEREAFTER THE PROPERTY WAS SOLD VIDE AGREEMENT TO SELL DATED 03.08.1991 – THE SALE DEED WAS EXECUTED BY THE ASSESSEE IN THE FAVOUR OF BUYER BY EXERCISING RIGHT AS A GPA HOLDER IN AY 2010-11 – THE AO TREATED THE YEAR OF EXECUTION OF SALE DEED AS TRANSFER OF PROPERTY FOR THE PURPOSE OF CAPITAL GAIN AND ASSESSED INCOME IN ASSESSEE'S HAND IN THAT YEAR BY APPLYING CIRCLE RATE AS PER THE PROVISIONS OF SECTION 50C OF THE ACT – TRIBUNAL HELD THAT AS PER SECTION 2(47)(v),TRANSFER INCLUDED EXECUTION OF AGREEEMNT TO SELL ALONG WITH GRANTING POSSESSION OF THE PROPERTY – NO REQUIREMENT OF REGISTERING AGREEMENT TO SELL IN THE YEAR 1991 AS PER SECTION 53A OF TRANSFER OF PROPERTY ACT – ACCORDINGLY THE SALE FOR THE PURPOSE OF SECTION 45 TOOK PLACE IN THE YEAR 1991 NO CAPITAL GAIN AROSE IN AY 2010-11 AND THEREFORE THE PROVISIONS OF SECTION 50C WERE ALSO NOT APPLICABLE.**

Held, We have considered the rival submissions and have also perused the material on record. On going through the records, we note that the assessee has purchased a plot

bearing no. A-34, Sector-30, Noida from Smt. Lilawati Kapur in terms of the agreement to sell dated 22.06.1987. The assessee also obtained a General Power of Attorney in his favour from Smt. Lilawati Kapur. The assessee, thereafter, constructed a house having only the ground floor thereon. Thereafter, the assessee sold the property to Smt. Santosh Sareen through an agreement to sell dated 03.08.1991 for a sum of Rs.4,55,000/- which was received by cheque. In the year under consideration, Smt. Santosh Sareen obtained approval for the transfer of the above plot from the Noida Authority in her favour and asked the assessee to execute a proper Sale Deed in her favour, being the General Power of Attorney holder of Smt. Lilawati Kapur, the original owner. The assessee, accordingly, executed the Sale Deed in his capacity as the General Power of Attorney holder as is evident from the Sale Deed (placed at Paper Book Pages 13-45) executed on 23.06.2009. The assessing officer has assumed this as sale by the assessee during the year and has taxed the capital gain in the assessee's hand. From the facts, it is clear that the assessee had purchased the property through an agreement to sell in 1987 and had sold the same again through an agreement to sell in 1991. The assessee had given possession to the buyer in the year 1987. The buyer had also confirmed the same in response to the enquiry conducted by the AO. The buyer has also filed evidences to support that she was in possession all along from the year 1991. The AO has not brought any material to the contrary to rebut the evidences submitted by the assessee and by the buyer Smt. Santosh Sareen. The contention of the assessee is supported by the definition of transfer in section 2(47) clause (v) of the Act whereby 'transfer' in relation to capital assets includes any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act. As per section 53A of the Transfer of Property Act, as applicable in the year 1991, an agreement to sell need not be registered if the transferee has, in part performance of the contract, taken possession of the property and continues in possession of the same. In the present case, the transferee has taken possession in the year 1991 and has continued to be in possession of the property and hence, transfer was complete in the year 1991 in view of clause (v) of section 2(47) of the Income Tax Act… We also note that in the sale deed the total consideration has been stated at Rs. 4,50,000/- and the details of the cheque and mode of payment is stated in this sale deed at internal page 8 Paper Book page 24. This fact supports the case of the assessee that the assessee had sold this property way back in the year 1991. In view of these facts, the AO and the Ld. CIT (A), both, were not justified in drawing an adverse inference merely on the ground that the assessee had failed to produce the bank statement for the year 1991. From the assessment order, it is also evident that the assessing officer has made a direct inquiry from the buyer Smt. Santosh Sareen and she also has confirmed having bought this property from the assessee in the year 1991… The allegation of the assessing officer that the property has been sold in the year 2009, when the assessee has executed the sale deed also ignores the fact that the sale deed has been executed by the assessee in the capacity of General Power of Attorney holder and not as an owner. This fact is evident from the sale deed itself which is between Smt. Lilawati Kapur, the original owner as the seller and Smt. Santosh Sareen as the buyer… In view of the above facts, we hold that the sale of this property by the assessee has taken place in the year 1991 and the AO was not justified in taxing the capital gain arising on the sale of this property in the year under consideration. As regards invoking the provision of section 50Cof the Act, the same will

come to be attracted only when sale has taken place during the year. As we have held that the sale by the assessee stood completed in the year 1991, there is no question of invoking the provision of section 50C. Accordingly, the addition made by the assessing officer of Rs. 78,40,062/- as long term capital gains is directed to be deleted. **[Paras 5, 5.1, 5.2, 5.3]**

5. **Savita Gupta vs. ITO (ITA No. 6475/Del/2016) (Dated 08.03.2019) (ITAT, Delhi)**

**SECTION 2(47) - EXTINGUISHMENT OF ANY RIGHT IN A CAPITAL ASSET WAS ALSO CONSIDERED TO BE TRANSFER FOR THE PURPOSE OF THE ACT –EVEN IF THE ASSESSEE HAD NOT BECOME THE OWNER OF THE PROPERTY DUE TO LITIGATION- THE FACT REMAINED THAT SHE PAID CONSIDERATION FOR ACQUIRING INTEREST IN THE PROPERTY AND THAT INTEREST WAS ULTIMATELY RELINQUISHED BY HER IN FAVOUR OF THE NEW VENDEE BY VIRTUE OF THE AGREEMENT- THE ASSESSEE BECAME A PARTY TO THE AGREEMENT AS A WITNESS HAVING ACQUIRED INTEREST IN THE PROPERTY BY VIRTUE OF THE EARLIER AGREEMENT - THE CONSIDERATION RECEIVED FOR RELINQUISHING HER RIGHT IN THE PROPERTY U/S 45(1) OF THE ACT MAKING HER LIABLE TO CAPITAL GAINS TAX.**

16. We have carefully considered the rival contentions and perused the orders of the lower authorities. Looking at the facts culled out by us , admittedly in the present case the agreement to sale dated 22/9/2004 was without possession and the transfer deed were not registered in the name of the assessee till that property was sold by MrLiladharJha to MrsIndrawati& Others. The learned assessing officer has held that for these reasons consideration received by the assessee is not chargeable to tax as capital gain but as income from other sources. In fact according to the provisions of section 2 (14) the capital asset means property of any kind held by an assessee whether or not connected with his business or profession. Therefore, by entering into the agreement to sale on 22/9/2004 the assessee acquired the right to get this property registered in her name or her nominees' name. For acquisition of the above right, the assessee has paid consideration on 22/9/2004 and subsequently deposited all the dues of Noida development authority. When the seller sold the above property to the third party, assessee received all the consideration in his bank account, which has not been disputed by the learned assessing officer. Therefore, the assessee earned the total consideration received on sale of the property by the original seller to Mrs. Indrawati and others. Assessee being witness in the sale deed does not go against the assessee. It is not in dispute that assessee has paid substantial sum to NOIDA for transfer deed registered in the name of Mr. LiladharJha . All these facts show that assessee has acquired right in the property on 22/9/2004. Such right is also a property u/s 2(14) of the act and hence capital asset, transfer of which is chargeable to tax as capital gain.

6. **DCIT v. Offcom Systems Pvt. Ltd. (ITA No.2813/D/15) (Dated 12/03/2019) (ITAT, Delhi)**

**SECTION 9 – RECOGNITION OF INCOME - ADVANCE RECEIVED IN AN ANNUAL MAINTENANCE CONTRACT IS NOT INCOME IN THE YEAR OF RECEIPT BUT NEEDS TO BE SPREAD OVER A PERIOD OF CONTRACT AS PER THE MERCANTILE SYSTEM OF ACCOUNTING.**

Held, We have carefully considered rival contention and perused orders of lower authorities. Looking to nature of business of assessee wherein assessee is a service provider of uninterrupted power supply equipments. At time of sale of those goods, assessee enters into annual maintenance contract with buyer, which spreads over more than one year. Assessee receives amount of annual maintenance contract over an agreed contract period in advance. Assessee accounts in income amount pertaining to financial year and balance sum was shown as income received in advance. Such income received in advance is also converted into income in subsequent year according to time line of such contract. Above system of accounting cannot be found fault as income is accounted for and offered for taxation on accrual basis. Above method of accounting as been followed by assessee consistently in earlier years as well as in subsequent years and it has not been disturbed. In view of this, we do not find any infirmity in manner of offering of income by assessee on an annual maintenance contract amount based on proportionate amount over a period. It is not case that all income accrued up to 31/3/2010 has not been accounted by assessee as income and offered for tax. Merely because payer has deducted tax at source, does not become income of recipient. In similar manner and year of claim of expenses by payer also does not determine income in hands of recipient. Amount received was only as charges for services to be rendered in future. Services may be rendered or may not be rendered depending upon withdrawal of money as and when customer required. Therefore, it is highly uncertain as to whether it would at all remain as income of assessee. Only when services are rendered assessee has a right over amount that was paid as advance. Until then, it has no right over it. It is in that sense until then, it cannot be considered as an income of assessee and is not exigible to tax. Therefore, we confirm order of learned CIT – A and direct learned assessing officer to delete addition of Rs. 8888733/–. Accordingly, ground number 1 of appeal of learned assessing officer is dismissed. **[Para 6]**

**7. New Amazing Shiksha Society vs. ITO (ITA No. 3550 & 3551/Del/2018) (Date: 26.2.2019) (ITAT, Delhi)**

**SECTION 10(23C)(iiiad) - EXEMPTION U/S. 10(23C)(iiiad) OF THE ACT CANNOT BE DENIED MERELY BECAUSE BUYING AND SELLING OF UNIFORM AND BOOKS FOR EDUCATIONAL PURPOSE IS NOT SPECIFICALLY MENTIONED IN THE MEMORANDUM OF ASSOCIATION OF THE ASSESSEE SOCIETY.**

From the plain reading of section 10(23C)(iiiad) of the Act, it is apparent that any income of any university or other educational institutional existing solely for educational purposes and not for the purpose of profit is totally exempt if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual

receipt as may be prescribed. This means that there is no restriction on the generation of surplus u/s 10(23C)(iiiad). It can be said that any university or other educational institution can generate surplus. Therefore, so long as the purpose of the institution does not involve carrying on of educational activity for profit, the requirement of condition given under section 10(23C)(iiiad) could be met if the activity of the educational institution is carried out not for the purpose of profit.

It is also noted that buying and selling of uniform and books to students of assessee, for educational purpose is not commercial activity. Because the assessee is engaged in providing primary and higher education to the poor students and working under the aims and objects of the society. It also engaged in sale and purchase of books and uniform to the students of the assessee school only, at cheaper rate than market prices, which is also a part of educational activity. Also, the assessee buys and sells only those books and uniforms which are related to the students only. It is entirely for the education of the students which is not beyond the aim and objective of the society. There is no need to specifically mentioned about the sale of uniforms and books in the memorandum of association as it is incidental to the educational activities which is object of the assessee.

**8. Smt. Kamlesh Rani vs. ITO (ITA No. 8218/Del/2018) (Dated: 05.03.2019)& Aashna Capital Services Pvt. Ltd. vs. ITO (ITA No. 7710/Del/2018) (Dated: 05.03.2019) (ITAT, Delhi)**

**SECTION 10(38) READ WITH S. 68 - CREDIT IN BANK ACCOUNT SIMPLY OR ANY OTHER RAW INFORMATION AVAILABLE TO AO CAN'T BE LOOSELY CALLED AS BOOKS OF ACCOUNT U/S 68 OF THE ACT.**

6.1 If objectively and dispassionately section 68 of the Act is dissected following would be key ingredients of the same: Firstly is requires that "Where any sum is found credited in the books of an assessee maintained for any previous year" that is there is a "sum" found to have been credited in books of assessee for previous year which mandates existence of books of accounts of assesssee sans which section 68 can't be pressed into service;

6.2 From above provisions it is crystal clear that mere bank statement which is issued by bank to its client/account holder can't be elevated to status of books maintained by assessee within the meaning of section 2 clause 12A and section 44AA of the Act.

6.3 It is noted that judicial analysis of books of accounts is available in Hon'ble Bombay High Court decision in case of Sheraton Apparels reported at 256 ITR 20.

6.4 Above dictum leaves no room for any possible doubt that credit in bank account simply or any other raw information available to AO can't be loosely called as books of account u/s 68 of the Act.

9. **ITO vs. Anil Kumar Gupta (ITA No. 5911/Del/2014) (Dated: 13.03.2019) (ITAT, Delhi)**

**S. 23(1)(c) - IN CASE PROPERTY HAS REMAINED VACANT FOR WHOLE YEAR THE INCOME ASSESSABLE WOULD BE NIL U/S. 23(1)(c) OF THE ACT - THE PROVISIONS OF SECTION 50C ARE HELD NOT APPLICABLE HERE BEING THE CASE OF A BUILDER & DEVELOPER WHERE THE PROPERTIES ARE HELD AS STOCK-IN-TRADE AND NOT AS ASSETS - THE NEW SECTION 43CA INTRODUCED BY FINANCE ACT 2013 W.E.F. 1ST APRIL 2014 FOR COMPUTATION OF BUSINESS INCOME WILL APPLY TO SALE OF THE IMMOVABLE PROPERTY HELD AS STOCK-IN-TRADE AFTER 01.04.2013 AS THE AMENDMENT IS PROSPECTIVE AND CANNOT BE APPLIED TO SALES OF PROPERTIES HELD AS STOCK IN TRADE IN THE RELEVANT AY.**

6.1 The decision of the ITAT, Mumbai in the case of Sh. Sachin R. Tendulkar vs. DCIT decided in ITA no. 3755/Mum/2016 dated 10.8.2018 is also applicable in the present case, wherein it was held that in case property has remained vacant for whole year the income assessable would be NIL u/s. 23(1)(c) of the Act. Therefore, respectfully the precedents relied upon by the Ld. CIT(A) in his order, Ld. CIT(A) has rightly held that there is a document evidencing the sale and there is nothing on record to prove that the assessee has received anything more than stated in the said document evidencing the sale, then the sale consideration shall be full value of consideration stated in the document sale and not any other value. Ld. CIT(A) further rightly held that the AO has erred in adopting the sale price @ circle rate for the purpose of computing the assessee's income.

10. **DCIT v. Delhi Auto and General Finance P. Ltd. (ITA No. 1837/D/16)(14.03.2019)(ITAT, Delhi)**

**SECTION 37 –DISALLOWANCE OF EXPENSE – DIFFERENCE BETWEEN SUSPENSION OF BUSINESS AND TEMPORARY LULL – EXPENSES FOR MAINTAINING OF BUSINESS ALLOWABLE EVEN WHEN THERE IS NO BUSINESS ACTIVITY.**

Held, as could be seen from the order of the learned CIT(A), the fixed assets of the assessee are the subject matter of litigation u/s 18 of the Land Acquisition Act and the assessee was due to receive a compensation amount of Rs.460 crore with interest which would be the income of the assessee in the year that would be received. In this context, the maintenance of the establishment by the assessee has rightly accepted by the learned CIT(A) as an indication of the intention of the assessee to resume the business if the opportunity for it arises in future. It cannot be said that the operation of the assessee were closed down permanently or its name struck off the register or that the company is dissolved. In these circumstances, we find every force in the observation of the learned CIT(A) that till such time the company has to maintain its status as company and also has to be discharged certain legal obligations for which it requires the support of the clerical staff and the secretary or the accountant, as the case may be, and also to incur certain

incidental expenses in that pursuit. It is, therefore, clear that when the possibility of the revival of the business activities or operation of the assessee are not ruled out once for all, it cannot be said that the assessee company had closed down its operations permanently so as to disallow the business expenditure. The temporary lull in the business during the lean period of transaction cannot be mistaken to be the permanent close down of the business. The clear indication is that the assessee has to maintain its status as company till the end comes and it has to perform certain legal obligations by incurring certain expenditure and more particularly to pursue the litigation as a result of which it has to receive Rs.460 crores approximately which shall form part of the income of the assessee in the year in which it will be received. **[Para 7]**

**11. Sparrowhawk International Channels India P. Ltd. v. Dy. CIT (ITA No.216/D/14) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 37(1) – ALLOWABILITY OF FOREX FLUCTUATION LOSS ON CONVERSION OF ECB LOAN INTO SHARE CAPITAL – CONVERSION OF ECB LOAN INTO EQUITY SHARE CAPITAL AS PER THE PROVISIONS OF COMPANY LAW IS A VALID TRANSACTION – CONVERSION IS NOTHING BUT DISCHARGE OF LOAN LIABILITY THROUGH EQUITY SHARE BY AVOIDING TWO WAY TRAFFIC OF PAYMENT OF CASH TO DISCHARGE LOAN AND RECEIPT OF CASH IN LIEU OF FRESH ALLOTMENT OF SHARES – THUS THE FOREX LOSS ARISING ON SUCH CONVERSION CANNOT BE DISALLOWED ON THE GROUND THAT THE SAME IS SUFFERED ON CONVERSION AND NOT BY ACTUAL REPAYMENT.**

Held, We are satisfied that the allotment of shares by a company in lieu of a genuine debt is in perfect compliance of Section 75(1) the Companies Act, 1956. Handing over cash to the allottee of shares by a company in payment of the debt and the allottee in turn returning the same cash as payment for the shares allotted to him is not necessary for treating the shares as having been allotted for cash. We, therefore, agree with the submissions made on behalf of the assessee that the conversion of dollar denominated ECB into rupee denominated share capital is comprised of two distinct transactions, namely, allotment of 2,45,37,990 equity shares to the overseas company at Rs.10 per equity share and the second transaction of repayment of ECB of US $49,79,300 at the exchange rate prevailing, both the transactions on 9.2.2009… We, therefore, do not agree with the observations of the authorities below that the conversion of ECB into share capital is of revenue in nature and consequently, we find that the disallowance of Rs.4,67,05,830/- cannot be sustained. We accordingly direct the learned AO to delete the addition made by this disallowance… In the result, appeal of the assessee is allowed. **[Paras 7, 8, 9]**

12. **The National Small Industries Corp Ltd. v. Dy.CIT (ITA No.1367/D/16) (Dated 25/02/2019) (ITAT, Delhi)**

**EXPLANATION 2 TO SECTION 37(1) – ALLOWABILITY OF CORPORATE SOCIAL RESPONSIBILITY (CSR) EXPENDITURE – CSR EXPENSES INCURRED BY AN ASSESSEE IN CONNECTION WITH ITS BUSINESS IS ALLOWABLE REVENUE DEDUCTION UNDER SECTION 37(1) OF THE ACT – EXPLANATION 2 TO SECTION 37(1) INSERTED BY FINANCE (NO.2) ACT, 2014 WITH EFFECT FROM 01.04.2015 IS PROSPECTIVE AND NOT RETROSPECTIVE / CLARIFICATORY IN NATURE – THUS THE SAID PROVISION CANNOT BE APPLIED FOR DISALLOWING CSR EXPENDITURE INCURRED IN AY 2012-13**

Held,We are unable to agree with plea advanced by Ld. Sr.DR. In our opinion Explanation 2 has been inserted in the section 37 (1) w.e.f. 01/04/15 and is prospective in nature. In our considered opinion amendment by way of Explanation 2 to Sec.37(1) cannot be construed as disadvantage to the assessee in the period prior to the amendment. It is a disabling provision, as set out in Explanation 2to Sec.37(1), and refers to such Corporate Social Responsibility expenses u/s 135 of Companies Act, 2013 and as such cannot have application for period not covered by this Statutory Provision which itself came into existence in 2013. We draw our support from the decision of Hon'ble Supreme Court in case of CIT vs. Vatika Townships Pvt. Ltd. Reported in (2014) 367 ITR 466 …. Thus we reject this argument of Ld. Sr.DR and hold that this amendment would not affect allowability of such expenses for the year under consideration, being assessment year 2012-13. It is observed that authorities below rejected claim of assessee only on the ground that Explanation 2 to Sec.37(1) is applicable to year under consideration….. We therefore allow grounds raised by assessee. As we have already allowed the said expenses under section 37 (1) for the year under consideration… .**[Paras7, 8]**

**13. ACIT v. M/s. Continental India Ltd. (ITA No. 207/D/16)(19.03.19)(ITAT,Delhi)**

**SECTION 37 – CLAIM OF EXPENSES INCURRED TOWARDS TECHNICAL KNOW HOW IN RESPECT OF NON EXCLUSIVE AND NON TRANSFERABLE LICENCE FOR USE OF TECHNOLOGY FOR MANUFACTURING TYRES IN INDIA – THE AGREEMENT TO US LICENSE WAS FOR LIMITED PERIOD GIVING LIMITED RIGHT TO THE ASSESSEE- NO CAPITAL ASSET CAME INTO EXISTENCE – EXPENDITURE ALLOWABLE AS REVENUE EXP.**

Held, We are of the considered view that the expenditure incurred by the assessee in accordance with TEA agreement pertaining to the technical "know-how" is quantified on the basis of sale / production effected by using such technical know-how is of revenue nature and as such allowable as business deduction. Ld. CIT(A) has also relied upon Circular no. 21 of 1969 issued by CBDT / clarified that when a licence is obtained for user of technical knowledge from a foreign participant for a limited period together with or without the right to use the patents and trademarks of the foreign party, the payment would not bring into existence an asset of enduring advantage to the Indian party. So in view of the matter decision relied upon by Ld. DR viz. Honda Siel Car India Ltd. v. ACIT, Semoco Electrical Pvt. Ltd. are not applicable to the facts and circumstances of the

case. Consequently, we find no illegality or perversity in the findings returned by Ld. CIT(A). **[Para 22]**

**14. DCIT v. Sahara India Life Insurance Company Ltd. (ITA No.3855/D/14) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 44 –COMPUTATION OF INCOME FROM INSURANCE BUSINESS – INVESTMENTS MADE AS PER THE IRDA GUIDELINES FROM PART AND PARCEL OF THE INSURANCE BUSINESS AND CANNOT BE CONSIDERED AS A DIFFERENT BUSINESS SEGMENT – PROVISIONS OF SECTION 44 READ WITH FIRST SCHEDULE SHALL APPLY TO INVESTMENT ACTIVITY CARRIED ON BY THE ASSESSEE ENGAGED IN INSURANCE BUSINESS – ACCORDINGLY PROFIT / LOSS ARISING FROM SUCH ACTIVITY HAS TO BE COMPUTED IN ACCORDANCE WITH THE PROVISIONS OF AFORESAID SECTION AND NOT THE OTHER PROVISIONS OF THE ACT.**

Held, The issue involved in the appeal is during the year the appellant has written off a sum of INR 1 7556702/– as amortized charge against the earnings from securities. The accounts of the assessee have been prepared in accordance with The Insurance Act, 1938 and as per the said account the profit of INR 1 63939000/– as appearing as per profit and loss account and INR 212325000/– surpluses appearing in the policyholders account in accordance with the valuation made as actuarial. The learned assessing officer noted that the investment activity of the appellant' is a separate and distinguished business from life insurance business carried on by the appellant and accordingly the same cannot be covered by the provisions of section 44 of the income tax act 1961. The claim of the assessee is that The Insurance Regulatory Development Authority Regulations primarily govern its business activities and the income of the assessee carrying on life insurance business has to be computed in accordance with the provisions of section 44 of the income tax act read with the 1st schedule of the act. It is fact that as per IRDA regulations the insurance company cannot carry on any other business other than insurance business. However, the learned assessing officer was of the view that the provisions of insurance regulatory development act and the first schedule of the income tax act governs the insurance activities of the assessee and not the investment activities of the assessee. Therefore, the learned AO after considering the provisions of section 44 of the income tax act and the rules in the first schedule of the act held that investment activity of the assessee is separate and distinguished from the life insurance business carried on by the assessee company. Therefore same is not covered u/s 44 of the income tax act 1961 the learned assessing officer further supported his argument stating that when the assessee has claimed INR 1075675/– as exempt under section 10 (23AAB) and Rs. 55524591/– income as deemed dividend income exempt under section 10 (34) of the income tax act the assessee cannot claim that its investment business is considered under section 44 of the income tax act. The identical issue has been covered by the coordinate bench in assessee's own case for assessment year 2005 – 06 to assessment year 2010 – 11 vide order dated 31/10/2018. As per para number 5.2 of the order of the coordinate bench it has been held that it is a settled law that section 44 of the act overrides other provisions of

the act for the purposes of the competition of profits and gains from the life insurance business. In all those years, any adjustment made to the total income of the assessee was negated. Further as per para number 5 of the order of the honourable Bombay High Court in 73 taxmann.com 201 in case of Commissioner of income tax vs ICICI Prudential insurance Co Ltd the honourable High Court has held that that income on shareholders account has to be taxed under section 44 of the income tax act whereas the claim of the revenue was that it should be taxed as income from other sources. The honourable High Court has held that in terms of section 44 of the act such income is to be taxed in accordance with the first schedule as provided therein. He also it is not the case of the revenue that assessee is carrying on any separate business other than life insurance business. In view of this we uphold the order of the learned CIT – A and dismiss the solitary ground of appeal of the revenue. .. Accordingly, appeal of the revenue is dismissed. **[Paras 7, 8]**

**15. M/s. RH International Ltd. v. ITO (ITA No. 6724/D/18)(20.03.19)(ITAT, Del)**

**SECTION 40(a)(ia) – SECTION 192 – NO DISALLOWANCE OF SALARY COULD BE MADE ON THE GROUND OF NON DEDUCTION OF TDS AS SAME FALLS OUTSIDE THE AMBIT OF SECTION 40(a)(ia) OF THE ACT.**

**SECTION 40(a)(ia) – AMENDMENT BROUGHT IN VIDE FINANCE ACT, 2014 IS CLARIFICATORY IN NATURE – DISALLOWANCE FOR NON DEDUCTION OF TDS IS TO BE RESTRICTED TO THE EXTENT OF 30% OF SUM CLAIMED.**

Held, The A.O. in the assessment order noted that as regards Section 192B of the I.T. Act, the amount on which TDS is to be deducted comes to Rs.29,01,190/- on which, TDS of Rs.2,90,119/- have been deducted but was not paid by assessee. Learned Counsel for the Assessee rightly contended that the amount in question relates to payment of salary and according to Section 40(a)(ia) of the I.T. Act, the word "Salary" have not been incorporated in the Act. Therefore, assessee would not be in default of TDS under section 40(a)(ia) of the I.T. Act because such provision is not attracted in this Section. Therefore, Section 40(a)(ia) of the I.T. Act is not application on such transaction. This addition is, therefore, liable to be deleted. We, accordingly, set aside the Orders of the authorities below and delete the addition of Rs.29,01,190/-. **[Para 7.1]**

Held, following the above decision, we set aside the orders of the authorities below and direct the assessing officer to follow the order of ITAT, Jaipur Bench in the case of Shri Rajendra Yadav vs., ITO (supra), and in case of disallowance under section 40(a)(ia) of the Income Tax Act, 1961, the same should be restricted to 30% only as against 100% because the amended provision is curative in nature and have made to remove the undue hardships to assessee and accordingly should be applied retrospectively.**[Para 10]**

**16. Technip Italy SPA (ITA No. 7171/Del/2017) (28th February 2019) (ITAT, Delhi)**

SECTION 45 – SECTION 92 - CAPITAL GAINS –INDIRECT TRANSFER – DETERMINATION OF ALP – ARTICLE 25 – WHETHER TP PROVISIONS APPLY – HELD NOT DISCRIMINATORY.

FAIR VALUATION –DISCOUNTED CASH FLOW METHOD - ADJUSTMENTS

Assessee is incorporated in Italy - Indian subsidiary - Assessee acquired balance 50% stake in Indian subsidiary which thereafter became a wholly-owned subsidiary of the appellant company – In relevant year assessee entered into a Share Purchase Agreement with Technip France SAS for transfer of its entire shareholding comprising of 29 lakhs equity shares in Indian Subsidiary at an agreed price of Rs 396.42 per share and, accordingly, Technip India became 100% subsidiary of Technip France - Sale consideration was determined based on fair valuation of shares undertaken by an independent valuer applying Discounted Cash Flow (DCF) Methodology. The transaction involved transfer of shares of capital assets situated in India, assessee offered the income arising from sale of such shares to long term capital gains tax in terms of section 45 – AO made reference to TPO.

Held on legal issues challenging applicability of TP provisions:

(a) Under Article 25 of this India-Italy DTAA, an Italian national shall not be subjected to in India to any taxation or any requirement connected therewith to which Indian nationals in the same circumstances and under the same conditions are or may be subjected which is more burdensome to Italian national. This means that if an Indian national [legal person], enters into any international transactions with its Associated Enterprises, will it not be subjected to transfer pricing proceedings? The answer is "YES". The Indian national will be subjected to transfer pricing proceedings. Therefore, in our considered opinion, the transfer pricing proceedings taken in the case of the appellant company is not at all discriminating and, therefore, do not fall within the purview of Article 25 of the India Italy DTAA as claimed by the appellant. (para 22 and 23)

(b) The next objection of the assessee is that the AO had no power to substitute actual consideration with notional consideration u/s 45 r.w.s 48 – held "In our considered opinion, the Assessing Officer has not substituted actual consideration with notional consideration but has made adjustment as per the report of the TPO after receiving directions from the DRP. Section 92 of the Act provides that any income arising from an international transaction shall be computed having regard to the arm's length price." (para 26)

Held on merits of DCF:

(i) Liquidity Discount - TPO should have allowed rebate for illiquidity since the shares of the assessee company do not have any liquidity in the open market. If the illiquidity discount alone is considered, then the fair value as per the share of the assessee would be more than the fair value per share determined by the TPO (para 34)

(ii) Market Risk Premium - The market risk premium measures the extra return that would be demanded by investors for shifting their money from riskless investments to an average risk investment. This excess return compensates investors for taking higher risk by investing in the market. The amount of the premium will vary as the risk in a

particular stock, or in the stock market as a whole, changes; high-risk investments are compensated with a higher return. Therefore, the market risk premium is generally computed as return on market index i.e. SENSEX over a long period of time. (para 36)

(iii) Goodwill adjustment – *"In our considered opinion, Goodwill is an intangible asset arising as result of name, reputation, customer loyalty, location, products and other similar factors not separately identified. Goodwill is an apparatus that assists in improving the profitability of a Company, being the base for determination of value under the DCF approach. Therefore, Business Value arrived at under DCF approach subsumes the value attributable to Goodwill. Since DCF valuation methodology inherently captures the entire value of business, therefore, based on valuation principles, there cannot be a separate addition of the value of goodwill"* (para 42).

**17. Bal Kishan Atal v. ACIT(ITA No. 2649/D/16)(06.03.2019)(ITAT, Delhi)**

**SECTION 54F – ASSESSEE HAVING INVESTED SALES CONSIDERATION IN PURCHASE OF NEW PROPERTY- PURCHASE DEED EXECUTED WITHIN 3 YEARS FROM SALE – CLAIM OF EXEMPTION CANNOT BE DENIED MERELY BECAUSE THERE WAS DELAY IN OBTAINING POSSESSION WHICH WAS ATTRIBUTABLE TO BUILDER**

Held, from the facts, it is clear that assessee has made payment of for the purchase of flat to the developer of Rs.62,68,311/-. The fact of payment of the same and the transaction of purchase of flat are not in dispute. The only issue is that assessee could not obtain the possession and got the purchase deed executed within the period of three years. The delay was on account of developer and not on account of the assessee. We have also perused the paper book, where we find that there is a complaint filed by La Tropicana, Resident Welfare Association against the developer with National Consumer Disputes Redressal Commission. Thus, the fact that delay in obtaining possession and getting purchase deed executed was on account of the developer and was by reason beyond the control of the assessee. The assessee has made substantial payment of Rs.62,68,311/-. In such peculiar facts and circumstances, we are inclined to agree with the contentions of the assessee that exemption under section 54 cannot be denied to the assessee. The assessee has done all what he could have done. There is no failure on the part of the assessee. **[Para 6]**

*[Decision of Delhi High Court in the case of* ***Balraj vs CIT 254 ITR 22*** *and* ***CIT vs R.L. Sood 245 ITR 727*** *followed.]*

**18. Radiance Stock Traders P. Ltd. v. DCIT (ITA No. 2212/D/18)(27.02.19)(ITAT, Delhi)**

**SECTION 68 – ADDITION OF SHARE CAPITAL ON THE GROUND OF ACCOMMODATION ENTRY – IT IS THE DUTY OF THE ASSESSING OFFICER TO CONFRONT THE ASSESSEE WITH ANY ADVERSE MATERIAL OR INFORMATION WHICH IS BEING USED AGAINST – REFUSAL TO PROVIDE MATERIAL GOES AGAINST THE PRINCIPLE OF NATURAL**

**JUSTICE AND STRIKES AT THE ROOT OF THE ADDITION - ADDITION DELETED**

Held, The information on the basis of which assessee's case has been reopened could be very credible information that can lead to prima facie 'reason to believe' that the share application money received by the assessee may not be genuine. However, if Assessing Officer has recorded at the time of recording the 'reasons' that he is in possession of specific material that discredits the particulars furnished by the assessee then it was all the more incumbent upon the Assessing Officer to share those materials with the assessee, if these materials were to be used against the assessee. It is a tried and well settled law that principles of natural justice has to be strictly adhered which cannot be faltered and if there is any material found against the assessee, then same should not only be confronted to the assessee but it will also be made available to the assessee so that assessee can rebut these material and show that how these material are not relevant for the assessee or they do not implicate the assessee in any manner. The assessee from those materials can point out various factors and adduce evidences to dislodge the material and in case assessee is unable to rebut, then the Department would be wholly justified in drawing any adverse inference. Here in this case the entire addition is made on certain information received from Investigation Wing that assessee company is one of the beneficiaries of accommodation entry, but what is that information received from the Investigation Wing has neither been discussed in the 'reasons recorded' nor anywhere in the impugned assessment order or Appellate order; nor it is borne out from any records as to what was the material and evidences gathered by the Investigation Wing against the assessee. If there was any such material, then I find it very difficult to fathom as to why such material should not be shared with the assessee especially when adverse inference is being drawn against it. It is not the case here that assessee has not asked any such material, but as pointed out in the earlier part of the order that on several occasions assessee kept on repeating before the Assessing Officer and Ld. CIT(A) that if there is any material on record with the Department then same should be provided to the assessee. Even the Tribunal has directed the department to confront the material, but again same has not been adhered to. The onus was initially upon the AO to confront the material to the assessee and when such material is confronted then onus shifts upon to the assessee. When assessee has filed catena of evidences as listed above, then all the more it was important that Department should have brought something on record to dislodge as to why all these evidences filed by the assessee negates the explanation of the assessee; and if all these evidences were mere paper trial, then the onus was on the Assessing Officer to prove that in the wake of specific material these evidences of the assessee cannot be relied upon. Merely because these two companies were handled by some entry operator that does not mean that entire evidences in the form of statutory records and Income Tax records are either bogus or mere piece of paper. From the reading of both the orders of the Assessing Officer and Ld. CIT (A), I am unable to decipher as to what was the specific material found against the assessee during the course of search carried out on some other place and whether there is any such information or material that these persons have taken some kind of cash from the assessee to provide the accommodation entry or there is any kind of entry in the name of the assessee in the diary or any of the record. Both the authorities have simply relied upon various judgements to hold against the assessee. The judgements are precedent on the facts and there are judgements on such

issue, both in favour and against the assessee, depending upon the material facts brought on record. Even if there is an iota of material against the assessee then one can hold that the share application received by the assessee company is bogus and is in the form of accommodation entry. The evidences filed on record cannot be brushed aside unless there is a strong material indicating that these evidences have been fabricated or created for routing the unaccounted money in the circuitous manner. Accordingly, I hold that if principle of natural justice has violated then any adverse material which has been used against the assessee which has not been made available to the assessee, then I find it very difficult to sustain the addition simply based on information which too is in domain of the Department only. Under these facts and circumstances of the case, I find no option but to delete the addition. **[Para 12]**

**19. Himanshu Verma v. DCIT (ITA No. 1627-29/D/15)(15/03/2019)(ITAT, Delhi)**

**SECTION 68 – ACCOMMODATION ENTRY PROVIDER – NO ADDITION COULD BE MADE IN RESPECT OF CREDITS APPEARING IN THE BANK ACCOUNT IN THE HANDS OF PERSON ONCE HE IS HELD TO BE ENTRY PROVIDER – ONLY ADDITION ON ACCOUNT OF COMMISSION INCOME IS SUSTAINABLE**

**ESTIMATION OF COMMISSION INCOME IN ENTRY BUSINESS – COMMISSION @0.80% HELD TO BE REASONABLE**

Held, we find that Ld. CIT(A) while deciding the appeals has also called for the assessment records and has rendered a finding that the assessee in response to several quarries raised by the AO had furnished the replies. Referring to the observation of AO in the assessment order, it is observed by Ld. CIT(A) that the entire case of AO is that the assessee is an accommodation entry operator and such fact was also admitted by the assessee himself. The assessee has admitted that he is engaged in the activity of providing accommodation entries to various beneficiaries through the entities controlled and managed by him. Thus, Ld. CIT(A) has concluded that the assessee is an entry operator which cannot be disputed. Ld. CIT(A) has also referred to the relevant portion of the statements of the assessee to conclude that the assessee is an accommodation entry provider. It is in this view of the situation she has held that the assessee is an accommodation entry operator. The AO has also reproduced post search statement of the assessee which is recorded on 14-04-2012 wherein the assessee in answering to question No. 9 has stated that he was receiving cheques and RTGS from the company in the shape of loans etc. which were deposited in different companies account which were maintained by him. He also stated that the cash was also being received which was deposited in the bank account of firms, proprietary concerns managed and controlled by him. Similarly, he has also stated that he was receiving cheques and RTGS from companies against the sale, which were being deposited in different bank accounts of the firms and companies managed and controlled by him. Further, the AO has also referred to the statement of the assessee recorded on 29-03-2012, wherein in response to question No. 10, it was stated by the assessee that whenever any company/concern wishes to take accommodation entries from him through various CAs operating in this field, the cash was received from

them to give the entries through cheques from any of the entities controlled by him on which commission is received in the range of 0.75% to 1.75%. In answer to question No. 12, it was also stated that he was receiving such commission in cash. Further, the fact of receiving commission has also been confirmed through the evidence found in the shape of laptop of the assessee which was seized and marked as annexure A-37, which according to AO as per observation in his assessment order, has revealed that assessee was receiving brokerage/commission at the rate of 1% to 1.50%. The AO has also listed out 88 entities in the assessment order which are managed and controlled by the assessee. The AO has also listed out 203 bank accounts of these entities through which such accommodation entries have been provided by the assessee. All these fact establish beyond doubt that the assessee has been acting only as a conduit to provide accommodation entries to the beneficiaries which are identifiable through the bank accounts of the entities controlled and managed by the assessee for providing accommodation entries. No material has been brought on record by the AO to show that any money owned by the assessee was utilized to provide the accommodation entries. In this view of the situation we are of the considered opinion that Ld. CIT(A) did not commit any error while rendering the findings that the assessee was an accommodation entry operator. Further, Ld. CIT(A) has also recorded a contradiction in the action of the AO on the ground that while the AO is making addition of commission in the hands of the assessee for providing such entries then, again he is adding the entire entries in the case of the assessee and by making such addition the AO has illogically presumed that the assessee had deposited his own cash while providing the entries to the beneficiaries. In respect of the disclosure/surrender made by seven Chandigarh based beneficiaries, the AO himself has granted the benefit. Further, Ld. CIT(A), while arriving at the conclusion that the assessee is an entry provider and the cash deposited in bank accounts of different entities (which the AO has tabulated on page 64 of the assessment order amounting to Rs. 235,96,03,074) for different years for issueing cheques do not belong to the assessee but moneys of the beneficiaries to whom cheques were issued (list of such beneficiaries is tabulated by the AO on pages 107-120 of the assessment order) who received the cheques from the assessee's group entities. Ld. CIT(A) has also observed that it is incorrect on the part of AO to allege that the assessee did not provide him with the trail of events leading to the beneficiaries as the AO was in possession of entire information including tally accounts, bank statements, names of entities used as intermediaries, names of the beneficiaries etc. from which the AO himself has culled out every specific and precise information and incorporated the scanned copies in the assessment order. Ld. CIT(A) has also found that the case law relied upon by assessee in the cases of Sanjay Kumar Garg Vs. ACIT (2011) 12 taxmann.com 294 (Del) and S.K. Gupta order U/S 245D(4) of the Act, Manoj Aggarwal Vs DCIT (2008) 113 ITD 377 (Del)(SB) and M/s Goldstar Finvest (P) Ltd. Vs. ITO ITA No. 4625/Mum/2005 Vs ITO supports the case of the assessee that in the case of entry provider the income to be assessed would be only the premium/ brokerage/ commission received by him and not the cash deposited in their hands. **[Para 5]**

We have heard both the parties and perused the records. We note that the entries provided by the assessee are mix-match of three types of entries as disclosed by the assessee in his statement recorded on 14-04-2012(post search). The rate of commission is not uniform in respect of these three types of entries. Therefore, to upheld the addition to the extent of

1.50% is not justified on the facts of the case more particularly when AO has not brought any material on record to justify the addition to this extent. In our opinion, looking in to the facts of the case and the decisions relied upon, Ld. CIT(A) is justified in taking commission rate 0.80%. Therefore, we decline to interfere in a such well reasoned finding of Ld. CIT(A), hence, we uphold the findings of the Ld. CIT(A) on the issue in dispute and accordingly these grounds relating to the determination of rate of commission by the assessee as well as by the department are dismissed. **[Para 6.2]**

**20. Amadeus India Pvt. Ltd. vs. ACIT (ITA No. 1811 & 7691/Del/2017) (Dated: 27.02.2019)**

**S. 92B – IN ABSENCE OF AN AGREEMENT, ARRANGEMENT OR UNDERSTANDING BETWEEN THE APPELLANT AND ITS ASSOCIATED ENTERPRISE FOR SHARING THE ADVERTISEMENT, MARKETING AND PROMOTION EXPENSES OR FOR INCURRING THE ADVERTISEMENT, MARKETING AND PROMOTION EXPENSES FOR THE SOLE BENEFIT OF THE ASSOCIATED ENTERPRISE - PAYMENTS MADE BY THE APPELLANT UNDER THE HEAD "ADVERTISEMENT, MARKETING AND PROMOTION" TO THE DOMESTIC PARTIES CANNOT BE TERMED AS AN "INTERNATIONAL TRANSACTION"**

2.7 The TPO observed that the assessee had incurred more than normal AMP expenses to build "Amadeus" brand in India which is legally owned by M/s Amadeus Spain. The TPO held that the assessee should have been reimbursed with appropriate mark-up on such excessive AMP expenditure identified by him by applying the Bright Line Test (BLT). In his order, the TPO has identified the said abnormal AMP expenses by applying the bright line method i.e., by comparing the AMP as a percentage to sales of the assessee with average AMP as a percentage of the comparable companies finally selected by him for benchmarking the main functions of the assessee. Thereafter, by applying a mark-up of 11.69%, the TPO has computed the final adjustment for the alleged transaction of brand promotion.

3.0 At the outset, submitted that in absence of a "transaction" between the assessee and its deemed AE for incurring AMP expenditure on behalf of the AE, the impugned adjustment deserved to be deleted. It is submitted that this is a jurisdictional issue which merits adjudication at the outset. It was submitted by the Ld. AR that lower authorities have held that there exists an international transaction for brand promotion premised following facts/material:

(a) Distribution Agreement dated 01st October 2004;

(b) Loyalty Agreement with various subscribers;

(c) Findings recorded by the ITAT in case of AE {reported in 113 TTJ 767 (Del)} wherein it is held that the assessee constitutes a Dependent Agency Permanent Establishment of the AE;

(d) Amendments made to provisions of section 92B by Finance Act 2012;

(e) Decision given by the Special Bench of ITAT in case of LG Electronics reported in 140 ITD 41 (Del) (Trib);

(f) Decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile (supra).

5.0 We have carefully considered the submissions made by both the sides and have also perused the material available on record. It is seen that the issue in dispute has been decided in favour of the assessee by the coordinate Bench of this Court in earlier assessment years and the order passed by the coordinate Bench for A.Y.2009-10 has also been upheld by the Hon'ble Jurisdictional High Court. In earlier years the issue in dispute has been decided in favour of the assessee by the coordinate Bench by taking into consideration the following decisions of the Hon'ble Jurisdictional High Court:-

(i) Maruti Suzuki India Ltd. vs. CIT reported in 381 ITR 117 (Delhi);

(ii) CIT vs. Whirlpool of India Ltd. reported in 381 ITR 154 (Delhi);

(iii) Honda Siel Power Products Ltd. vs. Dy. CIT reported in 237 Taxman 304 (Delhi);

(iv) Bausch and Lomb Eyecare (India) Pvt. Ltd. v. Addl. reported in CIT 381 ITR 227 (Delhi);

**21. Knowledge Platform India P. Ltd. v. DCIT (ITA No. 1333/D/15)(ITAT, Delhi)**

**SECTION 92C – ASSESSEE COMPANY ENGAGED IN THE BUSINESS OF CAPTIVE SERVICE PROVIDER EXCLUSIVELY TO AE – COMPANIES WITH HIGH TURNOVER AND GIANT OPERATIONS CANNOT BE TAKEN AS COMPARABLE IN DETERMINING ALP.**

Held, in our opinion, if the TPO has rejected certain companies from the list of comparables on the basis of low turnover, then by adopting the same criteria he should have excluded at least the companies whose turnover is more than Rs.100 crores. We find from the list that even certain companies are having turnover of more than Rs.1000 crores. Further, the assessee in the instant case is a captive service provider and working exclusively for the AE and its entire export sale is to the AE. However, in the instant case, the above nine companies whose details have been given in the preceding paragraphs are not captive service providers and they are not working exclusively for the AE and their entire sales is not to the AE. **[Para 20]**

**22. Addl. CIT v. Jubilant Life Sciences Limied Dy (ITA No.4410/D/03) (Dated 12/03/2019) (ITAT, Delhi)**

**SECTION 115JA/JB – ADDITION TO BOOK PROFIT ON ACCOUNT OF AMOUNT CARRIED TO RESERVE – AMOUNT CARRIED TO AMALGAMATION RESERVE ON AMALGAMATION OF ASSETS AND LIABILITIES OF AMALGAMATING COMPANY BY FOLLOWING PURCHASE METHOD PRESCRIBED BY THE RELEVANT ACCOUNTING STANDARD ON ACCOUNTING OF AMALGAMATION DID NOT FALL WITHIN THE MEANING OF "AMOUNT CARRIED TO ANY RESERVE BY WHATEVER NAME CALLED" REQUIRED TO BE ADDED TO BOOK PROFIT UNDER EXPLANATION 2 TO SECTION 115JA OF THE ACT.**

Held, We have carefully considered rival contentions and perused orders of lower authorities. During year in schedule B – reserve and surpluses of balance sheet of assessee, it has credited on amalgamation reserve of INR 10,540,000 during year. As per note number 14 of schedule M, assessee stated that during year AIL and ESCL has been amalgamated with assessee company on and from 22/10/1999 with retrospective effect from 01/02/1997 in terms of scheme of amalgamation sanctioned by honourable Bombay, Gujarat and Allahabad high courts vide their orders dated 11/06/1999, 28/1/1999 and 21/10/1999 respectively. Accordingly, entire business and undertaking of these two companies have been transferred to assessee company. The above amalgamation has been accounted for by assessee company in nature of "purchase method" defined under accounting standard number 14 issued by Institute of chartered accountants of India which has resulted in transfer of assets and liabilities and issue of shares of consideration thereof. Accordingly total fixed assets at book value of Rs. 3300 lakhs and other assets of 563.02 lakhs was acquired along with liabilities which has resulted into excess of assets over liabilities transferred of INR 10,540,000 which was shown as amalgamation reserve account. The above sum was never transferred to profit and loss account and withdrawn there from. As per para number 16 of accounting standard if amalgamation is "amalgamation in nature of merger" identity of reserve is preserved and they appear in financial statement of transferee company in same form in which they appeared in financial statement of transferor company. Thus, for example, general reserve of transferor company becomes general reserve of transferee company, capital of transferor company becomes capital reserve of transferee company, and revaluation reserve of transferor company becomes revaluation reserve of transferee company. However if amalgamation is in nature of "amalgamation in nature of purchase", then identity of reserve other than statutory reserve dealt with in paragraph 18 of Accounting standard (AS) is not reserve, amount of consideration is deducted from value of net assets of transferor company acquired by transferee company. If result of computation is negative, difference is debited to goodwill arising on amalgamation and dealt with in manner stated in paragraph number 19 – 20 of AS. If result of computation is positive, difference is credited to capital reserve. Therefore, accordingly assessee has credited such reserve to capital reserve account. According to explanation to section 115JA, (b) amount carried to any reserve by whatever name is required to be added to profit shown in profit and loss account. Here assessee has not carried to any reserve from sum credited in profit and loss account. The above sum has been credited in accordance with accounting standard issued by Inst of chartered accountants of India, which conforms to profit and loss prepared by assessee according to schedule VI of companies act. Therefore, we do not find any

infirmity in order of learned CIT – A in directing learned assessing officer to not to increase book profit by amalgamation reserve credited by assessee directly to balance sheet of assessee company. Accordingly, ground number 6 and 7 of appeal of revenue is dismissed.**[Para 16]**

**23. Priapus Developers Pvt. Ltd. vs. ACIT (ITA No. 170/Del/2019) (Dated 14.03.2019) (ITAT, Delhi)**

**SECTION 115JB - WHEN AMALGAMATION SCHEME HAS BEEN APPROVED BY THE COURT, IT IS NOT OPEN FOR THE ASSESSING OFFICER AND CIT (A) TO HOLD THAT AMALGAMATION HAS BEEN USED BY THE ASSESSEE COMPANY AS A TOOL FOR TAX EVASION – THAT ON THE DATE OF AMALGAMATION, THE SHARES WERE VALUED AT FMV AND NOT ON COST AND ONCE, THE SHARES WERE AMALGAMATED IT BECAME PART OF RESERVE OF ASSESSEE, THEREFORE, SUCH REVALUATION AMOUNTS TO REVALUATION OF RESERVES - THE SOLE ISSUE INVOLVED IN THIS CASE IS, WHETHER THE ADDITION OF RS.61,56,80,326/- CAN BE MADE IN THE BOOK PROFIT U/S. 115 JB ON ACCOUNT OF SHARES SOLD BY THE ASSESSEE, WHICH WAS HELD AS 'CAPITAL RESERVE', WHICH THE ASSESSING OFFICER AND CIT(A) HAVE TREATED ON ACCOUNT OF AMOUNT STANDING IN REVALUED RESERVE RELATING TO REVALUATION OF ASSETS IN TERMS OF CLAUSE (J) OF EXPLANATION 1 OF SECTION 115JB – HELD NO**

17. Such a premise of the Assessing Officer cannot be approved for the reason that;

Firstly, this reserve has not been created on revaluation of asset albeit same has been acquired through amalgamation and the shares have been valued as per the purchase method for a certain price.

Secondly, it is not revaluation of any asset held by the assessee, because no such reserve has been created by the assessee on revaluation of shares. Revaluation of assets takes place only when the assessee decides to revalue the asset existing in the balance sheet.

Lastly, in this case all the assets belonged to amalgamating companies, that is, the shares of IHFL originally belonged to PREPL and PPPL and appeared in their balance sheet; and these assets entered in the books of assessee by virtue of amalgamation valued on fair market value as mandated by the order of Hon'ble High Court. Thus, it would be wrong to say that there was any kind of revaluation of assets.

Therefore, there could not be any question of invoking clause (j) of Explanation to section 115JB for calculation of book profit u/s. 115JB. Here in this case, nowhere it has been disputed that the profit and loss account has not been prepared in compliance of requirement of Part-I and Part-II of the Companies Act, 2013 and as per accounting standard. The profit and loss account has been approved by the Statutory Auditors and also laid before the Members in the AGM, which is sacrosanct for computing the book profit u/s. 115JB. Thus, once the accounts have been prepared in accordance with the

Companies Act duly certified by statutory auditors and approved by Company AGM, then same cannot be disturbed as held by Hon'ble Supreme Court in the case of Apollo Tyres (supra). Here the Assessing Officer cannot tinker with such profit and loss account or treat the part of capital reserve by holding that it should have been routed through regular profit and loss account. The reasoning given by the ld. CIT (A) too cannot be upheld for the same reason.

**24. Shri Meer Hassan Vs. ITO (ITA NO. 1571/DEL/2015) (ITAT- DELHI) (Dated. 28.02.2019)**

**SECTION 132- SEARCH AND SEIZURE – INCRIMINATING MATERIAL PERTAINING TO ASSESSEE FOUND IN COURSE OF SEARCH ON SOME OTHER PERSON – AO INITIATED PROCEEDINGS U/S 147 – WHETHER WERE INCRIMINATING MATERIAL IS FOUND ACTION U/S 153C IS TO BE TAKEN OR ACTION U/S 147 BE TAKEN – HELD- PROCEEDINGS U/S 147 WERE VOID AND LIABLE TO BE SET-ASIDE.**

**ADDITIONAL GOUND OF APPEAL – LEGAL ISSUE**

Assessees by raised following additional ground of appeal before ITAT:-

*"That on the facts and in the circumstances of the case and law, the A.O. has erred in initiating proceedings on the basis of incriminating material of appellant found in search of other persons u/s 147 of the Act and CIT (Appeals) in upholding such assessment, when provisions of Section 153C for assessment only were applicable and not of section 147 & section 148."*

Held:

(a) legal grounds can be raised at any stage.(**para 8)**

(b) bare perusal of the provisions contained u/s 153C which is a non-obstante provision shows that when the assessment proceedings were to be initiated on the basis of incriminating material found in search of a third party, as in the present case, the provisions contained u/s 153C are applicable which specifically excludes application of sections 147 & 148 of the Act. **(para 16)**

(c) 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)**

**[followed- Rajat Shubra Chatterji Vs. ACIT- ITA NO. 2430/DEL/2O15, Arun Kumar Kapoor – (2011 140 TTJ 249).**

**25. DCIT v. Gawri Builders P. Ltd. (ITA No. 6304/D/15)(07.03.19)(ITAT, Delhi)**

**SECTION 142A – REFERENCE TO DVO – IT IS INCUMBENT UPON THE ASSESSING OFFICER TO REJECT BOOKS OF ACCOUNT BEFORE MAKING**

**REFERENCE TO DVO IN RESPECT OF COST OF CONSTRUCTION CLAIMED BY THE ASSESSEE – REFERENCE WITHOUT REJECTION OF BOOKS NOT VALID.**

Held, We find that section 142A provides for reference to the Ld. Valuation Officer for the purpose of enabling the Assessing Officer to estimate the value of any investment, bullion, jewellery etc. in the course of assessment proceedings, in relation to sections particularly section 69, 69A and 69B. However, in our opinion, this power of making reference cannot be used arbitrarily. Sections 69, 69A and 69B of the Act are attracted mainly, when the assessee fails to explain the nature and source of the investment from the books of accounts or their investment is either not recorded in the books of accounts or not fully disclosed in the books of accounts. If the Assessing Officer find himself satisfied with the correctness of the books of accounts, he may not required to invoke these provisions and the Assessing Officer may choose making reference under section 142A , when he is satisfied about the incorrectness of the books of accounts. According the Hon'ble Supreme Court in the case of Sargam Cinema (supra), the rejection of books of accounts is a prerequisite for the Assessing Officer for assuming the powers conferred under section 142A of the Act. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> "4. In the present case, we find that the Tribunal decided the matter rightly in favour of the assessee in as much as the Tribunal came to the conclusion that the assessing authority could not have referred the matter to the DVO without the books of account being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were never rejected. This aspect has not been considered by the High Court. In the circumstances, reliance placed on the report of the DVO was misconceived."

**[Para 9]**

We also note that Hon'ble Gujarat High Court in the case of Goodluck Automobiles Private Limited Vs ACIT in Tax Appeal No.148 of 2000, in judgement dated 07/08/2012 following various decisions of the Hon'ble Supreme Court concluded that reference made by the Assessing Officer to the Valuation Officer for estimating the cost of construction, without rejection of books of accounts was not valid. **[Para 10]**

On perusal of facts of instant case, we find that the Assessing Officer has nowhere pointed out any mistake or error in the cost of construction debited in profit & loss account. The AO has nowhere mentioned that how declaring excess cash of Rs.1.25 received by the assessee would impact cost of construction debited by the Assessee. Thus, in view of facts of instance case, respectfully following the above decisions, we are of the opinion that there is no infirmity in the order of the Ld. CIT(A) on the issue in dispute. **[Para 11]**

**26. CBS International Projects P. Ltd. v. ACIT (ITA No. 144/D/19)(28.02.19)(ITAT, Del)**

**SECTION 143(2) – LIMITED SCRUTINY UNDER CASS – THE ASSESSING OFFICER IS NOT EMPOWERED TO EXPAND THE SCOPE OF LIMITED SCRUTINY WITHOUT OBTAINING PRIOR APPROVAL FROM HIGHER AUTHORITIES – NOTICE U/S 143(2) WAS HELD TO ILLEGAL AND WITHOUT JURISDICTION.**

Held, A perusal of the aforesaid instruction shows that the Assessing Officer can widen the scope of scrutiny even if it is selected for scrutiny assessment under CASS. However, the condition precedent for such action of the Assessing Officer is that he has to seek prior approval of the higher authorities. A perusal of the assessment order shows that the Assessing Officer has not mentioned as to when the permission from the PCIT was sought to make further enquiries in the case of the assessee. Considering the facts of the case in totality, in the light of the CBDT Instructions mentioned hereinabove, qua notice u/s 143(2) of the Act, we are of the considered opinion that the assessment order so framed by the Assessing Officer is not in consonance with Instruction of the CBDT and, therefore deserves to be quashed. The order of the ld. CIT(A) is accordingly set aside. **[Para 16]**

**27. ITO v. A.K. Goenka & Sons Pvt. Ltd. (ITA No.3569/D/15) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 147 – REOPENING ON THE BASIS OF REPORT OF INVESTIGATION WING – ORIGINAL ASSESSMENT COMPLETED UNDER SECTION 143(3) AFTER MAKING EXHAUSTIVE INQUIRIES INCLUDING WITH THE PARTIES FROM WHOM SHARE APPLICATION MONEY WAS RECEIVED DURING THE YEAR UNDER CONSIDERATION – REOPENING OF ASSESEMENT UNDER SECTION 147/148 AFTER EXPIRY OF FOUR YEARS FROM END OF RELEVANT ASSESSMENT YEAR – NO FAILURE ON THE PART OF ASSESSEE TO DISCLOSE FULLY AND TRULY ALL MATERIAL FACTS RELATING TO SHARE APPLICATION MONEY – REPORT OF INVESTIGATION WING NOT A RELEVANT MATERIAL TO DISAPPROVE THE FULL AND TRUE DISCLOSURE OF MATERIAL FACTS BY THE ASSESSEE – RE-ASSESSMENT PROCEEDINGS WERE HELD TO BE BARRED BY LIMITATION UNDER PROVISO TO SECTION 147 – THE DECISION OF JURISDICTIONAL HIGH COURT IN THE CASE OF ALCATEL LUCENT FRANCE AND OTHERS VS. ADIT FOLLOWED AND THE DECISION OF DELHI HIGH COURT IN BIJU PATNAIK FOLLOWED BY THE REVENUE DISTINGUISHED.**

Held, We find the Assessing Officer, on the basis of information received from the Investigation Wing that the assessee has taken accommodation entries to the tune of Rs.2.79 crores from ten share applicants, reopened the assessment u/s 147 of the IT Act. We find the ld.CIT(A) quashed the reassessment proceedings on the ground that the

original assessment was completed u/s 143(3) and the reassessment proceedings were initiated after four years from the end of the relevant assessment year and there was no allegation of failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment. While doing so, he relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Viniyas Finance & Investment (P) Ltd. (supra) and the decision in the case of Suren International Pvt. Ltd. (supra)…. We do not find any infirmity in the order of the CIT(A). Admittedly, the assessment was reopened beyond four years where the original assessment was completed u/s 143(3). A perusal of the reasons recorded in the notice issued for reopening of the assessment does not show any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment.

Therefore, the decision relied on by the ld.CIT(A) are fully applicable to the facts of the case and, therefore, there is no infirmity in his order quashing the reassessment proceedings… So far as the decision relied on by the ld. DR in the case of Biju Patnaik (supra) is concerned, the same is not applicable to the facts of the present case and is distinguishable. In that case, the notice was issued u/s 147(a) as it then stood. However, the provisions of 147(a) has undergone a change and the entire provisions of section 147 has been amended by the Direct Taxes Law (Amendment) Act, 1987 w.e.f. 01.04.1989. This view of ours is fortified by the decision of the Hon'ble Delhi High Court in the case of M/s Alcatel-Lucent France and Anr. Vs. Asstt. Director of Income-tax and batch of other appeals. The Hon'ble Jurisdictional High Court in the batch of appeals delivered on 27th April, 2016, has distinguished the decision in the case of Biju Patnaik (supra)

In view of the decision of the Jurisdictional High Court cited (supra) the decision relied on by the ld. DR is not applicable to the facts of the present case. In this view of the matter, we uphold the order of the CIT(A) and the grounds raised by the Revenue are dismissed.**[Paras 20, 21, 22, 23, 24]**

**28. Hightech Construction Pvt. Ltd Vs .ITO (ITA Nos. 1605 & 1606/DEL/2019) (DATED 22.03.2019) (ITAT- DELHI)**

**SECTION 147/148 – REOPENING OF ASSESSMENT – INFOMRATION FROM INVETSTIGATION WING - STATEMENT OF ENTRY PROVIDER – LACK OF SANCTION OF U/S 151 –LACK OF CROSS EXAMINATION OF WITNESS- NON APPLICATION OF MIND - VIOLATION OF PRINCIPLE OF NATURAL JUSTICE**

**SECTION 151 – SANCTION OF JCIT**

Assesse is engaged in Business of real estate activities - AO received information that 'H' which was engaged in providing accommodation entries to various beneficiaries also provided the same to the assesse - Proceedings u/s 147 initiated - Before ITAT assessee contended violation of principle of natural justice on the grounds of lack of opportunity to cross examine all the witness and specifically the witness 'H' on whose statement is heavily relied upon by the AO.

Before testing the arguments of both sides on validity of reopening action, it may be

profitable to refer to guiding words of Hon'ble Delhi High Court in case of Signature hotels (338 ITR 51) on subject of reopening made of allegation of accommodation entry. It is accepted that Section-151(2) of the act is applicable in the present case as the proceeding u/s 148 were initiated after expiry of four years from the end of relevant assessment. Therefore, AO was required to take approval of an officer not below the rank of JCIT after recording reasons. (**para 6.6)**

It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order.It is clear as day light that reasons are recorded without independent application of mind on part of AO who has recorded reasons on the basis of rumor and suspicion only **(para 6.9)**

On issue of lack of cross examination when we refer the assessment order and order of CIT(A) and test them on elementary principle of natural justice which mandates the cross examination of revenue witness where persons whose statements are extensively relied by AO and CIT(A) same without cross examination cannot be basis to draw adverse inference against the assesse u/s 68.**(para 6.10)**

A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. ( **338 ITR 343), AIR 1998 SC 1289, 2005 SC 1964**

**HELD**- All facts relating to the cash credits in question were fully disclosed. Mere fact that some names of the creditors figured in a list made by department would be too general and vague to lead to an inference regarding the loans recorded by the assessee. Application of mind must come out from the reasons recorded. AO recorded reasons on basis of rumor and suspicion only and re-opned the case of assesee u/s 147 on basis of mechanical reasons

**[Followed N.D Bhatt IAC of IT Vs. IBM World Trade Corporation (1995) 216 ITR 811 (Bom)]**

**29. TCG Development India Pvt. Ltd. v. ITO (ITA No.4310/D/14) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 147 – WHERE ORIGINAL ASSESSMENT IS COMPLETED UNDER SECTION 143(3), THE SAME CAN BE REOPENED UNDER SECTION 147 ON THE BASIS OF FRESH TANGIBLE MATERIAL COMING TO THE POSSESSION OF ASSESSEE AND NOT ON THE BASIS OF RE-APPRECIATION OF SAME FACTS, EVEN THOUGH NO QUERY ON THE RELEVANT ISSUE WAS RAISED IN THE ORIGINAL ASSESSMENT – DECISION OF SUPREME COURT IN THE CASE OF KELVINATOR OF INDIA LIMITED: 320 ITR 561 APPLIED – RE-ASSESSMENT PROCEEDINGS ALSO DESERVED TO BE SET-ASIDE FOR NOT FOLLOWING THE PROCEDURE LAID DOWN BY THE SUPREME COURT IN THE CASE OF GKN DRIVE SHAFTS LIMITED: 259 ITR 2019 AND LESS THAN FOUR WEEKS TIME**

**GRANTED TO THE ASSESSEE TO FILE OBJECTION TO THE REASONS RECORDED.**

Held, Reading from the above reasons recorded by the learned assessing officer it is apparent that there is no tangible material coming to the possession of the assessee after formation of the order under section 143 (3 of the income tax act. Admittedly, the assessment is reopened within 4 years from the end of the assessment year. However even in the assessment falling within the period of 4 years from the end of the assessment year there has to be a tangible material coming into the possession of the assessing officer to reopen the cases. Such is the mandate of the honourable Supreme Court in case of Kelvinator's of India Ltd 320 ITR 561 (Supreme Court). Therefore it is apparent that the reasons recorded by the learned assessing officer is on the appreciation of the same facts as was available before the assessing officer during the course of assessment proceedings under section 143 (3) of the income tax act. In view of this, we hold that the learned assessing officer has initiated the reassessment proceedings without any tangible material hence it does not deserve to be sustained. Hence, reassessment is quashed on this ground… Secondly, the AO has issued the reassessment notice under section 148 of the income tax act on 23/3/2012. The assessee submitted by letter dated 20/04/2012 to consider the return originally filed on 24/01/2008 as return filed in response to the notice under section 148 of the income tax act. Further, by the same letter the assessee also asked the learned assessing officer to provide reasons to believe possessed by the learned assessing officer in respect of which Assessee Company has escaped assessment within the meaning of section 147 of the income tax act 1961. Assessee further requested for the reopening reasons on 25/2/2013. On that date the learned assessing officer, give the reasons. Assessee was given time to file an objection up to 4/3/2013. The assessee filed objection on 6/3/2013. The learned AO passed an order disposing of the objection raised by the assessee as per order dated 8/3/2013. The learned authorized representative submitted that that these order was never served on the assessee before the service of the assessment order. The assessment order was passed on 20/3/2013. Therefore, it is apparent that assessee was provided the reasons only on 25/2/2013 asking to file an objection up to 4/3/2013 and the objections were disposed off on 8/3/2013 whereas the final assessment order based on the above reason was passed on 20/3/2013. This clearly shows that the learned assessing officer has not followed the dictate of the decision of the honourable Supreme Court in case of GKN driveshafts Ltd. Vs ITO 259 ITR 19. Further the assessee was also not given 4 weeks time after the rejection of the objections against the reopening of the assessment to explore the alternative remedy available to the assessee which is also contrary to the decision of the honourable Bombay High Court in case of 290 ITR 90 wherein it has been specifically held that if Assessing Officer does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee. In the present case even before the service of the order rejecting the objections of the assessee the learned assessing officer as passed the assessment order on 20/3/2013. In view of this, there is a clear-cut violation of the principles of natural justice by the learned assessing officer and procedure deserves to be set right. But as we have already quashed the reopening of the assessment on the reason that there is no tangible material for reopening of assessee, we do not wish to set the procedure right but quash the

reassessment proceedings. Even otherwise the limitation of time for pasing order u/s 147 has already passed, no fruitfull purposes will serve by setting aside the issue for correcting procedural irregularities. **[Paras 10, 11]**

**30. MAS Metals & Components Pvt. Ltd. vs. ITO (ITA No. 4263/Del/2018) (Dated 26.02.2018) (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 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.**

8. 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.

**31. Rajdhani Realcon Pvt. Ltd. vs. ITO (ITA No. 1146/Del/2018) (Dated: 12.03.2019) (ITAT, Delhi)**

**S. 148 - MERELY BECAUSE THE NOTICE ISSUED AT THE OLD ADDRESS HAS NOT BEEN RETURNED UNSERVED - IT CANNOT BE PRESUMED TO BE A VALID SERVICE - NOTICE SERVED AT THE OLD ADDRESS WHICH IS**

**AVAILABLE AS PER PAN DATABASE - A PERUSAL OF THE COPY OF THE ACKNOWLEDGEMENT OF THE RETURN FILED FOR ASSESSMENT YEAR 2010-11 TO 2014-15 SHOWS THAT THE RETURNS FOR THESE YEARS HAVE BEEN FILED WITH THE NEW ADDRESS - REASSESSMENT ORDER IS NOT SUSTAINABLE IN LAW IN ABSENCE OF VALID SERVICE**

9. I have considered the rival arguments made by both the sides and perused the material on record. I have also considered the various decisions cited before me. I find the AO, in the instant case, issued the notice u/s 148 of the Act at the old address at GF-8, AntarikshBhavan, 22, K G Marg, Connaught Place, New Delhi which is available as per PAN database. The notice was issued on 18th March, 2015. A perusal of the copy of the acknowledgement of the return filed for assessment year 2010-11 to 2014-15 shows that the returns for these years have been filed with the address at 2612/13, 2nd Floor, Naya Bazar, New Delhi – 110 006. Merely because the notice issued at the old address has not been returned unserved it may be presumed to be a valid service as mentioned by the AO in the remand report cannot be accepted. The ld. DR also fairly conceded that the notice was served by affixture and there is no proof on record that the notice has been served on the assessee. Since the notice u/s 148 in the instant case has not been served on the assessee, the question that arises is as to whether the assessment framed u/s 147/144 of the Act can be construed as a valid assessment in absence of service of notice u/s 148. An identical issue had come up before the Hon'ble Delhi High Court in the case of CIT vs. Chetan Gupta cited (supra) and the Hon'ble High Court quashed the reassessment proceedings on the ground that such proceedings finalised by the AO without effecting proper service of notice on the assessee u/s 148(1) of the Act are invalid and liable to be quashed.

**32. DCIT vs. Vikas Jain (ITA No. 4075/Del/2014) (Dated: 19.03.2019) (ITAT, Delhi)**

**S. 132(4A) read with S. 153A - THE SEIZED DOCUMENT WAS FOUND AT A PLACE OTHER THAN THE PLACE WHERE THE SEARCH ON THE ASSESSEE HAS BEEN CARRIED OUT- IT CANNOT BE SAID THAT THIS DOCUMENT WAS FOUND IN POSSESSION OR CONTROL OF THE ASSESSE - THE PRESUMPTION UNDER SECTION 132(4A) WILL NOT BE AVAILABLE - FURTHER THE SAME CANNOT BE THE SUBJECT MATTER FOR ADDITION IN ASSESSMENT PROCEEDING UNDER SECTION 153A.**

5.0 We have heard the rival submissions and have also perused the record. On going through the same, we note that the AO has drawn an adverse inference on a document found and seized from the premises 697, UdyogVihar, Phase-V, Gurgaon. The AO has held that the document seized is relatable to a property purchased by the assessee along with Mrs. Aroma Jain. The AO, on the basis of the seized document, has made out a case that the assessee had purchased a property for Rs. 2,60,00,000/- and had paid only Rs. 49,50,000/- through cheque and the balance amount had been paid in cash……..

5.1 We have perused the said seized document and on going through this document we do find that there are certain figures stated therein and that the name 'ChawlaJi' is also

stated therein. It is also a matter of record that the assessee, along with Mrs. Aroma Jain, has purchased a property from M/s Chawla Buildwell Pvt. Ltd. Thus, there can indeed be an inference as to that what is recorded in the seized document may be relatable to property purchased. However, to reach such a conclusion, one needs to undertake verification, which, unfortunately, has not been done in this case. We also note from this document that it is not clear as to how the AO worked out the figure of Rs. 2,60,00,000/- as being the value of total consideration. It is equally surprising that the AO did not make any enquiry from the seller. Nor any action apparently has been taken against the seller. We are also in agreement with alternative contention of the Ld. AR that this property has been purchased in joint-names and, therefore, the entire addition cannot be made in the hands of the assessee unless the AO is able to bring on record any material to substantiate that the entire 'money' was paid by the assessee. All these issues were required to be examined by the lower authorities which both the AO and the Ld. CIT (A) has failed to consider. At the same time, we also note that the contention of the Ld. AR that the presumption under section 132(4A) read with section 292C is available only against the person from whose possession or control such document is found is also correct. From the facts stated hereinabove, apparently, it appears that the seized document was found at a place other than the place where the search on the assessee has been carried out. Thus, in these circumstances, it cannot be said that this document was found in possession or control of the assessee. If that be so, then the presumption under section 132(4A) will not be available. Further, in case such document was not found in the course of the search on the assessee then the same cannot be the subject matter for addition in assessment proceeding under section 153A of the Act. Since, the facts on record are not clear and all the issues as stated hereinabove have not been taken into due consideration by the lower authorities, we deem it fit to set aside the order passed by the authorities below to the file of the AO with a direction to examine each of the above issues and, thereafter, frame a fresh assessment order in accordance with law. Needless to say, the AO will give adequate opportunity to the assessee before passing the fresh assessment order.

**33. M/S Accil Corporation P. Ltd Vs. ACIT, [ITA NO. 6319 TO 6321 & 6206/DEL/2018) (ITAT NEW DELHI) (DATED 28.02.2019)**

**SEACH & SEIZURE-ORDER U/S 153A - SHARE CAPITAL BOGUS ACCOMODATION ENTRY-UNEXPLAINED CREDIT U/S 68 – TRAIL OF MONEY EXAMINED BY THE AO DOES NOT SHOW ANY UNEXPLAINED DEPOSIT – ADDITION LIABLE TO BE DELETED.**

A search and seizure operation was carried out in Asian Colour Coated Ispat Ltd. group of cases which included Assessee Company too - notice under section 153A – in assessment AO made addition of Rs.46,75,95,000/- on account of the share capital received by the assessee company. AO supported its conclusion on the basis of investigations made by Investigation Wing.

**Held**

**(a)** In the present case, the assessee has led credible evidences to the ultimate source of money to demonstrate that it is the money within the group and no unaccounted money or cash has come in the form of share capital. Detailed charts were furnished

in support tracing source of source

**(b)** Each of the transaction may be as per the above chart the share allotted during the year of verified. It is a case where one company has advanced money to another company which in turn has advanced money to another company and such another company has advanced money to the company where the money was originated. Thus, it is a circulation of the money within the various entities where complete trail right from origin till the end is available with the assessee. All these transactions are verifiable from the bank statements of the respective companies. Thus, the contention of the AR that the money received by it is not any unaccounted money seems to be justified. Where the there is satisfactory explanation as to the nature and source of the credit, no addition could be made u/s. 68 of the Act. In the present case, there is no such statement or involvement of any entry operator. As against this, in the present case the assessee has provided complete trail and source of money. All these companies are group/associate companies, where the money have been routed and hence the source of the money is clearly identifiable. Thus, it cannot be said that assessee has not discharged its onus under section 68 of the Act . **(para 9)**

**34. DCIT vs. Smt. Shivali Mahajan (ITA No. 5585/Del/2015) (Dated 19.03.2019) (ITAT, Delhi)**

**SECTION 153A – THAT IN THE ASSESSMENT U/S 153A, ONLY THE MATERIAL FOUND DURING THE COURSE OF SEARCH OF THE ASSESSEE'S PREMISES CAN BE USED AGAINST THE ASSESSEE AND NOT THE MATERIAL FOUND IN THE CASE OF SOME OTHER ASSESSE - THAT FOR UTILIZING THE MATERIAL FOUND DURING THE COURSE OF SOME OTHER ASSESSEE, THERE IS A SPECIFIC PROVISION I.E., SECTION 153C - THAT AN ADDITION FOR UNEXPLAINED INVESTMENT CAN BE MADE IN THE YEAR WHEN THE INVESTMENT IS MADE OR NOT IN ANY OTHER YEAR.**

9. We have carefully considered the arguments of both the sides and perused the material placed before us. After considering the facts of the case and the rival submissions, we find that in these appeals, following two questions arise for our consideration :-

(i) Whether any material found in the search of any other person than the assessee in appeal can be considered in the assessment under Section 153A of the assessee.

(ii) Whether the addition can be made only on the basis of statement given by the assessee during the course of search.

15. Thus, when during the course of search of an assessee any books, document or money, bullion, jewellery etc. is found which relates to a person other than the person searched, then the Assessing Officer of the person searched shall hand over such books of account, documents, or valuables to the Assessing Officer of such other person and thereafter, the Assessing Officer of such other person can proceed against such other person. However, in the case under appeal before us, admittedly, Section 153C is not

invoked in the case of the assessee and the assessment is framed under Section 153A. We, respectfully following the above decisions of Hon'ble Jurisdictional High Court, hold that during the course of assessment under Section 153A, the incriminating material, if any, found during the course of search of the assessee only can be utilized and not the material found in the search of any other person.

16. Now, coming to question No.2, we find that this issue is also covered by the decision of Hon'ble Jurisdictional High Court in the case of HarjeevAggarwal (supra) and Best Infrastructure (India) (P.) Ltd. (supra). In the case of HarjeevAggarwal (supra), Hon'ble Jurisdictional High Court considered the evidentiary value of the statement recorded during the course of search.

17. Thus, Hon'ble Jurisdictional High Court has held "The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations". Their Lordships further observed "However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation". In paragraph 24, their Lordships have mentioned about the prevailing practice of extracting statement by exerting undue influence or coercion by the search party. Though the above decision in the case of HarjeevAggarwal is with reference to the meaning of undisclosed income u/s 158BB of the Income-tax Act, however, in our opinion, the above observation of Hon'ble Jurisdictional High Court would be squarely applicable while considering the evidentiary value of the statement while making the assessment u/s 153A.

23. ………..The decision of Hon'ble Delhi High Court in the case of HarjeevAggarwal (supra) is referred to for consideration by the Larger Bench. Therefore, following the above decision of ITAT, we hold that merely by reference to Larger Bench, it cannot be construed that decision in the case of HarjeevAggarwal (supra) is overruled. The above decision continues to be binding precedent.

**35. M/s. M3M India Holdings v. DCIT (ITA No. 2691/D/18)(15.03.2019)(ITAT, Delhi)**

**SECTION 153D – APPROVAL BEFORE PASSING OF ORDER U/S 153A –THE ADDL. CIT GRANTING APPROVAL ON MECHANICAL BASIS - THERE IS NO EVIDENCE ON RECORD TO SUGGEST THAT SANCTIONING AUTHORITY ACTUALLY PERUSED THE ASSESSMENT RECORD BEFORE GRANTING SANCTION – THE APPROVAL WAS COMMUNICATED AFTER PASSING OF ASSESSMENT ORDER - THE ASSESSMENT ORDER U/S 153A LIABLE TO BE QUASHED IN ABSENCE OF VALID APPROVAL U/S 153D**

Held, Considering the facts of the case in the light of above discussion, it is clear that assessee filed last reply before assessing officer at Faridabad on 29th January 2014 and according to Learned Counsel for the Assessee, it contained more than 500 pages. Therefore, it is difficult for the Assessing Officer at Faridabad to go through these voluminous papers and prepare a draft order on 30$^{th}$ January 2014, so that the draft order

could be transmitted to the Addl. CIT at Chandigarh on same day. In reply to RTI application, the assessing officer has reported that no record of mode of dispatch of assessment record to the Addl. CIT is available with the Assessing Officer. Similarly, no record is available as to how the draft order and assessment record have been received by Addl. CIT at Chandigarh. The Addl. CIT, Chandigarh did not mention in his approval dated 31st January 2014 (supra), if he has gone through the assessment record or that assessment record was produced before him. Since no details are available on record about the mode, through which, assessment record was transmitted by the assessing officer at Faridabad to Addl. CIT in Chandigarh and vice-versa by Addl. CIT, Chandigarh to Assessing Officer at Faridabad on the very next day would lead to suspicion, in explanation of A.O. if any, valid draft order was transmitted to the Addl. CIT within the time or if the Addl. CIT has communicated the approval under section 153D to the Assessing Officer at Faridabad on 31st January 2014. These facts would clearly show that the action of the Addl. CIT, Chandigarh granting approval in this case was, thus, a mere mechanical exercise, accepting the draft order as it is, without any independent application of mind on his part. Nothing has been clarified during the course of hearing to the effect that if Addl. CIT has gone through the assessment record, before accepting the draft assessment order. Thus, there was no application of mind on the part of the Addl. CIT before granting approval. The Addl. CIT, Chandigarh has merely gone through the draft assessment order as per PB-47. Therefore, the contention of Learned Counsel for the Assessee is justified that the approval was granted in a most mechanical manner without application of mind and such approval was intimated to assessing officer only on 5th February 2014, after passing of the assessment order on 31st January 2014. The above decisions are clearly applicable to the facts and circumstances of the case. In view of the above discussion, we are of the view that no valid approval/sanction have been granted by the Addl. CIT, Chandigarh before passing the assessment order in the matter. The requirement of Section 153D of I.T. Act, 1961, are not satisfied in this case. We accordingly hold that entire assessment order is vitiated and is null and void. We, accordingly, set aside the orders of the authorities below and quash the assessment order in the matter. [Para 14]

**36. M/s. Vikas Globalone Ltd. v. DCIT (ITA No. 2498/D/18)(08.03.19)(ITAT, Delhi)**

**SECTION 250 – POWERS OF CIT(A) – FIRST APPELLATE AUTHORITY HAS NO POWER TO MAKE ENHANCEMENT IN RESPECT OF NEW SOURCE OF INCOME WHICH WAS THE SUBJECT MATTER OF ASSESSMENT PROCEEDINGS – THE ASSESSING OFFICER INVOKING PROVISION OF SECTION 14A WHILE DEALING WITH ISSUE OF COMPULSORY ACQUISITION OF AGRICULTURAL LAND – THE CIT(A) COULD NOT HAVE MADE ENHANCEMENT BY TREATING AGRICULTURAL INCOME AS TAXABLE INCOME.**

Held, The Ld. CIT(A), however, noted that the nursery and plants etc., are spontaneous growth without any basis and without bringing any evidence on record. The Ld. CIT(A) has not given any basis or justification how he has treated the nursery and trees in the impugned agricultural land as spontaneous growth. Thus, the Ld. CIT(A) considered a

new source of income for the purpose of making addition considering the amount of compensation of Rs.3.39 crores as non-agricultural income. It is well settled Law that appellate authority has no power to consider a new source of income. It is also well settled Law that power of enhancement was restricted to the subject matter of the assessment or the source of income, which had been considered expressly or by clear implication by the assessing officer from the point of view of taxability and that the Appellate Commissioner had no power to assess the source of income which had not been taken into consideration by the assessing officer. The Ld. CIT(A), however, as against the Law has considered the new source of income for the purpose of making the addition by enhancing the income of the assessee from different new source, which have not been considered by the assessing officer. Thus, the Ld. CIT(A) clearly acted beyond his power and jurisdiction. We rely upon Judgment of the full bench of the Delhi High Court in the case of Sardari Lal & Company (2001) 251 ITR 864 (Del.). **[Para 20.1]**

In view of the above, it is established that the assessing officer did not consider the agricultural income to be taxable income and assessing officer has considered the issue with reference to disallowance of expenses under section 14A of the Income Tax Act. Therefore, Ld. CIT(A) was not justified in enhancing the income by considering it as source of income on account of Agricultural income considered to be taxable income without any basis as to how the agricultural produce was spontaneous growth. Therefore, on this ground itself, the Order of the Ld. CIT(A) in enhancing the income of assessee by Rs.3,39,19,015/- cannot be sustained. We, accordingly, set aside the orders of the Ld. CIT(A) and delete the addition of Rs.3,39,19,015/- . **[Para 20.2]**

**37. Manisha Juneja Sawhney vs. CIT (ITA No. 2828/Del/2018) (Dated: 26.02.2019) (ITAT, Delhi)**

**SECTION 263 – UNDER PROVISIONS OF SECTION 263 OF INCOME TAX ACT IF ORDER IS SUBJECT MATTER OF APPEAL WHICH IS SUBJECTED TO REVISION UNDER SECTION 263 OF INCOME TAX ACT, SUCH REVISION CANNOT TOUCH "MATTERS WHICH HAVE BEEN CONSIDERED AND DECIDED IN SUCH APPEAL.**

Admittedly, in assessment proceedings under section 143 (3) of income tax act, learned assessing officer in original order computed total capital gain chargeable to tax in hands of assessee of INR 53010040/– against net capital gain shown by assessee of Rs 52592418/- before claiming deduction/ exemption u/s 54 of Rs 3,41,25,000/- offering net capital gain chargeable to tax at Rs. 1,84,67,418/- . The assessee preferred an appeal before learned CIT(A) wherein he held that appellant is eligible for deduction under section 54 of act, which was denied by learned assessing officer. Therefore claim of deduction out of capital gain u/s 54 of act merged with order of learned CIT(A). Further learned CIT(A) held that total consideration received for working of long-term capital gain is INR 63082378/– and not INR 63500000 was enhanced by learned assessing officer. Therefore, issue of consideration received on sale of capital gain was also considered by CIT(A) and decided issue. Therefore this issue was also merged with order of learned CIT(A). The learned CIT in revision proceedings under section 263 also

tinkered with net sale consideration and estimated it at INR 69336628. Therefore, as issue of net sale consideration has already been decided by learned assessing officer and adjudicated by learned CIT(A), it is out of purview of provisions of section 263 of income tax act, since matter has already been considered and decided by appellate authority. There is no dispute on indexed cost of acquisition. Therefore, it is apparent that on computation of capital gain learned CIT was not correct in assuming jurisdiction under section 263 of act as matter was considered and decided by appellate authority. Therefore, on this ground also order of learned CIT passed under section 263 of income tax act is not sustainable.

**38. M/s SMA Construction Pvt. Ltd. v. PCIT (ITA No.4832/D/18) (Dated 18/03/2019) (ITAT, Delhi)**

**SECTION 263 – REVISION ORDER PASSED IN CASE OF NON-EXISTENT ENTITY – SUCH ORDER HELD TO BE NULLITY – DECISION OF SUPREME COURT IN THE CASE OF SKY LIGHT HOSPITALITY LLP DISTINGUISHED AND DECISION OF DELHI HIGH COURT IN THE CASE OF SPICE ENTERTAINMENT: 247 CTR 5000 APPLIED – HELD FORMER DECISION APPLICABLE TO A NOTICE ISSUED TO NON-EXISTENT ENTITY, WHEREAS THE LATTER DECISION IS APPLICABLE TO THE FINAL ORDER – ACCORDINGLY THE ORDER PASSED UNDER SECTION 263 IN THE HANDS OF NON-EXISTENT ENTITY WAS QUASHED.**

Held, After considering both the above decisions of Hon'ble Delhi High Court, we find that the decision of Sky Light Hospitality LLP (supra) would be applicable while considering the applicability of validity of notice, while, for considering the validity of a final order, the decision of Spice Entertainment Ltd. (supra) would be applicable. Their Lordships have clearly held that while considering the validity of an order, Section 292B would not be applicable because the framing of an assessment against a non-existent entity goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a dead person. The above observation would be squarely application with regard to order under Section 263. When on the date of order under Section 263 admittedly the company M/s SMA Construction Pvt.Ltd. is not in existence, any order passed on a non-existent entity would be nullity. We, therefore, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Spice Entertainment Ltd. (supra), hold that the order passed under Section 263 in the case of M/s SMA Construction Pvt. Ltd. was void ab-initio and nullity. The same is quashed…
In the result, the appeal of the assessee is allowed.**[Paras 8, 9]**

**39. Logicladder Tech Pvt. Ltd. vs. ITO (ITA No. 4262/Del/2018) (Dated : 26.02.2019) (ITAT, Delhi)**

**SECTION 271(1)(b) - THE SUBSEQUENT COMPLIANCE IN THE ASSESSMENT PROCEEDINGS IS CONSIDERED AS GOOD COMPLIANCE**

**AND THE DEFAULT COMMITTED EARLIER CAN BE IGNORED BY THE ASSESSING OFFICER AND IT CANNOT BE SAID THAT THE DEFAULT IS WILLFUL.**

8. I have considered the arguments made by both the sides and perused the orders of the authorities below. I find the Assessing Officer levied penalty of Rs10,000/- u/s 271(1)(b) of the IT Act on the ground that the assessee did not comply with the various statutory notices issued by him. However, a perusal of the assessment order shows that the order has been passed u/s 143(3) on 10.11.2016. Further, the Assessing Officer, in the body of the assessment order has mentioned that the assessee has complied with the statutory notices issued u/s 142(1) and the information/details asked for have been furnished which were discussed and placed on record. He has further mentioned that the assessment proceedings were attended by Shri Sanjay Jain, CA with whom the case was discussed. Since the assessee has furnished requisite details for completion of assessment by compliance of statutory notices issued by the Assessing Officer and the assessment has been completed u/s 143(3), therefore, under the facts and circumstances of the case, I am of the considered opinion that it is not a fit case for levy of penalty u/s 271(1)(b) of the Act. I, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty so levied. The grounds raised by the assessee are accordingly allowed.

**40. Hindustan Coca Cola Marketing Company (ITA No. 7900/Del/2018) (dated 27-02-2019) (ITAT, Del)**

INCOME TAX ACT – SECTION 271(1)(C) – PENALTY INITIATION – WHEN IN ORDER OF ASSESSMENT PENALTY INITIATED ON SOME ISSUES AND THERE IS NO REFERENCE TO INITIATION ON OTHER ISSUES PENALTY QUASHED ON OTHER ISSUES

*"When the AO specifically initiates penalty proceedings in respect of certain additions in the assessment order, but does not record initiation of penalty proceeding in respect of the other additions; it has to be inferred that the additions in respect of which penalty proceedings were not initiated were not intended to be considered for subsequent order imposing penalty U/s 271(1)(c) of IT Act. When certain things are specifically included and remaining things are not included therein, it has to be inferred that what was not specifically included was not intended to be included at all. Scope of penalty proceedings U/s 271(1)(c) of IT Act cannot be widened later to include within its scope such additions which were not sought to be covered within the scope of penalty U/s 271(1)(c) of IT Act, at the time when penalty proceedings were initiated and assessment order was passed. The retrospective widening of the scope of penalty, to include those items for levy of penalty U/s 271(1)(c) of IT Act which were not included for this purpose at the time when penalty proceedings U/s 271(1)(c) of IT Act were initiated and assessment order was passed; amounts to review and change of opinion by the AO, to the detriment of the Assessee; which has no authority of law. In this context, it will be useful to refer to statutory provisions U/s 271(1)(c) of IT Act. On its perusal, it is obvious that initiation of penalty proceedings by the AO is valid only if the AO is satisfied in the course of any proceedings, that the Assessee has concealed the particulars of income or furnished*

*inaccurate particulars of income. When this satisfaction for initiation of penalty proceedings U/s 271(1)(c) of IT Act is recorded by the AO in assessment order in respect of certain additions during the assessment proceedings; and not recorded in respect of certain other additions; it acts as a bar against levy of penalty U/s 271(1)(c) of IT Act in respect of those additions in respect of which such satisfaction was not recorded in the assessment order or during the assessment proceedings."*

**41. Ajay Kumar Gupta vs. DCIT (ITA No. 6104/Del/2014) (Dated: 27.02.2019) (ITAT, Delhi)**

**SECTION 271AAA - THERE WAS NO SURRENDER BY THE ASSESSEE AND THE SEIZED CASH WAS INCLUDED IN THE COMPUTATION OF INCOME AND OFFERED FOR TAX WHICH WAS DULY ACCEPTED BY THE AO WITHOUT ANY FURTHER QUERY – NO PENALTY COULD BE LEVIED – FOLLOWED MAHAVIR PRASAD JAIPURIA VS. ACIT REPORTED IN 167 ITD 253 (DELHI – TRIB).**

5. We have heard the rival submissions and have also perused the orders of the lower authorities. We have also perused the statement of the assessee which was recorded u/s 132(4) of the Act on the date of search i.e. 21/01/2011. A perusal of the said statement shows that no surrender of the amount of cash seized i.e. Rs. 17,50,000/- was made by the assessee during the course of search/in the statement recorded u/s 132(4). The amount of Rs. 17,50,000/- was offered for tax by the assessee as income from other sources for the first time in his return of income which was duly accepted by the AO and the assessment was completed at the returned income without any further query or investigation by the AO. Therefore, on the peculiar facts of this case, it is our considered opinion that the rigours of section 271AAA will not be attracted. The judgment of the Hon'ble Delhi High Court in the case of Ritu Singhal will not be of any help to the department as in this case the assessee had surrendered a certain amount as undisclosed income in the statement recorded during the search proceedings and had, thereafter, not substantiated the manner in which the undisclosed income was earned. However, in the present case, there was no surrender by the assessee and the seized cash was included in the computation of income and offered for tax which was duly accepted by the AO without any further query. We also note that this case is covered in favour of the assessee by an order of the coordinate Bench of this Tribunal in the case of Mahavir Prasad Jaipuria vs. ACIT reported in 167 ITD 253 (Delhi – Trib) wherein the coordinate Bench had held that where the AO had accepted the assessee's surrender without any questions being asked, no penalty u/s 271AAA was leviable. Therefore, on the same analogy, we do not find this case a fit case for imposition of penalty. The impugned order is set aside and the AO is directed to delete the penalty.

**42. ACIT vs. Deepali Design & Exhibits Pvt. Ltd (ITA No. 1710/Del/2015) (Dated: 14.03.2019) (ITAT, Delhi)**

**THE SERVICE TAX IS PERMISSIBLE DEDUCTION THE INTEREST PAID FOR LATE DEPOSIT OF THE SAME IS ALSO A PERMISSIBLE DEDUCTION AND SHOULD BE ALLOWED IN THE SAME MANNER – INSTITUTING A SUIT AGAINST THE CONSORTIUM FOR THE RENDITION OF ACCOUNTS OF THE CONSORTIUM AND FOR THE RECOVERY OF RS. 6,99,24,861 /- AS PER THE CONTRACT WITH THE CONSORTIUM – IT CANNOT BE DEEMED AS THE ASSESSEE HAD CLAIMED A RIGHT TO RECEIVE THE INCOME – THEREFORE NO ADDITION CALLED FOR.**

24. We have heard both the parties and perused all the relevant material available on record. The Revenue never disputed the fact that prior to the receipt of the money by the consortium in its bank account no legal right vested with any of the constituent member to claim or receive amount towards the work executed by the respected members in relation to its part of allocated work by all the constituent members collectively. Thus, it is clear that under no circumstances the constituent members have the right to claim the amount from the consortium unless the amount actually reaches the bank account of the consortium after receiving the same from OCCWG. During the year under consideration, the Assessee had undertaken a new and distinct line of business activity and it was for the first time that it had not only ventured into the business of overlaying of cables for electrification but also functioned as a sub- contractor. The Assessee during the year under consideration has entered in its books of accounts only those payments during the year under reference which were received by it. In regard to the remaining amount payable, the Assessee wrote numerous letters to the Consortium asking them to render the accounts for the ascertainment of the quantum of amounts received by the Consortium against the work executed by the Assessee. However, the Consortium did not render any accounts to the Assessee. The Assessee also wrote a number of letters to the OCCWG-2010 to ascertain the amount paid to the Consortium in relation to the work executed by the Assessee. Thereafter the Assessee instituted a suit in the Hon'ble High Court of Delhi against the consortium for the rendition of accounts of the Consortium and for the recovery of Rs. 6,99,24,861 /- as per the contract with the Consortium. Pursuant to the abovementioned suit filed, assessee was granted a preliminary decree in the money suit for Rs. 4,19,05,956/- with interest at 9% per annum vide order dated 18.07.2017 passed by the Hon'ble High Court of Delhi (the claimed amount was Rs. 6,99,24,861/-). Thereafter, Assessee company received Rs. 4,19,05,956 during F.Y. 2017-18 which was accounted for in the books of account of the Assessee as it income for AY 2018-19. From the records and the agreements it can be seen that these facts narrated by the assessee are correct and Revenue could not point out the new facts in the present case. The Hon'ble Supreme Court in the case of CIT v. Excel Industries Ltd. [2013] 358 ITR 295/219 has even held that "An income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then it can be said that for the purposes of taxability said income is not hypothetical and it has really accrued to the assessee". The Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini [2017] 398 ITR 531 (SC) have observed that the income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the

amount. Only then it be said that the purposed of taxability that the income is not hypothetical and it has really accrued to the assessee. Mere filing of the suit for recovery will not in law make it an income which has accrued. AO while passing the Assessment order dated 21.03.2013 and CIT(A) while passing the appellate order dated 26.12.2014 observed that by filing the suit against the consortium the Assessee had claimed a right to receive the income. This findings of the Revenue authorities are contrary to the decision of the Hon'ble Apex Court in case of Excel Industries (supra). Thus, Ground No. 1 of the assessee's appeal is allowed.

**43. Mentor Graphics (India) Pvt. Ltd. (ITA No. 1883/Del/2015) (Dated: 26.02.2019) (ITAT, Delhi)**

**RULE 37BA(3) OF THE INCOME-TAX RULES, 1962 - CREDIT FOR TAX DEDUCTED AT SOURCE AND PAID TO THE CENTRAL GOVERNMENT, SHALL BE GIVEN FOR THE ASSESSMENT YEAR FOR WHICH SUCH INCOME IS ASSESSABLE - WHERE TAX HAS BEEN DEDUCTED AT SOURCE AND PAID TO THE CENTRAL GOVERNMENT AND THE INCOME IS ASSESSABLE OVER A NUMBER OF YEARS, CREDIT FOR TAX DEDUCTED AT SOURCE SHALL BE ALLOWED ACROSS THOSE YEARS IN THE SAME PROPORTION IN WHICH THE INCOME IS ASSESSABLE TO TAX.**

13. The learned AR for the assessee contended that under Rule 37 BA(3) of the Income-tax Rules, 1962 (for short 'the Rules") if the tax deducted at source is included in the total income, the credit of TDS is to be allowed in the year of its inclusion and relied upon the decision rendered by the coordinate Bench of the Tribunal in Shri Chander Shekhar Aggarwal vs. ACIT in ITA No.6185/Del/2013 order dated 11.01.2016.

16. Section 37BA (3) is categoric enough to explain as to how the credit for tax deducted at source and paid to the account of the Central Government is to be given. When the tax deducted at source and paid to the Central Government and the income is assessable over a number of years, the credit for tax deducted at source shall be allowed across those years in the same proportionate in which the income is assessable to tax. In other words, an amount of TDS towards rent of Rs.80,567/- and an amount of Rs.77,215/- by way of interest is to be assessable on the income of AY 2012-13 proportionately and the credit for tax of the remaining TDS paid to the Central Government shall be given to the assessee in AY 2014-15 when actual rent of Rs.7,25,094/- and Rs.6,94,934/- on account of interest has been realized on settlement of the civil dispute. So, the AO is directed to give the credit of tax deducted at source and paid to the assessee in proportionate of income assessable to tax in AY 2012-13 and 2014-15.

**44. DCIT v. Wood Stock School (ITA No.3838/D/14) (Dated 25/02/2019) (ITAT, Delhi)**

**SECTION 253 –DEFECTIVE APPEAL TO TRIBUNAL – REVENUE FILED DEFECTIVE APPEAL BEFORE TRIBUNAL IN AS MUCH AS FROM 36 CONTAINED WRONG NAME OF THE RESPONDENT, WHICH WAS NOT RECTIFIED DESPITE DEFECTIVE NOTICE ISSUED BY REGISTRY OF TRIBUNAL – NON-RECTIFICATION OF SUCH DEFECT CONSTITUTES CALLOUSNESS AND CARELESSNESS ON PART OF THE ASSESSING OFFICER WHICH DESERVES TO BE CONDEMNED – REVENUE'S APPEAL DISMISSED ON THE GROUND OF DEFECT*VE* APPEAL.**

Held, We would also like to state that appeal of revenue does not deserve any merit even for admission. By looking at form number 36 it is apparent that learned assessing officer has mentioned respondent as "Oil and natural gas Corp Ltd, Dehradun." Here respondent is not ONGC but Woodstock school, Mussoorie. As learned assessing officer wrongly shows respondent, and form number 36 is wrongly filled up, on this issue, defect notice was also issued to LD AO at time of filing of appeal. Registry of tribunal has mentioned this defect in notice itself on 14/07/2014. It is also surprising that learned assessing officer has filed this appeal in 2014, until 2019, no attempt has been made to even correct mistake. However, until now learned assessing officer has not even carried to correct error. Such callousness and carelessness on part of assessing officer who filed appeal shows complete non-application of mind. It deserves to be condemned…. In result appeal of revenue is dismissed on 2 counts, one for wrong mentioning of respondent, not correcting same even after sending defect notice and two on merits. **[Paras 9, 10]**

**45. Neeraj Goel v. ACIT (ITA No. 5952-56/D/17)(28.02.19)(ITAT, Delhi)**

**DUMB DOCUMENTS – SECTION 292C- UNNAMED, UNSIGNED AND VAGUE DOCUMENT CANNOT BE CONSIDERED FOR MAKING ADDITION IN ABSENCE OF ANY CORROBORATION – PRESUMPTION U/S 292C IS REBUTTABLE - ADDITION OF INTEREST ON PRESUMED LOAN ON THE BASIS OF DUMB DOCUMENT DELETED.**

Held, Bare perusal of the document in question marked as A-1, extracted in the preceding paras, found and seized from the residence of the assessee apparently goes to prove that the 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. Nor the same bears the signatures of the assessee nor it bears the name of some other person. No doubt, the presumption arises u/s 292C in case of such document but the presumption is rebuttable one.

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 was found during the search and seizure operation to corroborate the document in question.

No doubt, date and amount has been jotted down in the seized document with one year gap but it is beyond imagination as to how the amount written has been attributed to the assessee having been given as loan to someone because there is neither name of the assessee nor the name of the loanee. The entire findings have been arrived at on the basis of presumptions and assumption that the amount of Rs.12,00,000/- attracts the interest @ 18% because when we examine para 5.4, the AO has tabulated the presumptive figure of interest calculated @ 18% on the principal amount of Rs.12,00,000/- but after 31.03.2007 till 31.10.2013 interest figures continued the same i.e. Rs.5,31,217/-.

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 any further 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.

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. **[Para 11 to 16]**