DELHI ITAT (BAR) REPORTS – APRIL 2019

1. Intelsat Corporation vs DCIT, Circle – 2(1)(1)(ITA Nos 236/Del/2016)(Dated: 26.3.2019)

SECTION 9 - THAT WHETHER CONSIDERATION RECEIVED FROM THE PROVISION OF SATELLITE TRANSMISSION SERVICES FALL UNDER THE ROYALTY DEFINITION AS GIVEN IN SECTION 9(1)(VI) OF THE ACT AND ARTICLE 12 OF THE INDIA USA TAX TREATY AND HENCE TAXABLE IN INDIA – ISSUE NO LONGER REMAINS RES INTEGRA JURISDICTIONAL HIGH COURT IN THE CASE OF ASIA SATELLITES (SUPRA) 332 ITR 340 (DEL) AND DIT VS NEW SKIES SATELLITE BV, 382 ITR 114 (DEL) FOLLOWED

6. At the outset, it is brought to our notice by the learned AR that in assessee's own case for the AYs 2005-06 and 2009-10 to 2011-12 in ITA Nos.2234/Del/2009, 6041/Del/2012, 451 & 6312/Del/2014, after considering the circumstances and contentions of the parties, a Coordinate Bench of this Tribunal decided the issue in favour of the assessee. The Tribunal followed the decision of the Hon'ble jurisdictional High Court in the case of Asia Satellites (supra) and DIT vs New Skies Satellite BV, 382 ITR 114 (Del). Learned AR further submitted that since there is no change in the fundamental facts permitting all these years including the Asstt. Year 2012-13, the consistent view taken by the Tribunal bas well as the Hon'ble High Court has to be followed and the issue has to be answered in favour of the assessee.

9. In the case of Asia Satellites (supra), the Hon'ble jurisdictional High Court vide order dated 28.9.2012 upheld the contention of the assessee and even subsequent to the amendment of Section 9(1)(vi) bythe Finance Act, 2012 with retrospective effect by way of Finance Act,2012, when the revenue filed the review petition, the Hon'ble High Court dismissed the review petition also. Further, post retrospective amendment by way of Finance Act, 2012 in Section 9(1)(vi) in the case of New Skies Satellite BV, the Hon'ble jurisdictional High Court held that the condition with respect to taxability of satellite transmission services in India would remain the same for the DTAA and amendment to the Act with a retrospective or prospective cannot be read in a manner so as to extend the operation to the terms of international treaty.

2. Puja Gupta v. ITO (ITA No. 6890/D/18)(02.04.19)(Delhi ITAT)

SECTION 10(38) R.W.S 68 – PENNY STOCK - ADDITION OF LONG TERM CAPITAL GAIN – THE TRANSACTION OF SALE OF SHARES WAS UNDERTAKEN ON RECOGNIZED STOCK EXCHANGE – THE STATEMENT OF VARIOUS BROKERS ARE NOT RELEVANT AS SAME HAVE BEEN RECORDED BEHIND THE BACK OF THE ASSESSEE- THERE IS NO MATERIAL TO SHOW THAT ASSESSEE WAS ENGAGED IN MANIPULATION OF SHARE PRICES – ADDITION U/S 68 IS MERELY ON THE BASIS OF SUSPICION AND PROBABILITY – ADDITION DELETED.

Held, We find that the transaction of the assessee of purchase of shares of M/s Dhanleela Investment & Trading Co. Ltd., holding of the shares for more than one year and the sale of shares through a registered share broker in a recognized Stock Exchange and payment of Securities Transaction Tax thereon, all are supported by documentary evidences which were placed before the lower authorities. The Revenue by making enquiry in respect of the same could not point out any specific defect therein. [Para 13]

In our considered view, effect of a transaction which is supported by documentary evidences cannot be brushed aside on suspicion or probabilities without pointing out any defect therein. [Para 14]

In the instant case, the Assessing Officer himself observed that the issue of preferential shares by M/s Dhanleela Investment & Trading Co. Ltd. raises a suspicion. The movement in price of shares of that company was without backing of financial performance of that company. [Para 15]

In our considered view, the above at best are a pointer or cause for careful scrutiny of the transaction by the Assessing Officer but from this it cannot be concluded that transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance of the company. [Para 16]

Further, the Assessing Officer also drawn support from the investigation report of the Kolkata Investigation Wing and the statements of two share brokers, namely, Sh. Anil Khemka and Sri Harshvardhan Kayan. [Para 18]

The ld. Departmental Representative could not controvert the submission of the assessee that the said investigation report and the statements of the share brokers were prepared or recorded at the back of the assessee and the assessee was not provided with the copy of the same and was not allowed any opportunity to cross examine the brokers. Ld. DR filed report of Assessing Officer wherein it is admitted that statement of Sh. Anil Khemka was not supplied to assessee, so where is question of allowing cross examination to the same statement. In the above circumstances, in our considered view, the said report or statement could not be used against the assessee. The decisions relied upon by the ld. Departmental Representative are not applicable to the facts of the case. [Para 19]

Even, otherwise also, we find that no reference to the transaction of the assessee could be pointed out by the Revenue which was in the said report or said statements. Thus, the said report or statements was not in respect of specific transaction of the assessee. The assessee transacted through share broker, namely, Pee AAR Securities Ltd. and not through Shri Anil Khemka and Sri Harshvardhan Kayan. [Para 20]

Simply, because in the shares of M/s Dhanleela Investment & Trading Co. Ltd. some manipulation was made by few persons it cannot be concluded that all the transactions which took place in the shares of the said company were manipulated and all the persons who transacted in the shares of the said company indulged in sham transaction. The Revenue has brought no material on record to show that the assessee actually indulged in some manipulation and paid cash in lieu of cheque received against sale of shares. [Para 21]

During the course of hearing, before us, the Departmental Representative contended that SEBI has barred dealing in shares of M/s Dhanleela Investment & Trading Co. Ltd. However, Authorized Representative of the assessee contended that no such ban has been imposed. The Departmental Representative in support of his contention filed copy of SEBI order dated 19.12.2014. However, a perusal of the said order, particularly para no. 32 at page 16 shows that amongst others M/s Dhanleela Investment & Trading Co. Ltd. was prohibited till the final order from dealing in shares of Radford Global Ltd. Thus, it is observed that the said order has not prohibited any person from dealing in shares of M/s Dhanleela Investment & Trading Co. Ltd. [Para 22]

The assessee pleaded that substantial shares were still retained by assessee as all shares were not sold which shows bonafide of assessee that she entered into genuine transaction. Thus, principle of preponderance of probabilities will not apply to the case. [Para 23]

In the above facts and circumstances, we find that the transaction of the assessee of deriving long term capital gains of Rs.1,69,12,820/- by selling shares of M/s Dhanleela Investment & Trading Co. Ltd. was treated as bogus by the Revenue only on the basis of suspicion and probability and without finding any defect in the various documentary evidences filed by the assessee. [Para 24]

3. Narender Kumar Chopra vs. ACIT (ITA No. 3130/D/2016) (11.04.2019)

SECTION 37(1) - THE EXPENDITURE INCURRED PRIMARILY IN THE NATURE OF RENOVATION OF THE EXISTING PREMISES NAMELY PLASTER OF PARIS, FALSE CEILING, FIXATION OF GATE, PUTTING MARBLE SLABS ETC ARE REQUIRED TO BE TREATED AS REVENUE NATURE RATHER THAN CAPITAL NATURE.

5. The expenditure incurred by the assessee are primarily in the nature of renovation of the existing premises which is apparent from the nature of the Head of expenses under which the expenditures were incurred namely Plaster of Paris, false ceiling, fixation of gate, putting marble slabs etc. By incurring such expenses, no new capital assets came into existence rather the assessee would be able to use the existing assets more effectively & commercially (i.e leased premises & Office). Further the expenditure incurred by the assessee was wholly and exclusively for doing with business / profession of rendering of legal services for which Assessee had renovated / repaired the existing office keeping in mind the requirement of clients of Assessee , hence these expenses are required to be treated as revenue nature rather than capital nature.

4. Oxigen Services India P. Ltd. v. DCIT (ITA No.3831/D/16)(18.04.19)(ITAT, Delhi)

SECTION 37 – EXPENSES ON ESOP SCHEME – DISCOUNT ON SHARES UNDER ESOP IS AN ALLOWABLE EXPENDITURE IN THE HANDS OF THE ASSESSEE COMPANY.

The Hon'ble ITAT allowed the claim of ESOP expenses by relying upon decision of Hon'ble Delhi High Court in the case of **Lemon Tree Hotel Ltd.**

5. Manjeet Kaur HUF Prop. Rawalpindi Jewellers vs. ACIT (ITA No. 2885/D/2016) (Dated 12.04.2019)

SECTION 40(a)(ia) - SECOND PROVISO TO SECTION 40(a)(ia) OF I.T. ACT HAS RETROSPECTIVE EFFECT AND THE ASSESSEE SHOULD BE ALLOWED ITS BENEFIT FOR THIS ASSESSMENT YEAR, i.e. FOR 2011-12, ALTHOUGH, IT IS INSERTED w.e.f. 01.07.2012.

(D) …..Under second proviso to Section 40(a)(ia) of I.T. Act, there are statutory provisions to the effect that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of Section 201; then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso. The question before us, is whether second proviso to Section 40(a)(ia) of I.T. Act is prospective in application or is to be applied retrospectively. On the aforesaid question before us, we have the benefit of guidance from the order of Hon'ble Delhi High Court, in the case of CIT vs. Ansal Land Mark Township (P.) Ltd. 377 ITR 635 (Delhi) in which the Hon'ble High Court held that second proviso to Section 40(a)(ia) of I.T. Act is declaratory and curative and it has retrospective effect from 01.04.2005. Revenue's Special Leave Petition against this order of Hon'ble Delhi High Court has been dismissed by Hon'ble Supreme Court in CIT vs. Ansal Landmark Township (P.) Ltd. 242 Taxman 5 (SC). The view that second proviso of Section 40(a)(ia) of I.T. Act is declaratory and curative in nature and has retrospective effect from 01.04.2005 was also taken in Rajeev Kumar Agarwal vs. Addl. CIT 149 ITD 363 (Agra- Trib.); and in DCIT vs. Esaote India (NS) Ltd. 172 ITD 299 (Ahd.) and Hindustan Plywood Company vs. ITO (supra). The issue in question is squarely covered in favour of the assessee, in view of these precedents. Therefore, we also hold, respectfully following theses precedents, that second proviso to Section 40(a)(ia) of I.T. Act is curative in nature and has retrospectively.

6. Quippo Oil and Gas Infra Ltd. v. Addl. CIT (ITA No. 5634/D/14)(03.04.19)(Delhi ITAT)

SECTION 43B(F) – LEAVE ENCASHMENT – AS HELD BY HON'BLE CALCUTTA HIGH COURT IN THE CASE OF EXIDE INDUSTRIES, THE PROVISIONS OF SECTION 43B(F) ARE ULTRA VIRUS THE CONSTITUION – THE PROVISION FOR LEAVE ENCASHMENT IS ALLOWABLE EXPENSES.

Held, we have heard both the parties and perused all the relevant material available on record. Leave Encashment under no circumstance can be called as a statutory liability/payment so as to invoke the provision of Section 43B as it is for the benefit of employees which accrues in lieu of the un-availed leave during the tenure of one's service in the organization. The ratio set out in case of Exide Industries Ltd. (supra) by Hon'ble Calcutta High Court is applicable in the present case as in that decision it was held that leave encashment not being a statutory liability or a contingent liability, enactment of Sec. 43B(f) is not consistent with the original provision of Sec. 43B, and the legislature having disclosed no reasons while inserting the said clause, Sec. 43B(f) is struck down being arbitrary and unconscionable. Ground No. 2 of the assessee's appeal is allowed. [Para 12]

(Note : As per the submission of the counsel for the assessee, the stay by Supreme Court on the judgement of Calcutta High Court in the case of Exide Industries has been vacated vide subsequent order in Civil No. 22889/2008 dtd. 08-05-2009. However, on perusal of order dated 08-05-2009, it appears that Apex Court has in fact explicitly directed that provision of Section 43B(f) should be treated as part of statute till the final decision of the court)

7. ITO vs. Shri Jitender Kumar (ITA No. 3909/D/2015) (10.04.2019)

SECTION 54B - MERELY BECAUSE THE LAND WAS NEAR THE AREA SAID TO BE DEVELOPED AS INDUSTRIAL BY 2021, WITHOUT ANY NOTIFICATION FROM THE COMPETENT AUTHORITY, IT CANNOT BE SAID THAT THE LAND IN QUESTION LOSES ITS CHARACTER AND STATUS OF BEING AN AGRICULTURAL LAND.

13. We have gone through the record in the light of the submissions made on either side. In so far as the location of the land or the standing crops thereon is concerned, absolutely there is no dispute. Khasra revealed that there was standing crop of wheat and jwar on the land at the time of transfer. Further, as a matter of fact, ld. AO in the order dated 22.3.2013 u/s 143(3)/148 of the Act had accepted the agricultural income of the assessee to the tune of Rs.41,000/-. Further, there is no explanation as to how the mutation could have taken place in the Revenue record if the land was put to commercial use as on the date of sale. Merely because the land was near the area said to be developed as industrial by 2021, without any notification from the competent authority, it cannot be said that the land in question loses its character and status of being an agricultural land. It is not the case of the Revenue that any competent government had issued any notice changing the nature of land from rural agricultural land in order to apply the provisions u/s 54B of the Act.

8. Sushila Lakhotia vs ACIT (ITA Nos. 770/DEL/2015) (Dated: 12.04.2019)

SECTION – 68 MERELY BECAUSE NAME OF THE ASSESSEE IS APPEARING IN THE SAID HARD DISC AND AMONGST OTHER INVESTORS ARE INVESTOR SHRI I. E. SOOMAR APPEARING IN THE SAID HARD DISC HAS ADMITTED PAYMENT OF CASH AMOUNT, CANNOT BE A BASIS FOR ARRIVING AT A DEFINITE CONCLUSION, IN ABSENCE OF CORROBORATIVE EVIDENCE IN SUPPORT.

15. We have heard both the parties and perused all the records. It is pertinent to note that in present case on 17.08.2011, a search and seizure action has undertaken in the case of AEZ group during this search it is alleged that the assessee invested an amount of Rs 32,70,884/-via cash in M/s Indrapurarn Habitat Center Pvt. Ltd. Thereafter, a search action was also undertaken in the case of assessee on 10.02.2012. However, no evidence supporting the case of revenue vis-a-vis investment in cash in Indrapuram Habitat Center was found. AO issued notice to the assessee asking the source of alleged investment. During the course of assessment proceedings, the assessee explained that assessee had not invested anything in the alleged property. However, the Assessing Officer relied upon the confession of some I.E. Soomar and made the addition in the hands of the assessee. The said confession and the said Group search is already taken into account in coinvestor's case by this Tribunal. The Tribunal has allowed the appeal of the coinvestor which is

mentioned in the proceedings of the present assesse (SubhashKhattarVs. ACIT A.Y. 2006-07 ITA No. 902/Del/2015 order dated30/06/2016).

9. Jitendra Kumar Yadav vs ACIT(ITA Nos. 1808/Del/2016)(Dated: 10.04.2019)

SECTION 68 - ADDITION OF RS.19,00,000/- MADE IN THE INSTANT CASE BY INVOKING PROVISIONS OF SECTION 68 OF THE ACT IS UNSUSTAINABLE AS THE ASSESSEE WAS NOT MAINTAINABLE ANY BOOKS OF ACCOUNT DURING THE YEAR UNDER CONSIDERATION.

12. We find that under the scheme of the Income Tax Act, a persona ssessable on his total income computed as per the provisions of the Act. The Assessing Officer is duty bound to compute income as per the provisions of the Act after taking into consideration all the facts available before him. It is opined also by the CBDT that while making assessment, the Assessing Officer should not take advantage of the ignorance or mistake of the assessee.

19. Before us, the assessee raised a technical ground and submitted that as the assessee was not maintaining any books of account, the addition made u/s 68 of the Act is bad in law as the pre-condition for invoking Section 68 of the Act is a credit must be found of that amount in the books of account of the assessee. The assessee relied upon the decision of the Hon'ble Bombay High Court in the case of CIT Vs Bhaichand H. Gandhi 141 ITR 67 and the decision of the Delhi Bench of the Tribunal in the case of Nitin Agarwal (HUF), Kailash Prasad Agarwal(HUF) and Manish Agarwal (HUF) Vs ITO in ITA Nos. 7309, 7310 &7443/Del/2018, order dated 11.01.2019.

22. We, therefore, following the above decision of the Co-ordinate Bench hold that addition of Rs.19,00,000/- made in the instant case by invoking provisions of Section 68 of the Act is unsustainable as the assessee was not maintainable any books of account during the year under consideration. Therefore, the addition of Rs.19,00,000/- is hereby deleted. Thus, the ground of appeal of the assessee is allowed

10. Singhal Exim Pvt. Ltd. vs. ITO (ITA No. 6520/D/2018) (Dated: 12.04.2019)

SECTION 68 WOULD ALSO NOT BE APPLICABLE IN RESPECT OF RECOVERY OF SALES CONSIDERATION.

13.1 Now, coming to the facts of the assessee's case, there is no dispute with regard to purchase and import of mobile phones by the assessee from China. The major portion of the imported mobile phones was sold when the goods were in transit by way of high sea sales. Such sale is supported by the sales agreement duly attested by Notary Public. The custom authorities have approved the high sea sales agreement. The custom clearance documents of such goods show that the delivery of goods was taken by the buyer on high sea sales. On these surrounding circumstances, the only conclusion based on human probability that can be drawn is that the buyer of goods on high sea sales who has already taken the delivery of goods from custom authorities would make the payment for such goods. Therefore, on the facts of the case under appeal before us, the decision of Hon'ble Apex Court in the case of Sumati Dayal (supra) supports the case of the assessee rather than the Revenue.

15. In view of the above, we hold that the Assessing Officer was not right in concluding that the high sea sales are not genuine. Moreover, Section 68 would also not be applicable in respect of recovery of sales consideration. Once the assessee sold the goods, the buyer of the goods becomes the debtor of the assessee and any receipt of money from him is the realisation of such debt and therefore, we are of the opinion that in respect of recovery of sale consideration, Section 68 cannot be applied. In view of the above, we find no justification for upholding the addition of `59,51,29,517/-. The same is deleted.

11. Rajesh Kumar vs. ITO (ITA No. 6431/D/2018) (Dated: 11.04.2019)

SECTION 69A - PAYMENT AGAINST INVESTMENT IN PROPERTY IS NOT MADE DURING THE PERIOD UNDER CONSIDERATION AND AS SUCH AND AS SUCH NO ADDITION CAN BE MADE.

13. We find that the Assessing Officer made addition of Rs.8,75,000/- in the hands of the assessee on the ground that registered sale deed by which the assessee purchased property co-jointly with others was registered on 05.06.2008 which falls in the previous year relevant to the assessment years 2009-10.

14. A perusal of the said registered sale deed at page 3 thereof shows that Rs.8,75,000/- was paid vide cheque no. 634101 drawn on State Bank of India, Kishanpura, Panipat. Further perusal of the assessee's bank statement maintained with State Bank of India, Kishanpura, Panipat being savings bank A/c No. 00000010086200392 shows that the said cheque was paid by the assessee on 27.06.2007.

15. Thus, it is observed that the assessee paid consideration of Rs.8,75,000/- on 27.06.2007 i.e. during the previous year relevant to the assessment year 2008-09. No material has been brought before me to show that the assessee made payment of Rs.8,75,000/- during the assessment year under consideration. In the above circumstances, I find no justification for making addition of Rs.8,75,000/- during the year under consideration. Therefore, the addition of Rs.8,75,000/- is hereby deleted.

12. Kedar Educational Society v. CIT(E) (ITA No. 7708/D/18)(04.04.19)(Delhi ITAT)

SECTION 80G – APPLICATION FOR GRANT OF CERTIFICATE – ASSSESSEE SOCIETY HAVING BEEN REGISTERED U/S 12AA IMPLIES THAT THE OBJECTS OF SOCIETY ARE FOUND TO BE OF CHARITABLE NATURE – MERE FACT THAT NO ACTIVITY HAS BEEN CARRIED OUT WOULD NOT DISENTITLE ASSESSEE FOR APPROVAL U/S 80G OF THE ACT

Held, After considering the rival submissions, we are of the view that the matter requires reconsideration at the level of the Ld. CIT(E). It is not in dispute that assessee-society has been granted registration under section 12AA of the I.T. Act, 1961 considering it to be charitable society. The Ld. CIT(E) while granting the registration under section 12AA of the I.T. Act found that the objects of the assessee-society are genuine and carrying on charitable activities. Learned Counsel for the Assessee submitted that assessee is an Educational Society, which by itself is a charitable activity and that detailed reply and

evidences were filed before the Ld. CIT(E) to show that assessee-society carrying-out the charitable activities. Since the assessee-society has been granted registration under section 12AA of the I.T. Act, therefore, it is an admitted fact that assessee is established for charitable purposes having the objects which are charitable in nature. Therefore, even if no activity have been carried out by the assessee-society towards its objects, it would not make the assessee-society disentitle for approval under section 80G of the I.T. Act. [Para 3]

13. Dharampal Satyapal Ltd. v. DCIT (ITA No. 3738-39/D/16)(18.04.19)(ITAT, Delhi)

i. SECTION 80IB(13) & 80IC(7) R.W.S. 80IA(8)– REDUCTION IN CLAIM OF DEDUCTION ON ACCOUNT OF ADJUSTMENT IN VALUE OF GOODS AND SERVICES TRANSFERRED FROM NON ELIGIBLE UNITS TO ELIGIBLE UNITS – BEFORE MAKING ADJUSTMENT, THE ASSESSING OFFICER IS REQUIRED TO ASCERTAIN THE MARKET VALUE OF GOODS SO TRANSFERRED – NO MARK-UP CAN BE ADDED WHERE THE GOODS ARE NOT MARKETABLE – CENTRAL EXCISE VALUATION RULES ARE NOT RELEVANT IN DETERMINING THE MARKET VALUE OF THE GOODS.

ii. SECTION 80IB(13) & 80IC(7) R.W.S. 80IA(8) – ALLOCATION OF DEPRECIATION OF HEAD OFFICE TO ELIGIBLE UNITS – THE DEPRECIATION U/S 32 IS ASSET SPECIFIC AND IN ABSENCE OF ANY FINDING THAT ASSETS WERE USED FOR ELIGIBLE UNITS, THE DEPRECIATION CANNOT BE ALLOCATED.

Held, However in above prices there is no finding that in open market such semi finished goods are sellable or not. Explanation which defines market price provides that market price means price such goods would fetch ordinarily in open market. Therefore, there has to be a clear-cut finding that such goods are marketable, they have a sale price, and such sale prices determination is in open market. Therefore, it is apparent that market price can be more than cost and less than cost of goods. Therefore, any approach of loading of cost on goods, which are transferred from one undertaking to another undertaking without determination of market price of such goods, is not the mandate of provisions of section 80 IA (8) of The Act. Therefore any such attempt to substitute ‗cost plus profit‖ as market value of goods without finding out what could be market value‘ of goods is not acceptable as it is not requirement of law. If views of lower authorities is subscribed to, then it will amount that market price can never be less than cost of goods sold and therefore it presumes a market where only profit exists. Such can never be situation. In view of this, we reject finding of lower authorities and learned assessing officer that value that has been recorded in transfer of goods from one unit to another should further be loaded by cost of 37.58%. Further 10% profit has been presumed under Central Excise provision for purpose of transfer of goods as captive consumption for another unit. Therefore if goods having a cost of Rs 100/- is transferred to another unit, then transaction value of such goods shall be considered at INR 110/–. Therefore transferring unit will pay excise duty on INR 110 and unit to which such goods have been transferred will claim duty credit paid on transfer value of INR 110. Therefore, above rule can only be applied with respect to duty set off of excisable units. Central Excise rules has stated that INR 110/– would be deemed transaction value of such goods. Rule 8 of Central Excise valuation rule is a deeming

provision. It does not say what could be market price of such goods but for purpose of levy of Central Excise it deems that INR 110/– shall be transaction value. Therefore, in absence of any mandate available that Central Excise valuation rule 8 provides for market price of such goods, same cannot be imported into provisions of section 80 IA (8) of The Act. **[Para 48]**

Held, on perusal of order of learned CIT (A), we find that issue has been decided after considering facts and submissions of appellant. He has rightly held that depreciation on assets of one particular unit/division cannot be allocated to some other unit/division and as such, finding recorded by CIT (A) is well reasoned and based on sound legal principles. Further issue is also supported by decision of coordinate bench in case of ACIT v. Secure Meters Ltd. (ITA No. 542/Ju/2007 & 349/JU/2009) (28.08.2012). **[Para 84]**

14. Bramco WLL v. DCIT (ITA No.1780/D/15) (Dated 25/03/2019)

SECTION 92 – TRANSFER PRICING ADJUSTMENT – ARM'S LENGTH PRICE OF ALLOCATION OF COST BY THE FOREIGN COMPANY TO THE PROJECT OFFICE ON COST TO COST BASIS WITHOUT MARK-UP – ALLOCATION WAS SUPPORTED BY CERTIFICATE OF THE AUDITOR - AO / DRP DISREGARDED THE CERTIFICATE ON SUSPICION AND MADE ADHOC DISALLOWANCE TO THE ALLOCATION ON THE GROUND THAT THE PROFIT DECLARED WAS APPARENTLY LESS AND ON SUSPICION THAT THE FOREIGN COMPANY, RETAINING PROFIT, WAS EXEMPT FROM TAX IN THE HOME JURISDICTION – TRIBUNAL DELETED SUCH ADHOC DISALLOWANCE ON THE GROUND THAT THE SAME WAS PURELY BASED SUSPICION / ESTIMATE – CERTIFICATE OF THE AUDITOR ISSUED ON RATIONAL BASIS CANNOT HAVE BEEN DISREGARDED / BRUSHED ASIDE ON THE GROUND THAT THE SAME WAS SELF-CERTIFIATION – ADJUSTMENT MADE ON ADHOCISM THUS DELETED.

Held,On careful analysis of the order of the learned DRP l which has given a direction to the assessing officer/transfer pricing officer to upheld the adjustment to the arm's-length price of the international transaction with a sole objective of making the profit of 5.60 percentage of the total project to reach near to the profit rate of 8% as provided under the provisions of section 44AD of the act. The second sole reason was that Bahrain jurisdiction is no tax jurisdiction and therefore adjustment is required to be made. Both these reasons are not provided in the income tax act while determining ALP of the international transactions. The arm's-length price of the international transaction cannot be determined based on the estimates an adhocism…We have further verified the certificate issued by the BDO placed at page number 61 – 65 of the paper book filed by the assessee. The certificate dated 06/02/2011 submitted show that the allocation has been made by the auditor based on the audited financial statements of the company. Further, the appendices also reflect the total direct material cost and administrative expenses incurred by the marble division of the company on the New Delhi International Airport project. Further, merely because of the reason that the certificate has been given by an auditor of the company it can be brushed aside, as self-certification. It would have been the duty of the learned transfer-pricing officer/ Learned dispute resolution panel to examine the above certificate and show that there are infirmities in the said document furnished by the assessee. Unless that is shown, a certificate issued by a firm of chartered accountants cannot be rejected at the

threshold….. In view of this, we do not inclined to uphold the adjustment proposed by the learned transfer-pricing officer to the international transaction entered into by the assessee. Accordingly the adjustment proposed of INR 5 7325060/–incorporated in the assessment order dated 11/2/2015 made by the learned assessing officer based on the order of the transfer pricing officer incorporating the adjustment directed by the learned dispute resolution panel deserves to be deleted. Accordingly, the AO is directed to delete the above addition.**[Paras 13, 14, 15]**

15. Kaplan India P. Ltd. v. ITO (ITA No. 1481/D/15)(02.04.19)(Delhi ITAT)

SECTION 92C- TRANSFER PRICING ADJUSTMENT – ARM'S LENGTH PRICE-COMPANIES ENGAGED IN WIDE VARIETY OF SERVICES AND NOT HAVING SEGMENTAL INFORMATION CANNOT BE CONSIDERED AS VALID COMPARABLE – ALSO COMPANIES WITH HUGE BRAND VALUE AND LARGE SCALE OPERATION ARE NOT A VALID COMPARABLE IN CASE OF COMPANY PROVIDING CAPTIVE SERVICES.

Held, we have carefully considered the rival contentions as also the detailed arguments summarized hereinabove. It is apparent that Infinite Data Systems Private Limited is engaged in a wide variety of services including software technical consultancy services etc. It is our considered opinion that these services cannot be compared with software development services provided by a captive service provider like the assessee in the absence of segmental information. FAR of Infinite Data Systems Private Limited is clearly different from that of the assessee. We also note that the assessee's case is covered in assessee's favour by the order of the Delhi Bench of the Tribunal in Freesscale Semiconductors India (P) Ltd. (supra). **[Page 18 Para 4]**

We have considered the rival submissions. We notice that the TPO has rejected the assessee's contention on the understanding that the difference between the assessee-taxpayer and the so-called giant companies like Infosys was that the latter had more number of teams than the assessee-taxpayer to render software development services. We find merit in the contention of the Ld counsel that Infosys Limited is not comparable to a captive service provider like the assessee for more than one reason viz., Infosys Limited has income from sale of software products and segmental information to enable determination of margin earned from software development services is not available in the financials, Infosys Limited has the benefit of huge brand value, which is a valuable asset, clearly impacting its margins, the functional profile and scale of Infosys Limited are also different and not comparable to Assessee. We also note that this company was excluded by the Tribunal in the case of Freescale Semiconductors India (P) Ltd (supra). **[Page 22 Para 4]**

16. M/s. Tower Watson India P. Ltd. v. DCIT (ITA No. 1710/D/16)(02.04.19)(Delhi ITAT)

SECTION 92C – MOST APPROPRIATE METHOD – ASSESSEE ENGAGED IN THE BUSINESS OF CONSULTANCY SERVICES WHEREIN BILLING WAS AS PER RATES PER HOUR METHODOLOGY – ASSESSEE ADOPTED CUP METHOD AND USED INTERNAL CUP FOR BENCHMARKING THE TRANSACTION – TPO

APPLIED TNMM – WORK PERFORMED BY TEAM OF CONSULTANTS ON THE BASIS OF SPECIFIC REQUIREMENTS OF THE CLIENTS- CONSIDERING THE NATURE OF BUSINESS AND SERVICES RENDERED TO AE'S AND NON-AE'S, THE CUP METHOD IS MAM AS IT BEARS MORE DIRECT AND CLOSER RELATIONSHIP.

Held, Facts on record reveal that the time is recorded on rate per hour methodology. The AEs are charged on the basis of hours spent on services rendered to them. Though the UREs are also charged on hourly rate basis, but due to cut-throat competition in this line, predetermined fixed rate is billed and if the hourly rate is higher than the pre-determined fixed rate, then difference is written off. In our considered opinion, this is a standard practice followed by the enterprises providing similar consultancy services. Further, we find that the assessee has to assume total risk when it is providing services to the UREs whereas when the services are provided to AEs, the risk is that of the AEs whose client has been serviced. [Para 19]

The invoices raised to AEs and non AEs are exhibited in the paper book. Whether the same person is providing service to both the AEs and non AEs is irrelevant, so as long as the evidences of services provided are available. The services are provided by different set of personnel, having different qualification and it would not be justifiable to ask for invoices of the same person who has provided service to AEs and also to non AEs. [Para 20]

As mentioned elsewhere, risk and responsibility to the client is direct in Indian non AEs and for AEs the overall responsibility to the client is of the AE itself. In this line, work is assigned to different team members [whether relating to AE or non AE] based on the specific job skill-set requirement, available resources and overall deliverable expected, meaning thereby, that if the work requires more time of a junior consultant, he/she is assigned that work whereas if a senior's assistance is required, they devote time. Accordingly, a proper team composition is there to take care of the nature and technical difficulties of the project. Even the OECD Guidelines of July13 2010 preferred internal CUP over other methods, since it bears a more direct and closer relationship to the transaction under review. [Para 22]

Considering the totality of the facts in the light of invoices relating to AEs and non AEs exhibited in the paper book, we are of the considered opinion that CUP is the MAM and has been rightly adopted by the assessee to bench mark its transactions for provision of consulting services rendered. [Para 23]

17. M/s. Integreon India P. Ltd. v. DCIT (ITA No. 1173/D/16)(02.04.19)(Delhi ITAT)

SECTION 115JB – BOOK PROFIT AND TRANSFER PRICING ADJUSTMENT - THERE CANNOT BE UPWARD ADJUSTMENT OF BOOK PROFIT COMPUTED UNDER MAT PROVISIONS ON ACCOUNT OF TRANSFER PRICING ADJUSTMENT - SUCH ADJUSTMENT IS WITHOUT MANDATE OF INCOME TAX ACT, 1961

Held, the Tribunal followed the decision of Mumbai ITAT in the case of Owens Corning [India] Ltd 70 Taxmann.com 395. **[Para 20]**

18. M/s Oriental Insurance Co. Ltd vs DCIT(LTU) (ITA Nos. 3540/Del/2016) (26.3.2018).

SECTION 115JB - SECTION 115JB OF THE ACT HAS NO APPLICATION TO THE INSURANCE COMPANIES

11…..That assessee placed reliance on the decision of the Hon'ble jurisdictional High Court in their own case reported in (2018) 407 ITR 658 (Del) wherein the Hon'ble jurisdictional High Court clearly held vide para 54 to 56 that Section 115JB of the Act has no application to insurance companies On this aspect, the observations of the Hon'ble jurisdictional High Court are that from a reading of Section 44 read with the First Schedule of the Act, it is plainly clear that insurance companies are required to prepare accounts as per the IA and the regulations of the IRDA and not as per Parts II and III of Schedule VI of the Companies Act and the assesse prepares its accounts as per the IRDA principles, which regulations govern the preparation of the auditor's report. Hon'ble High Court, therefore, held that Section 115JB of the Act has no application to the insurance companies. In view of this decision of the Hon'ble jurisdictional High Court, while respectfully following the same, we answer Ground Nos.4 to 4.2 in favour of the assessee and against the revenue and consequently, also hold that ground nos. 5 & 5.1 are infructuous.

19. M/s RAJSI INFIN CONSULTANTS PVT. LTD. v. DCIT(ITA No.2785/D/18) (Dated 25/03/2019)

SECTION 143(2)/148 – ISSUE OF NOTICE UNDER SECTION 143(2) WHERE NO PHYSICAL RETURN OF INCOME FILED POST NOTICE UNDER SECTION 148 – FILING OF PHYSICAL RETURN OF INCOME AFTER NOTICE UNDER SECTION 148 IS NOT MANDATORY – LETTER OF ASSESSEE STATING ORIGINAL RETURN TO BE DEEMED AS RETRUN UNDER SECTION 148 VALID – STATUTORY NOTICE UNDER SECTION 143(2) NOT ISSUED AFTER SUCH LETTER BY THE ASSESSING OFFICER IS FATAL TO ASSUMPTION OF JURISDICTION UNDER SECTION 147 – DECISIONS OF DELHI HIGH COURT ON THE SAID ISSUE FOLLOWED AND DECISION OF OTHER NON-JURISDICTIONAL HIGH COURT HELD TO BE NOT BINDING – RE-ASSESSMENT ORDER PASSED UNDER SECTION 147 QUASHED.

Held,it is not in dispute that assessee filed original return of income on 11th August 2010. It is also not in dispute that notice under section 148 was issued to assessee on 20th March2015. It is also not in dispute that assessee, in response to notice under section 148 filed letter before assessing officer on 25th March 2015 submitting therein that original return filed on 11th August 2010 may please be treated as return filed in response to notice under section 148 of the Income Tax Act, 1961. In the case of Pr. CIT vs. Shri Jai Shiv Shankar Traders Pvt. Ltd., (supra), the assessee similarly made a statement before assessing officer to the effect that original return filed should be treated as return filed pursuant to notice under section 148 of the Income Tax Act and issue have been decided in favour of the assessee because notice under section 143(2) of the Income Tax Act was not

issued within the time. Similarly in the same Judgment the Judgment of the Honorable Delhi High Court in the case of CIT versus Madhya Bharat Energy Corporation Ltd., (supra), relied upon by the Learned Department of Representative has been considered and is distinguished by the Honorable Delhi High Court and have held that the said decision is not of any assistance to theRevenue as far as the issue in the present case is concerned i.e., failure to issue notice under section 143(2) of theIncome Tax Act within the period of limitation….Proviso to Section 143(2) provides that "providedthat no notice under clause (ii) shall be served on theassessee after expiry of six months from the end of thefinancial year in which the return is furnished". In thepresent case, the assessee filed letter on 25th March 2015before assessing officer praying that original return filed on11th August 2010 may be treated as return filed undersection 148 of the Income Tax Act. Thus, the return undersection 148 of the Income Tax Act shall be deemed to befurnished on 25th March 2015. According to the aboveproviso to Section 143(2) of the Income Tax Act, no notice inthis Section shall be served upon the assessee after expiryof six months from the end of the financial year in which thereturn is furnished which would expire on 30th September2015. However, in the present case, notice under section143(2) have been issued on 9th February 2016. In the caseof Indus Towers Ltd., vs. Dy. CIT (supra), the Hon'ble DelhiHigh Court held that "delay in issuing notice under section143(2) of the Income Tax Act, would be fatal to the reassessment proceedings." The above Judgment has been confirmed by the Hon'ble Supreme Court by dismissing theSLP of the Department. In the case of Principal CIT versusSilverline (supra) and CIT versus CPR Capital ServicesLimited (supra), it was held that "notice under section 143(2)within limitation is mandatory. Otherwise, assessment wouldbe nullity and void. No reassessment order could be passedwithout compliance with the mandatory requirement of noticebeing issued by the assessing officer to the assessee undersection 143(2) of the Income Tax Act." The above decisionsrelied upon by the Learned Counsel for the Assesseesquarely apply to the facts of the case. The decisions reliedupon by the Departmental Representative in the case of CITvs. Madhya Bharat Energy Corporation Ltd., (supra) isalready distinguished by the Hon'ble Delhi High Court andthat the Judgment of the Hon'ble Punjab and Haryana HighCourt in the case of CIT, Amirtsar vs. OCM India Ltd.,(supra), cannot be given preference as against the Judgmentof the Delhi High Court because Hon'ble Delhi High Court isa jurisdictional High Court in the case of the assessee. … In view of the above discussion and following thedecisions of the Hon'ble Delhi High Court relied upon by theLearned Counsel for the Assessee and others as reproducedabove, we are of the view that since notice under section 143(2) have been issued beyond the period of limitation,therefore, entire reassessment order is nullity and voidabinitio. We, accordingly, set aside the orders of theauthorities below andquash the reassessment order.Resultantly, all additions stand deleted. In view of theabove, there is no need to decide other issues on merits.**[Para 7]**

20. BSES Rajdhani Power Ltd. v. ACIT (ITA No.6222-25/D/18) (Dated 25/03/2019)

SECTION 143(3)/254 – POWER OF ASSESSING OFFICER IN PROCEEDINGS SET ASIDE BY THE TRIBUNAL – ASSESSING OFFICER CANNOT EXCEED JURISDICITON IN ADJUDICATING ISSUES WHICH WERE NOT DIRECTED BY THE TRIBUNAL – POWER OF AO IS RESTRICTED TO THE SCOPE OF REMAND BY ITAT.

Held, Thus the Tribunal categorically held that depreciation at 80% was available inrespect of simplicitor electricity/energy measuring meters and there was noadditional requirement of such meters being energy saving devices. TheTribunal held that the assessee has successfully able to demonstrate that itwas very much entitled to claim depreciation on energy meters @ 80%. Thus,the Tribunal has categorically given a finding on depreciation on energy meters@ 80% as only this much has to be verified by the Assessing Officer as towhether it is inextricable/integral part of meters without which the metercannot function and accordingly allow depreciation on the same. But insteadof verifying these aspects, the Assessing Officer has given a finding on thebasis of Bureau of Indian Standards Report and relying on the same held thatenergy meter is merely a measuring instrument and not appliances which canbe classified as energy efficient and hence was not eligible for depreciation atthe higher rate of 80%. The Ld. AR has given plethora of decisions includingthe decision of the Hon'ble Supreme Court in case of Union of India Vs.Kamlakshi Finance Corporation Ltd. AIR 1992 SC 711 wherein it is held thatorders of High Court/ Appellate Authorities are binding and revenue interest isno excuse for failure of lower authorities to follow those orders as the lawprovides appeal procedure for safeguards. The principles of judicial disciplinerequire that the orders of the higher appellate authorities shall be followedunreservedly by the subordinate authorities. The Assessing Officer is dutybound to follow the directions of the Tribunal in its true spirit and should havenot gone beyond what has been directed to be verified by the Tribunal to theAssessing Officer. Therefore, the assessment order is quashed and the appealof the assessee is allowed. All these appeals have common issues therefore, allthe appeals are allowed…**[Para 8]**

21. Dharam Bir Singh vs ACITCircle-62(1) (ITA Nos. 4099 /DEL/2016) (Dated: 27.03.2019)

S. 145 - ONCE THE PROFIT IS ESTIMATED ON GROSS RECEIPTS, NO FURTHER ADDITION NEEDS TO BE MADE ON THIS ACCOUNT – VARIOUS ADDITIONS MADE U/S 40A(3), 40(A)(IA), DISALLOWANCE ON ACCOUNT OF SUNDRY CREDITORS, DRAWINGS, TRAVELLING AND CONVEYANCE EXPENSES, TELEPHONE EXPENSES STANDS DELETED.

9. We have heard both the parties and perused the material available on record. As regards estimation of net profit at 8%, there is no dispute with the net profit rate which is slightly increased for Assessment Year 2012-13. Thus, we find that the estimation of profit at 8% is reasonable on the facts of the present case and should meet the ends of justice. Once the profit, if estimated on gross receipts, no further addition needs to be made on this account. We, therefore, do not interfere with the findings of the CIT(A) as far the estimation of the profit is concern. However, in our considered opinion, once net profit is estimated as a percentage of sales no further allowance should be made in the profit and loss account. Since, we have confirmed the estimation of net profit at 8%. We do not find any merit in the additions/disallowances made by the Assessing Officer.

22. DCIT v. M/s. KLA Foods (India) Ltd. (ITA No.2846/D/15) (Dated 08/04/2019)

SECTION 147 (S.K. JAIN) – REOPENING OF CONCLUDED ASSESSMENT UNDER SECTION 147 ON THE BASIS OF INVESTIGATION REPORT LACK INDEPENDENT APPLICATION OF MIND AND IS BASED ON BORROWED SATISFACTION WHICH IS NOT PERMISSIBLE IN LAW – FURTHER REOPENING MADE AFTER EXPIRY OF FOUR YEARS FROM END OF RELEVANT YEAR WITHOUT ANY FAILURE BEING POINTED OUT ON THE PART OF ASSESSEE TO DISCLOSE WHOLLY AND TRULY ALL MATERIAL FACTS – REASSESSMENT PROCEEDINGS UNDER SECTION 147 QUASHED.

Held, Considering the facts of the case, in the light of reasons recorded above and discussion, it is clear that the Assessing Officer did not mention any material facts in the reasons. The Assessing Officer did not mention that assessee was already assessed under section 143(3) in the original assessment, in which, Assessing Officer has already examined the issue of share capital/premium and what was the material produced before him regarding accommodation entry. The Assessing Officer did not record as to who has provided accommodation entry to assessee in the reasons. Thus, there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment under section 147 of the Income Tax Act, 1961. ..In view of the above, it is clear that in the instant case the Assessing Officer reopened the assessment after 04years from the end of the assessment year and Assessing Officer has failed to specify if there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment under section 147 of the Income Tax Act, therefore, conditions of Section 147 of the IncomeTax Act are not satisfied in this case. Further, the reasons are vague and do not disclose any incriminating material against the assessee. The decisions relied upon by Learned Counsel for the Assessee squarely apply to facts of case. Therefore, reopening of the assessment is wholly unjustified in the matter. We are, therefore, of the view that assumption of jurisdiction under section 147/148 of the Income Tax Act is clearly illegal and bad in Law. We, accordingly, set aside the orders of the authorities below and quash the reopening of the assessment under section 147/148 of the Income Tax Act, 1961. Resultantly, all additions stand deleted. The cross-objections of the assessee is allowed. In view of these findings, there is no need to decide the Departmental Appeal on merits, in which, Ld. CIT(A) has already deleted the addition.**[Paras5.6, 5.7]**

23. Raju Verma vs. DCIT (ITA No. 1796 & 1797/D/2017) (Dated: 09.04.2019)

SECTION 148 - NOTICE U/S 148 FOR 1997-1998 IN TERMS OF LIMITATION OF 16 YEARS U/S 149(C) OF THE ACT IN RELATION TO ANY ASSET (INCLUDING FINANCIAL INTEREST IN ANY ENTITY) LOCATED OUTSIDE INDIA - THE LIMITATION FOR REOPENING UNDER SECTION 147 OF EXPIRED ON 31/03/2004 - THE ASSESSMENT FOR THE YEAR UNDER CONSIDERATION ATTAINED FINALITY AND SAID FINALITY CANNOT BE DISTURBED BY WAY OF ISSUE OF NOTICE UNDER SECTION 148 INVOKING LIMITATION OF 16 YEARS PROVIDED UNDER SECTION 149(C) OF THE ACT BY WAY OF AMENDMENT INTRODUCED BY FINANCE ACT, 2012, W.E.F., 01/07/2012.

9.2 But according to the learned counsel, the period of 6 years for issue of notice under section 149 of the Act provided during relevant period has already expired on 31/03/2004 and thus assessment attained finality. The contention of the learned counsel is that said finality of assessment cannot be disturbed by way of amendment to section 149 of the Act w.e.f. 01/07/2012. The learned counsel has relied on the decision of the Hon'ble Delhi High Court in the case of Brahm Datt (supra). In the said case also, notice under section 148 of the Act was issued for assessment year 1998-99 invoking limitation of 16 years provided in section 149(c) of the Act for holding bank account in HSBC, Zeneva. In the said decision, the Hon'ble Delhi High Court has relied on the decision of the Hon'ble Supreme Court in the case of K.M. Sharma vs. ITO 254 ITR 772(SC), wherein the Hon'ble Supreme Court has held that law of limitation was intended to give certainty and finality to legal proceedings and therefore, proceedings which had attained finality under the existing law due to bar of limitation, could not be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting proceedings, which has already been completed and attained finality.

24. ACIT vs Rajinder Kumar Aggarwal (HUF) (ITA Nos.4142/DEL/2015)(27.03.2019)

SECTION 195 READ WITH 40(a)(ia) - COMMISSION PAID BY THE ASSESSEE TO ITS FOREIGN AGENT FOR ARRANGING OF EXPORT SALES AND RECOVERY OF PAYMENTS COULD NOT BE REGARDED AS FEE FOR TECHNICAL SERVICES U/S 9(1)(VII) AS SUCH DISALLOWANCE OF THE SAME BY INVOKING PROVISIONS OF SECTION 40(A)(I) AS NO TDS WAS DEDUCTED THEREON IS BAD IN LAW.

7. We have heard both the parties and perused the material available on record. The issues involved in this appeal relates to applicability of TDS u/s 195 on payments abroad of export commission to non-resident the foreign agent for the procurement of export orders for the assessee and consequently disallowance u/s 40(a)(i) of the Income Tax Act, 1961. As pointed out by the Ld. AR the issue is covered in favour of the assessee in case of DIT Vs. Panalfa Autoelektrik Ltd. 378 ITR 205 wherein it is held that commission paid by the assessee to its foreign agent for arranging of export sales and recovery of payments could not be regarded as Fee for Technical Services u/s 9(1)(vii). In the present case, the commission was paid to ACE Trading, a non-resident agent (payee) who is a tax resident of France. The payee was simply assisting in procuring export orders for the Assessee in his ordinary course of business in France. The commission was paid for activities of the payee outside India and the amount is received by the payee outside India through normal banking channels. Section 5(2) states that total income of a person, who is a nonresident, includes income from all sources which (a) is received or deemed to be received in India; (b) accrues or arises in India; or (c) is deemed to accrue or arise in India. In the present case, the commission income paid to the foreign agent neither accrued in India nor deemed to be accrued in India as per deeming provisions of section 9 and nor the same was received nor deemed to be received in India. Thus, there is no need to interfere with the findings of the CIT(A). The Appeal of the Revenue is dismissed.

25. Rajesh Kumar Saroj vs. JCIT (ITA No. 327/D/2019) (Dated: 27.03.2019)

SECTION 195 - THE ONLY QUESTION IS WHETHER IN VIEW OF THE PROTOCOL TO INDIA-SPAIN DTAA, A RESTRICTIVE MEANING OF THE "FEE FOR TECHNICAL SERVICES' HAS TO BE READ IN THE CONTEXT OF INDO-SPAIN DTAA OR NOT – HELD YES

10. The India-UK Treaty was entered into force on 26.10.1993 and because it is after 1.1.1990, the restricted scope provided in Indo-UKTreaty has to be read in the context of Indo-Spain DTAA. In so far asthe reliance by the authorities on the decisions of AAR in the case ofSteria (India) Ltd. (supra) is concerned, it is brought to our notice that in Steria (India) Ltd., vs. CIT (2016) 386 ITR 390 the Hon'bleDelhi High Court did not agree with the same. In this case, a similar protocol isthere vide clause 7 in Indo-France DTAA pursuant to which therestricted meaning of 'fee for technical services' appearing in the Indo-UK DTAA was sought to be read as forming part of Indo-France DTAAas well. The Hon'ble Delhi High Court after considering the provisionsof the DTAA of Indo –France, which are similarly worded as that ofIndo-Spain held that less restrictive definition of expression 'Fee forTechnical Services' appearing in Indo-UK DTAA, must be read asforming part of Indo-France DTAA as well.

11. We are, therefore, of the considered opinion that the decision ofthe Hon'ble Delhi High Court in Steria (India) Ltd., vs. CIT (2016) 386ITR 390 and para 7 of the Protocol between India and Spain, therestrictive meaning of 'Fee for Technical Services' appearing in Article13(4) (c) Indo-UK DTAA must be read as forming part of Indo-SpainDTAA as well and, therefore, the payment made by the assessee to the Spanish company for fabric testing would not constitute fee for technicalservices and consequently, section 195 of the Act has no application tosuch a receipt. With this view of the matter, we find it difficult to sustainthe addition and accordingly, direct the learned AO to delete the same.

26. Cotton Textiles Mills Pvt. Ltd. v. Principal C.I.T. (ITA No.2742/D/17) (08/04/2019)

SECTION 263 – SCOPE OF EXPLANATION 2 TO SECTION 263 - WHERE ENQUIRY WAS CONDUCTED BY THE ASSESSING OFFICER DURING ASSESSMENT, THEN CIT NEED TO CARRY OUT SOME PRIMA FACIE ENQUIRY TO CONCLUDE THAT ENQUIRY BY ASSESSING OFFICER WAS DEFICIENT OR LACKING – EXPLANATION 2 TO SECTION 263 APPLIES WHERE ORDER PASSED BY ASSESSING OFFICER WAS WITHOUT MAKING ANY ENQUIRY OR VERIFICATION AND IS NOT APPLICABLE WHERE ENQUIRY WAS CONDUCTED BY ASSESSING OFFICER.

Held, Otherwise also, it is trite law that, if the ld. Pr. CIT was not satisfied with the inquiry conducted by the Assessing Officer, then atleast he should have carried out some prima facie enquiry himself so as to reach to a conclusion that the inquiry conducted by the Assessing Officer was deficient or lacking. Without conducting any inquiry, Ld. PCIT cannot hold that the either the inquiry conducted by the Assessing Officer was insufficient or there is no verification of the evidences. This proposition is fully supported by the

judgments of Hon'ble Jurisdictional High Court as relied by the ld. Counsel. Explanation 2 contemplates a situation where Assessing Officer has passed the order without making any inquiry or verification. The said Explanation cannot be invoked where Assessing Officer has called for the evidences and sought assessee's explanation and has verified the evidences and then carried out inquiry u/s 133(6) from the parties from where he gathered that no money in form of cash or cheque has been received in lieu of share subscription and share premium. Under these facts and circumstances the assessment order cannot be set aside on the ground that no inquiry has been made or such an order is erroneous and prejudicial to the interest of revenue. Accordingly, we quash the impugned revisionary order u/s. 263 and restore the assessment order.**[Para 12]**

27. M**/s. ETT Ltd. vs. CIT (ITA No. 3341/D/2018) (Dated: 01.02.2019)**

SECTION 263 READ WITH 80IA OF THE ACT - ORDER PASSED IS CRYPTIC, SUMMARY AND NON-SPEAKING IN NATURE BY LD. CIT IN A HASTY MANNER, WITHOUT DUE APPLICATIONS OF MIND, WITHOUT FULLY TAKING INTO CONSIDERATION THE SUBMISSIONS MADE AND MATERIALS PLACED BY THE ASSESSEE BEFORE LD. CIT, AND WITHOUT DEALING WITH THE FULL FORCE OF ASSESSEE'S SUBMISSIONS AND CONTENTIONS. AN ORDER SUCH AS THIS, IS LIABLE TO BE QUASHED.

39) It is not clear from perusal of records as to what was the cause of action for initiation of proceedings U/s 263 of IT Act; such as, whether there was any audit objection, or whether any other new information from outside the assessment records were received by the Ld. CIT. Be that as it may, numerous hearings were fixed by the Ld. CIT, including on 07.11.2017, 29.11.2017, 11.12.2017, 10.01.2018, 08.02.2018 and 23.02.2018. Eventually the aforesaid impugned order dated 31.03.2018 was passed by the Ld. CIT on 31.03.2018. Thus, it is seen that although the revision proceedings U/s 263 of IT Act prolonged for a few months, the impugned order was passed by the Ld. CIT on the last day of limitation period, i.e. on 31.03.2018. A perusal of the aforesaid impugned revision order dt. 31.03.2018 passed U/s 263 of IT Act shows that although submissions made by the assessee vide aforesaid written submissions dated 08.02.2018 and 23.02.2018 have been mentioned; the contents of these submissions have not at all been discussed by the Ld. CIT. Even as far as aforesaid written submissions dated 11.12.2017 is concerned, only a small portion of it has found mention in aforesaid impugned revision order dated 31.03.2018 passed by Ld. CIT U/s 263 of IT Act. Thus, it is obvious that the material brought by the assessee for the consideration of Ld. CIT have not been fully factored in by the Ld. CIT; and the Ld. CIT has not fully dealt with the entire force of assessee's submissions before making an adverse decision against the assessee. Moreover, the Ld. CIT has observed in a cryptic, summary and non speaking manner in aforesaid order dated 31.03.2018, that the AO had not conducted requisite enquiry / investigation on exempt income earned by the assessee and applicability of the Provision of Section 14A of the IT Act, read with Rule 8D of I.T. Rules, 1962; without dealing with submissions made and materials placed by the assessee before the Ld. CIT vide aforesaid Letters dated 11.12.2017and 23.02.2018, as per foregoing paragraphs (38.1.1) and (38.1.1.2) of this order. It is also found, in view of foregoing paragraph (37.2) (i) of this order, that the allegations of the Ld. CIT against the AO, narrated by him in paragraph 4 of the aforesaid order dated 31.03.2018, fluctuate in severity and description. From these features of the aforesaid order

dated 31.03.2015 of Ld. CIT; it can be concluded that the order has been passed by Ld. CIT in a hasty manner, without due applications of mind, without fully taking into consideration the submissions made and materials placed by the assessee before Ld. CIT, and without dealing with thefull force of assessee's submissions and contentions; and part of the order is also cryptic, summary and non-speaking in nature. An order such as this, is liable to be quashed.

(40) As already mentioned in paragraphs (37.2)(i) and (39) of this order, the Ld.CIT has varyingly alleged that no substantial enquiry / investigation was conducted by the AO for assessee's claim of deduction U/s 80-IA of IT Act; that the AO has not at all initiated the requisite enquiry with regards to deduction claimed U/s 80-IA of the IT Act; and that it was the duty of the AO to minutely examine the eligibility of claim and true eligible quantum of exemption to be allowed (U/s 80IAof IT Act) and alleged that the AO completely failed in examining this aspect and in bringing any evidence on record in this behalf. All of these allegations, while varying in severity and description, are, however, contrary to materials on record.In paragraph (38) of this order, a list of various details filed by the assessee during assessment proceedings, has been summarized. In paragraph (38.1) of this order,the partial disallowance made by the AO out of assessee's claim for deduction U/s 80-IA of IT Act has been mentioned. In paragraphs (38.1.1), (38.1.1.1) and
(38.1.1.2) of this order, a gist of the submissions made by the assessee and the materials brought by the assessee for the consideration of the Ld. CIT during proceedings U/s 263 of IT Act, have been included wherein the assessee has elaborately explained the enquiries / investigations conducted by the AO and howthe AO examined this aspect and brought evidences on record in this behalf. In paragraphs 22, 23 and 24 of the order of esteemed Judicial Member, he has elaborately explained the enquiries / investigations conducted by the AO and how the AO examined this aspect and brought evidences on record in this behalf. In view of the foregoing, it is readily inferred that the allegations and conclusions of fact expressed by the Ld. CIT as per foregoing paragraph (37.2)(i) are such, whichcannot be drawn by any reasonable person or authority on the disclosed state offacts. Such being the case, the factual conclusions and the allegations of the Ld. CIT as per foregoing paragraph (37.2)(i) are held to be patently perverse.

28. ACIT v. M/s. Saviour Builders P. Ltd. (ITA No. 4818/D/14)(16.04.19)(ITAT, Delhi)

SECTION 271(1)(C) – PENALTY IN THE CASE OF SEARCH AFTER 1ST JUNE 2007 BUT BEFORE 1ST JULY, 2012 – PROVISIONS OF SECTION 271AAA ARE OVERRIDING PROVISIONS AND PENALTY U/S 271(1)(C) IS NOT SUSTAINABLE

Held, from the above, it is evident that Section 271AAA is an overriding provision and which is applicable where the search has been initiated under Section 132 on or after 1st June, 2007 but before the 1st day of July, 2012. In respect of such search for any undisclosed income, the penalty is leviable under this Section at the rate of 10% of the undisclosed income. Sub-section (3) has clearly provided that no penalty under Section 271(1)(c) shall be imposed upon the assessee whose case is covered by Section 271AAA. Admittedly, in this case, the search has taken place on 31st January, 2011 which falls within the period in which Section 271AAA was applicable i.e., after the 1st day of June, 2007 but the 1st day of July, 2012. In the above circumstances, in our opinion, learned CIT(A) rightly held that in

this case, penalty was leviable under Section 271AAA and not under Section 271(1)(c). Similar view has been expressed by the ITAT, Delhi Bench in the case of Ashwani Kumar Arora (supra) relied upon by the learned counsel. [Para 6]

29. Anuraag Jaipuria vs ACIT (ITA Nos. 737/Del/2016)(Dated: 27.03.2019)

SECTION 271AAA - IF THE AMOUNT WAS NOT SURRENDERED AT THE TIME OF SEARCH BUT WAS SURRENDERED SUBSEQUENTLY DURING THE COURSE OF ASSESSMENT PROCEEDINGS BY ASSESSEE SURRENDERING THE SAME IN HIS OWN HANDS IN THE COMPUTATION OF INCOME - SPECIFIC PROVISIONS OF SECTION 271AAA WILL NOT BE ATTRACTED - SHRI MAHAVIR PRASAD JAIPURIA IN ITA NO. 6643/DEL/2015 FOLLOWED.

7. After considering the rival submission, we are of the view that the issue is covered in favour of the assessee by order of ITAT Delhi 'F' Bench in the case of Mahavir Prasad Jaipuria (supra) who is also connected with the same search and connected with the group. On identical facts, the similar penalty has been cancelled by the Tribunal. In the case of the assessee also, assesse declared additional income at the assessment proceedings vide letter dated 04.03.2014 in a sum of Rs. 3,64,602/-. Further, the assessee has explained the items which have been surrendered at the assessment proceedings. Therefore, no penalty is leviable. Following the order of the Tribunal in the case of Mahavir Prasad Jaipuria (supra), we set aside the orders of the authorities belowand cancel the penalty.

30. Avtar Singh Kochar v. DCIT. (ITA No.2969/D/15) (Dated 25/03/2019)

SECTION 271AAA – PENALTY ON SURRENDER OF INCOME DURING THE COURSE OF SEARCH – DUE DATE FOR DEPOSIT OF TAX ON INCOME SURRENDERED IN THE COURSE OF SEARCH – SECTION 271AAA DOES NOT PRESCRIBE ANY TIME LIMIT FOR PAYMENT OF SUCH TAX – IF TAX NOT DEPOSITED ALONG WITH RETURN OF INCOME BUT DEPOSITED BEFORE THE ASSESSMENT, IMMUNITY FROM PENALTY UNDER SECTION 271AAA TO BE GRANTED.

Held, The contention of the assessee is that there is no time limit prescribed forgetting the immunity and the contention of the revenue is that such tax should have been paid before at least due date of the filing of the return of income. As per information available on record it is apparent that assessee has not paid the tax together with the interest in respect of the undisclosed income before the due date of filing of the return of income except, case seized of INR 12,100,000 during the course of search. Admittedly on such cash seized which is adjusted by the AO later on under section 154 of the income tax act the assessee should get benefit of the sum at least…. However with respect to the balance sum, the assessee has not paid tax before the due date of the filing of the return for that impugned assessment year i.e. on or before 30/9/2011. Admittedly such tax has not been paid before the due date of filing of return of income but only later on. Reading of the provisions of section 271AAA of the act, we also do not find that there is any time limit for payment of the tax, despite the necessary condition. It is rather surprising that the legislator has made a condition precedent for immunity from levy of the penalty of payment of taxes

alongwith interest on undisclosed income, but has not prescribed the time limit for the payment of such tax. It is necessary that whenever there is a condition precedent from seeking immunity from penalty of payment of tax, naturally there should also be a timeline by which it should have been paid. The legislature has not put such timeline. The honourable courts have interpreted such timeline up to the date of assessment because that is the time when the taxes are computed on the undisclosed income…. Further the ld CIT A has held that assessee has not paid tax alongwith the return of income, however there is another provision for consequences of for non payment of self assessment tax u/s 140A (3) of the Act but not271 AAA of the act…. In view of the above judicial precedents and respectfully following the decision of Honourable Delhi high court, we hold that when assessee has deposited complete tax before the assessment is made, the penalty u/s271AAA of the act to that extent cannot be levied. However, on reading the orders of the lower authorities as well as the information furnished by the ld AR, it is not certain about what is amount of tax paid before making the assessment u/s 143(3) of the act. Hence, we set aside the whole issue back to the file of the ld AO with a direction to levy penalty only on the proportionate sum for which tax and interest has not been paid on orbefore the passing of the assessment order u/s 143 (3) of the act. Accordingly, we reverse the order of the lower authorities and direct the learned assessing officer to recompute penalty u/s 271AAA of the act only on the tax along with interest on undisclosed sum remaining outstanding up to the date of assessment..**[Paras11, 12, 13, 14]**

31. Punjab and Sind Bank v. DCIT (ITA No. 5487/D/14)(04.04.19)(ITAT, Delhi)

SURCHARGE AND EDUCATION CESS ARE TO BE LEVIED ONLY AFTER REDUCING MAT CREDIT FROM TAX CALCULATED UNDER NORMAL PROVISIONS OF THE INCOME TAX ACT, 1961.

Held, On a reading of section 115 JAA (2) we find that the law says that the tax credit to be allowed under subsection (1) shall be the difference of the tax paid for any assessment year under subsection (1) of section 115 JAA and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of the Act. However, this aspect is no longer res Integra and the Hon'ble Allahabad High Court in the case of Vacment India (supra) dealt with this issue. [para 9]

In CIT vs. Vacment India(2014) 369 ITR 304 (All), the Hon'bleHigh Court of Allahabad while considering the question made the following observations, which are relevant for our present purpose of deciding this issue,-

> "4. The Commissioner (Appeals) allowed the appeal filed by the assessee by an order dated 18 October 2013 and directed the Assessing Officer to compute the gross tax liability on the assessee in accordance with the method of computation provided in ITR-6 for the assessment year 2011-12. The Tribunal has dismissed the appeal filed by the Revenue by its order dated 22 May 2014.
>
> 5. The only question which is raised pertains to the computation of tax in accordance with the modalities which are prescribed in the relevant form, ITR-
>
> 6. Insofar as is material, the relevant entries in the form (Part B-TTI) are as follows:

3. Gross tax payable (enter higher of 2c and 1)

4. Credit u/s 115JAA of tax paid in earlier years (if 2c is more than 1 (7 of Schedulre MATC)

5. Tax payable after credit u/s 115JAA (3-4)

6. Surcharge on 5

7. Education Cess, including secondary and higher education cess (5+6)

8. Gross Tax liability (5+6+7)

6. The aforesaid entries leave no manner of ambiguity in regard to the method of computation of tax liability. Entry 3 requires computation of the gross tax payable. Under entry 4, credit is required to be given under Section 115JAA of the Act of the tax paid in earlier years. Entry 5 requires a computation of the tax payable after credit under Section 115JAA of the Act. The matter is placed beyond doubt by the parenthesis, which indicates that tax payable under entry 5 is to be arrived at by deducting the credit under Section 115JAA of the Act (under entry 3) from the gross tax payable (under entry 4). The surcharge is computed on the amount reflected in entry 5.

7. The Tribunal has noted that from the next assessment year, AY 2012-13, the position was materially altered, but in the present case, since the dispute related to AY 2011-12, the method of computation, as directed by the Commissioner (Appeals), was plainly in accordance with the methodology as provided in ITR-6. The Tribunal in confirming the order of the Commissioner (Appeals) has, hence, not committed any error….."

[Para 10]

In view of this decision of the Hon'ble Allahabad High Court, while respectfully following the same, we are of the considered opinion that facts are squarely covered by the said decision and the issue goes in favour of the assessee. We, therefore, accepting the contention of the assessee direct the learned Assessing Officer to first reduce the taxability by the mat credit and then apply the surcharge and education cess to reach the taxability of the assessee. [Para 11]

32. ACIT v. Harish Kumar Luthra (ITA No. 890/D/14)(04.04.19)(ITAT, Delhi)

ADDITION ON THE BASIS OF PRESUMPTION – THE ASSESSEE PURCHASED SHARES OF A COMPANY THROUGH THIRD PARTY AT DISCOUNTED PRICE AND SURRENDERED THE SAME AS INCOME – THE ASSESSING OFFICER MAKING ADDITION IN RESPECT OF DIFFERENCE BETWEEN DISCOUNTED PRICE SO SURRENDERED AND SHARE PRICE RECORDED IN THE BOOKS – THERE ADDITION WAS HELD TO BE NOT JUSTIFIED AS THERE IS NO MATERIAL ON RECORD TO SUGGEST THE ASSESSEE HAD PAID OVER AND ABOVE THE SURRENDERED AMOUNT.

Held, Unless and until, learned AO gathers any material to be placed on record that the assesses have paid anything more than Rs.8 crore for purchase of the shares worth Rs.12 crores at a discounted price, it is not open for the learned AO to draw an inference that the assesses made payment of Rs.12 crore and thereby bring Rs.4 crore to tax in view of the judgment of the Hon'ble Apex Court in the case of Calcutta Discounts (supra), it is always open for the traders to arrange their business transactions at a mutually agreed terms and the tax authorities cannot substitute the issue price or the market value of the shares whereas the consistent case of the assessee is that they purchased the shares at a discounted price at Rs.8 Crore. With this view of the matter, we do not find any illegality or irregularity in the findings of the learned CIT(A) and according upheld the impugned orders. We find the appeals of the revenue as devoid of merit and are liable to be dismissed, the appeals are dismissed accordingly. [Para 11]