DELHI ITAT (BAR) REPORTS – MAY 2019

1. ACIT v. Bentex Control and Switch Gear Co. (ITA No. 4089/D/16) (ITAT, Delhi) (17/05/19)

SECTION 2(22)(e) – ADDITION OF DEEMED DIVIDEND IN THE HANDS OF PARTNERSHIP FIRM WHERE PARTNERS WERE THE SHAREHOLDER IN THE LENDING COMPANY – ADDITION WAS DIRECTED TO BE DELETED AS THE PARTNERSHIP WAS NEITHER THE REGISTERED SHAREHOLDER NOR BENEFICIAL SHAREHOLDER IN THE TRANSACTION OF LOAN.

Held, it is an admitted fact that assessee is not having any shareholding in the company which is granted loan. In absence of any shareholding in the hands of the assessee firm deemed dividend cannot be taxed in the hands of the assessee. Dividend income is required to be taxed only in the hands of shareholder. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the addition of Rs. 295,00,000 made in the hands of the assessee. [Para 6]

2. Aggarwal ShikshaSamiti v. Chief Commissioner of Income Tax (Exemptions), (ITA No.6254/D/15) (Dated 10/05/2019)

SECTION 10(23C)(vi) – OBJECTS BESIDES EDUCATION ALSO PRINTED BUT NOT PERSUED WILL NOT DISENTITLE EXEMPTION UNDER SECTION 10(23C)(vi) OF THE ACT - THE ASSESSEE INCORPORATED WITH THE MAIN OBJECT OF PROMOTING EDUCATION AND ONLY CARRIED OUT EDUCATION ACTIVITIES – MERELY BECAUSE ASSESSEE PRINTED CERTAIN OTHER AIMS AND OBJECTS AS PER REQUIREMENT OF REGISTRAR OF SOCIETIES WOULD NOT DISENTITLE APPROVAL / REGISTRATION UNDER SECTION 10(23)(vi) OF THE ACT.

Held, It is not in dispute that the aims and objects ofthe assessee are to promote education and assessee inpursuance of aims and objects only carried out theeducational activities. The assessee did not do any otheractivity, therefore, merely mentioning some other aims andobjects would not disentitle the assessee for claimingexemption/approval under section 10(223)(vi) of the I.T.Act,. The Learned CCIT did not bring any material on recordas to how assessee was doing any other activity inpursuance to aims and objects of assessee society. Merelybecause the assessee printed certain aims and objects asper the requirement of Registrar of Societies would notmake out a case for rejection of the application of assesseefor approval under the above provision. The Ld. D.R. alsoreferred to Board Circular No.14 of 2015, Dated 17.08.2015in which it was directed that while granting registration /approval under section 10(23C)(vi) of the I.T. Act, thePrescribed Authority has to ensure that educationalinstitution must exist “solely for educational purposes andnot for the purpose of profit.” The Board Circular would notsupport the case of the Revenue because nothing has beenbrought on record if assessee exist for the purpose of profit.The

material on record clearly suggest that assessee solelyexist for educational purposes only. Merely because someother aims and objects have been mentioned other thaneducation, which have also not been verified at this stagewould clearly show that assessee is entitled for exemption /approval 10(23C)(vi) of the I.T. Act. The issue is covered infavour of the assessee by the Judgment of the Hon'blejurisdictional Punjab & Haryana High Court in the case ofHarf Charitable Trust (Regd.) Malerkotla vs. ChiefCommissioner of Income Tax And Another (supra). In viewof the above discussion, we set aside the Order of the Ld.CCIT and direct the Ld. CCIT, Panchkula to grantapproval/exemption to the assessee under the aboveprovision as per Law, within one month from the date of theOrder. Appeal of assessee society is allowed.**[Paras 9.3, 9.4]**

3. Income Tax Officer v. M/s. Innovative Welfare and Educational Society (ITA No.4304/D/16) (Dated 08/05/2019)

SECTION 11 R.W.S. 13 – DISALLOWANCE OF SALARY PAID TO RELATED PARTY INVOKING SECTION 13 OF THE ACT – SALARY PAID TO THE RELATED PARTY WAS APPROVED BY RESOLUTION PASSED IN THE GOVERNING BODY MEETING – AO DID NOT BRING ANY EVIDENCE ON RECORD AS TO HOW SALARY PAID WAS EXCESSIVE / UNREASONABLE VIS-À-VIS QUALIFICATION OF NATURE OF SERVICE PROVIDED – SALARY PAID TO PERSONS WAS COMPARED BY ASSESSEE WITH ENHANCED SALARY UNDER 6TH PAY COMMISSION APPLICABLE TO GOVERNMENT EMPLOYEES – DISALLOWANCE OF SALARY AND CONSEQUENTIAL DENIAL OF EXEMPTION UNDER SECTION 11 REVERSED.

Held, After considering the submissions of the Ld. D.R,we are of the view that no interference is called for in thematter. The A.O. noted that salary have been paid to twopersons who were specified persons under section 13(3) ofthe I.T. Act. A.O. also noted that in previous assessment years, the assessee could not produce any documentsregarding approval of the governing body of the societyincluding the appointment and remuneration of both thesepersons. The A.O. also found that salary paid to thesepersons are excessive in comparison to the normal practicefollowed for other employees. The assessee, however,submitted before Ld. CIT(A) that both these persons wereappointed through the resolution passed under the GeneralBody Meeting dated 04.06.2008. It was also submitted thatboth these persons have devoted full time to the educational institution to the best of their knowledge, ability andexperience. It, therefore, appears that A.O. followed theorders for earlier years, in which the assessee did notproduce documents regarding approval of the GoverningBody. Further assessee explained that Governing Bodypassed resolution in earlier year on 04.06.2008. The A.O.did not bring any evidence on record as to how the salarypaid to these persons with reference to their qualificationwas excessive or unreasonable. A.O. did not make anycomparison, but, appears to have followed order for earlier years. In earlier year, the matter have been decided infavour of the assessee as is noted by the Ld. CIT(A) in hisOrder because the same salary have been considered inearlier years. The Ld. CIT(A) also referred to decisions of theCoordinate Bench of Delhi Tribunal in the case of ACIT vs.Idicula Trust Society (supra), in which the Tribunal hasreferred to the enhancement in pay/salary by Sixth PayCommission in January, 2006. In the case of the assessee,assessee explained that salary paid to these persons waseven less than the salary

prescribed by the Sixty PayCommission. Since the A.O. compared the facts of this yearfor earlier years, in which, relief has already been granted tothe assessee as per findings of the Ld. CIT(A), therefore, Ld.CIT(A) correctly following the earlier precedence, deleted theaddition. No interference is called for in the matter. Appealof Revenue dismissed.**[Para 6]**

4. GE Capital Services India vs. DCIT (ITA No. 2066/D/2015) (Dated: 14.05.2019)

SECTION 14A – DISALLOWANCE UNDER RULE 8D FOR EARNING TAX FREE INCOME HAS TO BE RESTRICTED TO THE EXTENT OF EXEMPT INCOME.

12. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We find that the assessee has suo moto disallowed Rs. 25,817/- u/s 14A of the Act for earning tax free dividend income of Rs. 78,037/-. It is also not in dispute that the Assessing Officer has not recorded any satisfaction in so far as correctness or otherwise of the suo moto disallowance of Rs. 25,819/- made by the assessee is concerned. There is also no finding that the assessee has used interest bearing funds for making the investment in shares. The Revenue has failed to establish the nexus between the borrowed funds and the investment in shares.

13. Considering the facts in totality in light of no satisfaction being recorded by the Assessing Officer and considering the suo moto disallowance of Rs. 25,817/- qua the dividend income of Rs. 78,037/-, we direct the Assessing Officer to restrict the disallowance to the extent of exempt income of Rs. 78,037/-. Ground No. 1 is partly allowed.

5. DCIT v. BMR Business Solutions Pvt. Ltd., (ITA No.2990-91/D/16) (Dated 10/05/2019)

SECTION 36(1)(ii) – PAYMENT OF BONUS TO DIRECTOR IS NOT IN LIEU OF DIVIDEND – DIRECTOR WAS IN ACTIVE SERVICE AND THE AMOUNT OF BONUS PAID WAS NOT LINKED WITH PERCENTAGE OF SHAREHOLDING OF DIRECTOR IN THE COMPANY BUT FOR SERVICES RENDERED – NO MATERIAL BROUGHT ON RECORD BY THE AO TO SUBSTANTIATE THAT AMOUNT OF BONUS DECLARED WAS PAYABLE AS DIVIDEND.

Held, We have heard both the parties and perused the records,Paper Book filed by the assessee; submissions of both the parties,case laws relied upon from both sides and especially the impugnedorder. We find that the assessee company filed its return of incomedeclaring a loss of Rs. 1,13,07,173/-. The case of the assessee wasselected for scrutiny. The assessee company engaged in thebusiness of management consultancy services during the year underconsideration. The AO in the assessment order was of the view thatthe amount of Rs. 1.78 crores paid by the assessee to its DirectorMr. Sanjay Mehta, and claimed as bonus was not allowable in viewof section 36(1)(ii) of the Act because the sum was actually payableas dividend. However, it has been observed by Hon'ble Courts thatthere are certain limitations and restrictions in the matter ofpayment of dividend and discretion of the company either to pay ornot to pay dividend cannot be assumed. We find that the AssessingOfficer has not brought any material on record to substantiate thisallegation that the amount in question was actually payable asdividend. In fact,

Mr. Sanjay Mehta was having only 11%shareholding in the assessee company and if Rs.1.78 crores hadbeen paid as dividend (and not as bonus) to him, the assesseewould have had to distribute dividends to tune of Rs. 16.16 crores(1.78 x 100/11) whereas it was having loss of Rs. 1.17 croresduring the year and accumulated profits of Rs.6 crores only. This isbecause, shareholding of Mr. Sanjay Mehta was 11% only and allthe equity shareholders have equal rights. Mr. Sanjay Mehta isstated to be a Chartered Accountant by profession and a seniorconsultant with many years of experience. Assessee furthersubmitted that bonus was a variable remuneration for professionalservices rendered and amount of bonus was decided by the Board prior to the commencement of the financial year i.e. vide BoardResolution dated 10th March, 2010. We further find that it wasactually paid during the year, on 31st August, 2010 and 30thNovember, 2010 and not post closing of the year. No bonus /dividend was paid to the remaining major shareholders holding 89%equity…. We further note that also similar circumstances prevailed inthe case of the assessee in the earlier assessment years, A.Ys.2007-08, 2009-10 and 2010-11, wherein additions/disallowancesmade by the Assessing Officer on this account were deleted by theLd. CIT(A). The relevant portion of the finding of the Ld.CIT(Appeals) in Appeal no. 106/13-14 vide order dated 30.04.2014for A.Y. 2010-11 in the case of the assessee on similar issue isreproduced below….We further note from the Assessee's Paper Book Vol. 2 whichis containing pages 148 to 153 having the copy of order dated1.10.2018 passed by the AO in assessee's own case for theassessment year 2009-10 pursuant to the order passed by the DelhiBench of the ITAT wherein the AO held that assessee was justifiedin making payment of bonus amounting to Rs. 2,35,00,000/- toMr.Sanjay Mehta and the same was allowed as a deductiblebusiness expenditure; copy of the order dated 8.10.2018 passed bythe AO in the assessee's own case for the assessment year 2010-11 pursuant to the order passed by the Delhi Bench of the Tribunalreveals that Sh. Sanjay Mehta had rendered services to theassessee company during the financial year 2009-10 relevant toassessment year 2010-11 and allowed the bonus payment of Rs. 1,97,43,000/- to him and allowed the same as deductible businessexpenditure; copy of the order dated 2.2.2018 passed by theTribunal in assessee's own case bearing ITA Nos. 6503/Del/2012and 4141/Del/2014 for assessment years 2009-10 and 2010-11 andthe chart depicting stand of the Department in assessee's case forvarious assessment years and relied upon the case law of ITAT, Delhi I (Third Member) decision in the case of Zuari Leasing &Finance Corpn. Ltd. vs. ITO reported (2008) 112 ITD 205 (Delhi)TM. It is also noted from page no. 169 of the Paper Book Vol. 2which is a Chart showing stand of the Department in variousassessment years on this issue in dispute stipulates that in theassessment year 2007-08 bonus of Rs. 47,46,000/- paid to Mr.Sanjay Mehta allowed by the AO vide order dated 31.7.2017pursuant to the order fo the ITAT, Delhi Bench order dated 7.8.2012and in the assessment year 2008-09 no addition was made by theDepartment and also the case was not picked for scrutinyassessment. Similarly, in the assessment years in dispute i.e. AY2011-12 & 2012-13, the AO made the addition of Rs. 1,77,79,000/-and Rs. 1,77,37,500/- paid to Mr. Sanjay Mehta have already beendeleted by the Ld. CIT(A) vide his impugned orders for which theAssessee is in appeal before the Tribunal. The case laws relied by both the parties do not support the case being distinguished on facts. …Keeping in view of the facts and circumstances of the case asexplained above and adhering to the doctrine of Stare decisis, we do not find any infirmity in the impugned orders of the Ld. CIT(A),hence, we uphold the action of the Ld. Commissioner of IncomeTax(A) of deleting the additions in dispute and reject the groundsraised by the Revenue in both the appeals.**[Paras 5, 5.1, 5.2, 5.3]**

6. Pawan Kumar v. ACIT (ITA No. 1632/D/18)(29/04/19)(Delhi ITAT)

SECTION 36(1)(va) R.W.S 43B – EMPLOYEE'S CONTRIBUTION TO PF AND ESI DEPOSITED BEFORE DUE DATE OF FILING OF RETURN U/S 139(1) IS ALLOWABLE.

Held, After considering the rival submissions and on perusal of the relevant finding given in the impugned order, we find that there is no dispute that though there is a marginal delay depositing the employee's contribution to the provident fund in respect of EPF and ESI Act. However, these payments have been made much before the due date of filing of return of income i.e. on 6.10.2014. Now it is a well settled proposition , therefore, the said judgments prescribed upon by the Ld. Counsel that the due date referred to section 36(1)(va) must be read with u/s 43B, wherein it has been provided that if the assessee has made the payment before the due date of filling of return, then same can be allowed u/s 43B, specifically with regard to payment and contribution to PF and ESI at any time. Thus, respectfully following the aforesaid judgments, we direct the AO to delete the disallowance made by the AO. [Para 4]

7. Mansarovar Infratech P. Ltd. v. ACIT (ITA No. 7022/D/14)(ITAT, Del)(29.04.19)

SECTION 37(1) – ALLEGATION OF BOGUS PURCHASES – IN CASE OF ASSESSEE IS FOUND TO HAVE OBTAINED BOGUS BILLS IN SUPPORT OF PURCHASES – THE ASSESSING OFFICER CANNOT DISALLOW ENTIRE PURCHASES WITHOUT DISPUTING THE CORRESPONDING SALES – THE DISALLOWANCE IS TO BE RESTRICTED TO THE EXTENT OF PROFIT EMBEDDED IN PURCHASES.

Held, We have considered the submissions and perused the material on record. During the instant year, it is a matter of record that assessee has declared sales of Rs. 9,99,91,142/- and purchases of Rs. 9,90,26,702/- from trading of M.S Bar. It is also noted that books of account are duly audited under section 44AB of the Act. It is also noted that out of the total purchases, purchases of Rs. 32,76,741/- have been made from one M/s. Meet Enterprises. The copies of invoices from the supplier duly stating the bill no., tin no. have also been placed on record and copies of cheques issued alongwith the receipts from whom two cheques were issued have also been placed on record. It is noted as a matter of record that according to invoices, the supplier is M/s. Meet Enterprises, Ramdham Colony, Shivalik Nagar, Haridwar and as per the receipts issued by the said supplier, it is noted that the cheques have been issued to the said supplier. This fact is specifically evident from the invoices from pages 107 to 110 of Paper Book and receipts placed at pages 111 to 113 of Paper Book. It is also matter of record that statement of Director of assessee has been recorded by the Investigation Wing and in the course of such investigation, he had admitted to have received supplies from M/s. Meet Enterprises, Haridwar. The purchase and sale of assessee have also been accepted in the order of sales tax for the instant assessment year, copy of which is placed at pages 32 to 34 of Paper Book. The issue, therefore, arises is that once the supplies have been received by the assessee which are duly recorded in the books of account accepted as such and also accepted in the sales tax order, would it be justified to hold that such supplies against which payments have already been made are not genuine purchases for the reason that there is another proprietorship concern by the same name i.e. Meet Enterprises at Ghaziabad. It is no doubt true that cheques issued by the assessee in the name of M/s. Meet

Enterprises had been deposited in the account of M/s. Meet Enterprises, Ghaziabad instead of Meet Enterprises, Haridwar. But the sales made by the assessee have not been doubted by the Assessing Officer. It is impossible to make sales without corresponding purchases. In the stock register corresponding to the sales, purchases have been duly recorded. In the circumstances of no irregularity observed in the inventory record, entire purchases of Rs.32,76,741/- cannot be disallowed. [Para 4.4]

In the above facts and circumstances, we are of the considered opinion that it would be inappropriate to deny the entire expenditure claimed by the assessee. We are of the opinion that at best it would be a case that purchases have been made from one party in grey market and bills have been obtained from another party i.e. accommodation entry provider. Thus, the purchases themselves cannot be said to be bogus as the same is duly recorded in the books of account of the appellant and such books stands accepted even in the impugned order of assessment. [Para 4.5]

We are of the opinion that the entire amount should not be disallowed but the disallowance should be restricted to the profit margin embedded in such amount. This view is also supported by the judgment of Gujarat High Court in the case of CIT vs. Bhola Nath, 355 ITR 290. [Para 4.6]

8. M/s. Aishika Pharma P. Ltd. v. ITO (ITA No. 732/D/19)(ITAT, Delhi)(29.04.19)

SECTION 37(1) – SALES PROMOTION EXPENSES INCURRED BY PHARMACEUTICAL COMPANY NOT IN THE NATURE OF FREEBEES TO DOCTORS- REGULATION OF INDIAN MEDICAL COUNCIL AND CBDT CIRCULAR 5/2012 ARE NOT APPLICABLE TO PHARMA AND HEALTHCARE COMPANIES – CLAIM OF SALES PROMOTION EXP ALLOWABLE.

Held, we have considered the rival submissions and perused the material available on record. The authorities below have rejected the claim of assessee of claiming expenses on account of business promotion. The assessee is admittedly engaged in the business of trading and marketing of medicines. During the year under consideration, the assessee claimed that due to competition in the Pharma Industry, the assessee company shall have to incur expenditure on business promotion which includes constant meetings/seminars/knowledge dissemination with doctors/medical practitioners/medical stores in the areas of operation of the company. The assessee company in this way organized medical camps/blood donations camps/free check-up camp etc., and on such occasion, incurred expenditure including distribution of medicines /kits etc., with logo of assessee company and refreshment and dinner etc. The list of expenditure as per ledger account is filed which shows that business promotion expenses have been incurred mostly on medical camps organized with tea and snacks, ball pens, purchased for distribution to Doctors and Hospitals, with logo of the assessee company, organizing cardiac camps, Doctors meetings for various products for awareness of their product with refreshment and dinners etc., The authorities below have not commented upon these expenditure incurred by the assessee company for business promotion. The assessee company in this way made aware the Professionals of the product in which assessee company was giving small gifts having logo and brand name of the assessee company and product name have been mentioned. Copies of the bills

and certificates from the concerned persons are filed which supports the explanation of assessee company that assessee company did not provide any gifts to the professionals for referring any patient or customer. The expenditure incurred by assessee company are thus not in the nature of freebies provided to any of the professionals. The activity of the assessee company for incurring the sale promotion expenses are to make the persons connected with business of the assessee company, aware of its product and research work carried out by the company for bringing the medicine in the market and its results are based on several efforts made by the assessee company. Since the assessee company make aware of such kind of product to the key persons in the market, then only it can successfully launch its product/ medicine. Thus, these expenditure were purely incurred for business promotion of the assessee company. The authorities below, rejected the claim of assessee company considering that assessee company has provided freebies to the Medical Practitioners and referred to the provisions contained under Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulations, 2002 and also referred to CBDT Circular No.5/2012, Dated 01.08.2012. The said Circular have been considered by the ITAT, Mumbai Bench in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra), in which it was clearly held that said Regulations and Board Circular are not applicable to Pharma and allied Health Care Companies. Therefore, there is no question of application of Section 37(1) of the I.T. Act. The issue is, therefore, covered in favour of the assessee by the Order of ITAT, Mumbai Bench, in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra). The authorities below have also referred to decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd., (supra) and Order of ITAT Delhi Bench in the case of DCIT vs. OCHOA Laboratories Ltd., (supra), which are clearly distinguishable on facts and would not be applicable to the facts and circumstances of the case. Considering the nature of the business promotion expenses incurred by the assessee company in the light of Order of ITAT, Mumbai Bench, in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra), we are of the view that whatever expenses incurred by the assessee company are only on account of business promotion expenses which are allowable under the provisions of the I.T. Act. The authorities below have failed to provide as to what offence have been committed by the assessee company on incurring such expenses under any Law. Therefore, there is no question of applying Explanation to Section 37(1) of the I.T. Act, 1961, against the assessee company. [Para 6]

9. ITO vs. Citi Financial Consumer Finance India Ltd. (ITA No. 2638/D/16) (Dated: 23.05.2019)

SECTION 37 - LOAN ACQUISITION FEE EXPENSES OF Rs. 34,10,24,866/- TO BE ALLOWED AS REVENUE EXPENDITURE - SINCE THERE IS NO CONCEPT OF DEFERRED REVENUE EXPENDITURE WHICH HAVE BEEN INCURRED WHOLLY AND EXCLUSIVELY FOR THE PURPOSE OF BUSINESS - THE SAME ARE ENTITLED TO BE ALLOWED IN THE YEAR IN WHICH THEY HAVE BEEN INCURRED – THAT FURTHER EXPENDITURE INCURRED BY THE ASSESSEE ON ISSUE OF NCD IS ALLOWABLE IN ENTIRETY IN THE YEAR IN WHICH IT WAS INCURRED.

7. AO declining the contentions raised by the assessee spread the loan acquisition fee expenses of Rs.34,10,24,866/- over the period of three years and after allowing the amount of

Rs.11,36,74,955/- made an addition of Rs.22,73,49,911/- to be allowed in the next two years. Ld. AR for the assessee supporting the order passed by the ld. CIT (A) contended that there is no concept of deferred revenue expenditure and stated that this issue is covered by the order passed by the Tribunal in assessee's own case for AY 2003-04, 2004-05, 2005-06 and 2006-07. Ld. AR for the assessee further brought on record that in AY 2006-07, Revenue challenged the order of the Tribunal before the Hon'ble High Court who has dismissed the appeal vide order dated 28.09.2015.

10. AO has spread the expenditure of Rs.16,42,99,870/- claimed by the assessee on account of non-convertible debentures issued by the company to fund its financing activities and on account of commercial papers, over a period of five years and accordingly allowed 1/5th thereof and remaining to be allowed in the next four years. However, the ld. CIT (A) has over turned the order passed by the AO and allowed the same in entirety in the year of its incurrence.

10. ACIT v. Akshay Sobti, (ITA No.5900-01/D/15) (Dated 10/05/2019)(ITAT, Del)

SECTION54 – EXEMPTION OF LONG TERM CAPITAL GAIN FROM INVESTMENT IN UNDER CONSTRUCTION FLAT – DATE OF BUILDER BUYER AGREEMENT ISNOT TO BE CONSIDERED AS THE DATE OF PURCHASE OF RESIDENTIAL HOUSE – CATEGORY OF BUILDER BUYER AGREEMENT WOULD COME WITHIN THE PURVIEW OF CONSTRUCTION OF RESIDENTIAL HOUSE – ACCORDINGLY, EVEN IF BUILDER BUYER AGREEMENT WAS ENTERED PRIOR TO ONE YEAR FROM THE DATE OF RESIDENTIAL HOUSE, IF THE FLAT IS ACQUIRED WITHIN THREE YEARS FROM THE DATE OF TRANSFER, THE ASSESSEE WOULD BE ELIGIBLE FOR EXEMPTION OF LONG TERM CAPITAL GAIN UNDER SECTION 54 OF THE ACT.

Held, We have heard both the parties and perused the records,Paper Book filed by the assessee; submissions of both the parties,case laws cited by the Ld. counsel for the assessee and specially the impugned order passed by the Ld. CIT(A). With regard toground no. 1 relating to disallowance of deduction u/s. 54 of theAct is concerned, we find that the assessee declared long termcapital Rs.12,33,36,714/- from the sale of property at 146, 2nd floorwith terrace Jorbagh, New Delhi on 21.12.2011 on which heclaimed deduction u/s 54 amounting to Rs.4,00,97,217/-. However,the AO disallowed the claim on the grounds that the assessee hadentered into an agreement dated 10.02.2006 and therefore the dateof agreement be treated as the date of acquisition, which fallsbeyond the period of one year prior to the date of transferprescribed under section 54 of the Income-tax Act, owing thejudgment of Honorable Delhi High Court in the case of GulshanMalik Vs. in ITA no. 55 of 2014 and CIT vs R.L.Sood [2008] 109taxman 227/245 ITR 727 Delhi), he disallowed the claim of theassessee. According to Assessing officer, the assessee could havepurchased a house property between 28.12.2010 to 28.10.2011 inorder to claim deduction under section 54. Since the assesseeinvested in the residential House property namely DLF Magnolia wayback in F.Y. 2005-06 which is clearly outside the time periodmentioned in section 54 of the Income-tax Act, it does not fit incase of exemption under section 54 of the Act. The Assessingofficer placed reliance on the judgement of Honorable High Court at Delhi in the case of Gulshan Malik Vs. CIT in ITA no. 55 of 2014 andCIT vs R. L. Sood [2008] 109 taxman 227/245 ITR 727 (Delhi).However, the assessee submitted that in order

to avail the benefitunder section 54 of Income-tax Act he is required to purchase aresidential house property either one year before or within two yearafter the date of transfer of original asset; or within a period ofthree years after that date he is required to construct a residentialhouse. We note that it has been clarified by the CBDT in CircularNo.672 dated 16.12.1993 in which it has been made clear that theearlier circular No. 471 dated 15.10.1986 in which it was stated thatacquisition of flat through allotment by DDA has to be treated as aconstruction of flat would apply to co-operative societies and otherinstitutions. The builder would fall in the category of otherinstitutions as held by Mumbai Bench of Tribunal in the case Smt.Sunder Kaur Sujan Singh Gadh and therefore booking of the flatwith the builder has to be treated as construction of flat by theassessee. Thus, in the present case, the period of three years wouldapply for construction of new from the date of transfer of theoriginal asset. The above circulars are binding on revenueauthorities under s. 119 of the Act. He referred the decisionrendered by Honorable High Court of Bombay in the case of Mrs.Hilla J. B. Wadia (216 ITR 376), wherein the Honorable High Court has held that it is a case of "Construction". Reliance was placed onthe judgment of Honorable Karnataka High Court in the case of CITVs. J.R. Subramanya Bhatt (1887) 165 ITR 571 (Karn), wherein ithas been held at it is immaterial whether the construction of thenew house was started before the ate of transfer, it should becompleted after the date of transfer of the original house. In thepresent case, he had booked a semi finished flat with the builder,namely DLF Universal Limited in the residential group housingcomplex named as Magnolias DLF Golf Links) and as per agreement,he was to make payment in installments and the builder was toconstruct the unfinished bare shell of flat for finishing by the buyerson their own to make it live-able (having specifications set out inAnnexure-V) as per clause 10.1 of the said agreement. It is alsonoted that Builder Company offered vide letter dated 30.12.2011that the Occupation certificate has been received from theCompetent Authorities and the six months period for completing theinteriors, in terms of agreement shall commence from 01.01.2012and is to be completed before 30.06.2012. Builder Company's letterdated 20.03.2012 and 20.01.2012 offered to finalise the details ofinteriors and extended the time for completion of interior to30.09.2012 and finally possession was granted on 30.10.2013. Ithas therefore to be considered as a case of construction of newresidential house and not purchase of a flat. Since the flat has beenallotted to the assessee by the builder who would fall in thecategory of other institutions mentioned in the circulars, it has to betaken as a case of construction of the residential flat and not as apurchase of a residential flat. Therefore, he had time window ofthree years period available to him commencing from 21.12.2011till 21.12.2014 to construct a house property. Having come to thisconclusion that it is case of construction it is now to be seen if theassessee fulfils the conditions laid down under s. 54(1) of the Act.In the instant case, the assessee has occupied the house propertyduring 2013 vide letter dated 30.10.2013 offering occupation ofHouse property. Further, the assessee has claimed the deduction onamount invested till the due date of filing of return under section139(1) of the Income Tax Act. Further, the reliance placed by theAssessing officer on the judgment of Honorable Delhi High Court inthe case of Gulshan Malik Vs. CIT in ITA no. 55 of 2014 is notrelevant to the facts of the case under appeal, since the issueinvolved in the case of Gulshan Malik was pertaining to the period ofholding of an asset for the purpose of establishing whether resultantgain is long term capital gain or is short term capital gain. It washeld a right or interest in an immovable property can accrue only byway of an agreement embodying consensus ad idem as against theconfirmation letter that does confer any right to claim title. Similarlyin the case of CIT vs. R.L.Sood [2008] 109 man 227/245 ITR 727(Delhi), the Honorable High Court has

declined request of therevenue to call for reference on the proposed question. It hasfurther been clarified at realizing the practical difficulties faced bythe assessee in such situations, the CBDT issued a circular No. 471,dt. 15th Oct,. 1986. The relief extending instructions of the CBDT, inwake of realization of practical difficulties faced by the assessees, byway of circular extending relief to even marginally non compliantassessees in its literal sense of hyper technicalities, cannot be used as a tool to interpreted instructions of the board or decision of thelaw Courts, to deny the very relief to the otherwise compliantassessees. In a recent reference to Honorable Delhi High Court, inthe case of CIT vs Kuldeep Singh, the Honorable Court has observedand discussed various decision of the other Honorable High Courtsand Honorable Supreme Court; as follows;

A. CIT Andhra Pradesh vs. T. N. Aravinda Reddy (1979) 4 SCC721;
B. Civil Appeal nos. 5899-5900/2014 titled Sh Sanjeev Lai etcetc vs. CIT Chandigarh &Anr decided on 01/07/2014, 2014 (8)SCALE 432
C. Reference was made to the decision of Supreme court in CITvs J.H. Gotla [1985] 156 ITR 323 (SC).
D. Moreover in CIT vs Bharati C Kothari (2000) 244ITR 352

In the instant case, since the assessee entered into an agreementfor construction of a bare shell of a house by periodic payment ofinstallments and he had to carry the internal fit-outs to make it liveableas per Annexure-V of the agreement with the Builder Company,within Six months from the date of certificate of occupation from thecompetent Authorities, this is to be treated as the case ofconstruction. Further, the construction has been completed withinthree years of the sale of original asset, which is accepted by theAssessing Officer, the relief under section 54 is genuinely claimed byhim and therefore, disallowance made under section 54 amountingto Rs. 4,00,97,217/- needs to be deleted. It is it is clear that thefacts of the present case that it was a case of construction of flatand not purchase of flat as held by the AO. Since, the case pertainsto construction, benefit of section 54 of the Act are available toassessee. In view of above, the booking of bare shell of a flat is aconstruction of house property and not purchase, therefore, the date of completion of construction is to be looked into which is asper provision of section 54 of the I.T. Act., therefore, the Ld. CIT(A),has rightly directed the AO to allow benefit to the assessee asclaimed u/s.54 of the I.T. Act, which does not require anyinterference on our part, hence, we uphold the action of the ld.CIT(A) on the issue in dispute and reject the ground raised by theRevenue.**[Para 6]**

11. Kapil Kumar Agarwal Vs DCIT (ITA No. 2630/Del/2015)(ITAT, Delhi)(30.04.19)

SECTION 54F – EXEMPTION OF CAPITAL GAIN – CONSTRUCTION OF NEW HOUSE STARTED PRIOR TO SALE OF ASSET – BENEFIT OF EXEMPTION AVAILABLE

Held, With respect to the 2nd question whether the construction of the house property if commenced before the date of the sale of the original asset whether the assessee is entitled to deduction u/s 54F of the income tax act or not. The Hon‟ble Delhi High Court in case of CIT vs Bharti Mishra (2014) 41 Taxmann.com 50 (Delhi)/[2014] 222 Taxman 2 (Delhi)/[2014] 265

CTR 374 (Delhi) has examined the issue that whether assessee can be denied benefit of section 54F because construction of the house had commenced before the sale of the shares. Identical is the issue before us that the assessee sold the shares as in assessment year 2011 – 12 and the assessee started making investment in the new asset with effect from 18/08/2006. For this reason the learned assessing officer denied the benefit of section 54F of the act. [Para 10]

As the impugned issue is squarely covered in favour of the assessee by the above decision of the honourable High Court, we hold that assessee has purchased a house property i.e. a new asset and is entitled to exemption u/s 54F of the act despite the fact that construction activities of the purchase of the new house has started before the date of sale of the original asset which resulted into capital gain chargeable to tax in the hands of the assessee. [Para 11]

12. ITO v. Computer Home Information Plus P. Ltd. (ITA No. 5680/D/16)(ITAT, Delhi)(24/05/19)

SECTION 68 – LOW INCOME IN ITR CANNOT BE DETERMINATIVE OF CAPACITY AND CREDITWORTHINESS OF THE LENDERS – IDENTITY OF THE PARTIES CONFIRMED BY THE RESPECTIVE BANK – NO CASH DEPOSIT IN THE BANK ACCOUNT OF THE LENDERS BEFORE TRANSFER OF FUNDS TO THE ASSESSSEE – ONUS U/S 68 STOOD DISCHARGED – ADDITION DELETED.

Held, we have also thoroughly examined the financial accounts of the five lender companies. At the very outset, we have to state that that income may be a good reason for examining the source of a person but it is certainly not the "be all end all". Let us take an example, if person is drawing salary of Rs. 10 lakhs p.a. and purchases a residential flat of Rs. 50 lakhs. Can merely on the basis of his income addition be made as unexplained investment? The answer is evidently "No" because that person may have taken housing loan of Rs. 40 lakhs to purchase the residential flat. [Para 18]

By the same analogy on examining the balance sheet of each of the lender company which are exhibited from pages 233 to 330 of the Paper Book. We find that each of the lender company has generated either short term borrowings or have liquidated current assets which are more than sufficient to extend the loan to the assessee company. It is pertinent to mention that the AO had also served notices u/s 133(6) of the Act to the banks of each lender company who has furnished the bank statement of the lender companies. The bank statements are exhibited from pages 31 to 56 of the Paper Book. A perusal of the same reveals that no cash was found to be deposited prior to the date of the issue of cheques to the assessee company. This conclusively proves that the assessee has not purchased cheques by paying cash to the lender companies. Since, the banks have responded to the notice by furnishing the Articles of Association, Memorandum of Association, bank opening forms of the lender companies which clearly demonstrated that all the companies have fulfilled KYC Norms of banks. Therefore, the identity of these lender companies have been established beyond doubts. [Para 19]

The genuineness of the transaction can be safely concluded as all the transactions have been done through proper banking channel. [Para 20]

The source of funds are clearly established from the financial statements of these lender companies irrespective of their meagre income or nil income. [Para 21]

13. IPL Realtors Pvt. Ltd. vs. ITO (ITA No. 2378/D/2018) (Dated: 21.05.2019)

SECTION 68 - AS A RESULT OF SEARCH AND SEIZURE OPERATIONS CARRIED ON IN SH SURENDER KUMAR JAIN GROUP OF CASES - ADDITION MADE BY THE AO AND CONFIRMED BY THE LD CIT(A) MERELY ON THE BASIS OF STATEMENT OF SATISH GARG ALLEGED ENTRY PROVIDER - NON PROVIDING OF OPPORTUNITY OF CROSS EXAMINATION IS IN VIOLATION OF PRINCIPLE OF NATURAL JUSTICE AND AGAINST THE LAW LAID DOWN BY THE HON'BLE SUPREME COURT IN THE CASE OF ANDAMAN TIMBER VS. CIT DECIDED IN CIVIL APPEAL NO. 4228 OF 2006 - IN THE CASE OF UDIT KALRA VS. ITO , THE HON'BLE DELHI HIGH COURT HAS AD JUDICATED THE CASE ON MERITS AND HAS NOT ADJUDICATED THE ISSUE ON CROSS EXAMINATION.

6. Keeping in view of the facts and circumstances of the present case and respectfully following the order of the Tribunal, SMC Bench, Delhi in the case of Smt. Jyoti Gupta vs . ITO (Supra) and in view of the law settled by the Hon'ble Supreme Court of India in the case of Andaman Timber vs. CIT (Supra) , on identical facts and circumstances, the addition in dispute is deleted and the appeal of the assessee is allowed . As regards the case laws cited by the Ld . DR are concerned , in the case of Udit Kalra vs. ITO , the Hon'ble Delhi High Court has ad judicated the case on merits and has not ad judicated the issue on cross examination, therefore it will not help the department . As regards ITAT, SMC, Delhi decision in the case of Pooja Ajmani vs. ITO is concerned, in this case the assessee has not raised any legal ground and argued only on merit for which asseseee has failed to substantiate his claim before the lower revenue authorities as well as before the Tribunal, which establish the facts are not identical to the present case, hence, do not support the case o f the Department.

14. ACIT vs. Shree Shiv Vankeshawar Educational and Social welfare trust (ITA No. 4623/D/2012) (Date: 16.05.2019)

SECTION 68 READ WITH 115BBC - IF A NORMAL DONATION IS DOUBTED BY THE AO ABOUT ITS GENUINENESS, AND IDENTITY OF THE DONORS, THE ADDITION CANNOT BE MADE U/S 68 OF THE INCOME TAX ACT IN THE CASE OF THE TRUST AS IT HAS ALREADY BEEN OFFERED AS AN INCOME - EVEN PROVISIONS OF SECTION 115BBC CANNOT BE INVOKED BECAUSE ASSESSEE HAS UNDOUBTEDLY MAINTAINED THE ENTIRE RECORD OF THE DONATION RECEIVED.

7. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly the assessee has received a donation of INR 16265000/– from 1038 individuals and ld CIT (A) has noted that same is credited to the income and expenditure account of the assessee, However ld AO has noted that same is credited as Corpus Donation. During the course of assessment proceedings the assessee produced multiple details with respect to the

various donors which establish the identity of those donors. The learned assessing officer on examination of the various details with respect to these donors and stated that there are several infirmities in the details furnished by the assessee, he made an addition of the about some u/s 68 of the income tax act and also applying the provisions of section 115BBC of the act. The learned CIT – A has categorically recorded a finding that above donation is normal donation which has been offered by the assessee as income. The claim of the AO is that same is a corpus donation. Corpus donation is never credited to the income and expenditure account of the trust whereas the normal donation is credited to the income and expenditure account as income. If a normal donation is doubted by the AO about its genuineness, and identity of the donors, the addition cannot be made u/s 68 of the income tax act in the case of the trust as it has already been offered as an income. The identical issue arose before the Hon"ble Delhi High Court in the director of income tax exemption vs Keshav social and charitable foundation 278 ITR 152.

10. The anonymous donations will not be covered if donations received by any trust or institution created or established wholly for religious purposes or donations received by any trust or institution created or established for both religious as well as charitable purposes other than any anonymous donation made with a specific direction that such donation is for any university or other educational institution or any hospital or other medical institution run by such trust or institution. Sub-section (3) defines "anonymous donation" to mean any voluntary contribution referred to in section 2(24)(iia), where a person receiving such contribution does not maintain a record consisting of the identity of the person making such contribution indicating the name and address of the person and such other particulars as may be prescribed. We asked whether the central board of direct tax as prescribed any particulars which is required to be maintained by the assessee trust, the answer was no. We also did not find any such prescription about what kind of particulars the assessee trust is required to maintain. Therefore, it is apparent that at present the simple requirement is maintaining the name and address of the donors. In the present case, the assessee has already given much more detail then the name and address of the donors. Therefore with respect to the donation from 1038 persons the assessee has shown their name and address along with other particulars. It is not the case of the revenue that assessee has not maintained and provided these details to the assessing officer. In view of this we do not find that the donation received by the assessee falls into the definition of anonymous donation. Hence on the applicability of the provisions of section 115BBC of the income tax act we find that the learned CIT – A has correctly reached the conclusion that the donation received by the assessee is not an anonymous donation as provided under section 115BBC of the act. Therefore on this count also we uphold the order of the learned CIT – A.

15. Jhabua Power Investment Ltd. vs. ITO (ITA No. 4670/D/2018) (Dated: 22.05.2019)

SECTION 68 - THE POWER OF THE CIT(A) ARE CO TERMINUS TO THAT OF THE A.O AND, THEREFORE, HE SHOULD HAVE EXAMINED THE TRANSACTION IF HE WANTED TO INVOKE THE PROVISIONS OF SECTION 68 OF THE ACT - NO SECOND INNINGS SHOULD BE GIVEN TO EXAMINE THE SAME SET OF FACTS WHICH WERE VERY MUCH BEFORE THE LOWER AUTHORITIES.

8. I have carefully considered the order of the authorities below. It is not in dispute that the A.O made impugned addition of Rs. 4,97,589/- treating the purchases as bogus expenses. It is equally

true that the purchases were debited in the regular books of account of the assessee. The sales out of the purchases were accepted by the A.O. I further find that the notices issued by the A.O on the address of M/s Kumar Sales were duly served. Nothing prevented the A.O to issue summons to M/s Kumar Sales to force its attendance and examine the transaction. I further find that the CIT(A) realizing that Section 69C is not applicable on the facts of the case invoked Section 68 of the Act. In find that the assessee has furnished all the details of sales made to M/s Overseas….

9. The sale invoices are exhibited at Pages 5 to 10 of the paper book. In my considered opinion, the power of the CIT(A) are co terminus to that of the A.O and, therefore, he should have examined the transaction if he wanted to invoke the provisions of Section 68 of the Act. Failing which the action of the CIT (A) cannot be upheld. The contention of the DR that fresh opportunity should be given to the CIT (A) to examine the transaction does not have any force.

16. CASIO India Co. P. ltd. v. DCIT (ITA No. 1764 & 2276/DEL/2015)(ITAT, Delhi)(22.04.19)

SECTION 92B – ADJUSTMENT ON ACCOUNT OF AMP EXP – BRIGHT LINE TEST – ONUS IS ON THE REVENUE TO ESTABLISH EXISTENCE OF ANY UNDERSTANDING BETWEEN ASSESSEE AND AE SO AS TO INFER INCURRING OF AMP EXP – BRIGHT LINE TEST HAS NO VALIDITY UNDER LAW – DECISION OF DELHI HIGH COURT IN THE CASE OF SONY ERICSSON AND MARUTI SUZUKI FOLLOWED AND EXPLAINED – EXTENSIVE DISCUSSION ON THE SUBJECT OF AMP EXPENSES AND BRIGHT LINE TEST.

Held, thus, form the plain reading of the aforesaid principles laid down by the Hon'ble Jurisdictional High Court, the key sequitur is that:

(i) International transaction cannot be identified or held to be existing simply because excess AMP expenditure has been incurred by the Indian entity.

(ii) International transactions cannot be found to exist after applying the BLT to decipher and compute value of international transaction.

(iii) There is no provision either in the Act or in the Rules to justify the application of BLT for computing the Arm's Length Price and there is nothing in the Act which indicate how in the absence of BLT one can discern the existence of an international transaction as far as AMP expenditure is concerned.

(iv) Revenue cannot resort to a quantify the adjustment by determining the AMP expenses spent by the assessee after applying BLT to hold it to be excessive and thereby evidencing the existence of the international transaction involving the AE.

Another key contention of the department, especially by the DRP has been that, by way of an advertisement where there is a display of 'CASIO' Logo which needs to enhancement of CASIO brand is owned by the Assessing Officer, and therefore, incurring of AMP expenditure it enhances the brand value of the AE. First of all, brand is a capital asset and it would be fallacious to treat any kind of AMP expenditure leading to brand building. The brand building not only lead

to enhancement of the value of the brand and benefits the brand owner but also helps simultaneously the brand exploiter, like distributor brand building on one hand it falls in realm of capital and brand promotion is targets towards sales of goods which is in the realm of revenue transaction, therefore, any distributor which increase AMP expenditure for promoting the sales of its goods is not guided by motive of enhancing brand value but purely by enhancing its sales. Increase in brand value happens at a very slow pace over a long period of time and there cannot be direct co-relation between AMP expenditure and brand value because brand value depends upon numerous other factors which may not be linked with AMP expenditure. The most important component of brand is its reliability and quality of goods and image in the minds of the customers. In order to link AMP expenditure with brand value it has to be demonstrated that brand value has gone up over a period of long time and portion of this enhancement is attributable to successful AMP campaign conducted by the Indian company. The benefit to the brand owner can only be incidental and cannot be the sole guiding force for the benchmarking the AMP expenditure separately this proposition strongly support from the judgment of Hon'ble Jurisdictional High Court in the case of Sony Ericson.

In any case, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by MNE group from exploiting the intangibles, even though such returns is initially accruing to the legal owner as a result of its legal /contractual right to exploit the intangible. The return depends upon the functions performed by the legal owner, assets it uses, and the risks assumed; and if the legal owner does not perform any relevant function, uses no relevant assets, and assumes no relevant risks, but acts solely as a title holding entity, then the legal owner of the intangible will not be entitled to any portion of the return derived by the MNE group from the exploitation of the intangible other than the Arm’s Length compensation if any for holding the title.

Otherwise also, it would be very difficult to determine the impact of increase intensity of advertisement function on profit margin, the impact of advertisement on sale cannot be determined or quantified in a particular year, and therefore, even if AMP expenditure is to be compared with other comparables by applying any method, it would be very difficult to make reasonably accurate adjustment to the profit margins of the comparables companies. Thus, it would be very difficult to treat AMP as separate international transaction and any attempt to benchmark such a presume transaction in any manner would be a very difficult exercise.

The entire finding and approach of the TPO and DRP has been purely based on hypothesis and one of the agreement entered in the earlier year for a limited period of six months and this has been stated to be a material so as to determine that there was an international transaction qua AMP expenditure in this year. Such a presumption based on said agreement cannot be inferred in this year at all as, firstly, it was for a very limited period in one of the earlier year as stated above; and secondly, each year has to be seen independently and if no such material act is permeating then presumption cannot be drawn for perpetuity. Thus, Revenue has failed to bring on record any material or any kind of arrangement existing between the AE and Assessee Company that there was separate international transaction with regard to AMP expenditure. Thus, on the facts and circumstances of the case, we hold that AMP expenditure cannot be treated as separate international transaction which needs separate benchmarking and accordingly we delete the entire AMP adjustment made by the Assessing Officer. **[Para 26 to 29]**

17. Hero Moto Corp Ltd (ITA 1351/Del/2018) (23.04.2019) (ITAT, Del)

SECTION 92C - TRANSFER PRICING – TNMM - AGGREGATION APPROACH –CONTRACT MANUFACTURER

Assessee for the purpose of it's business entered into international transactions of payment of model fee, royalty and export commission. Applying TNMM OP/Sales of assessee was 12.91% which was higher than the average of comparable companies.

TPO held that payment of model fee had been made in terms of License and Technical Assistance Agreement. In consideration of license to manufacture 'Products', technical know-how was provided by the AEs during the currency of the agreement. He therefore, determined the ALP at Nil holding that the assessee was equally responsible for the technology upgradation that was taking place in India; and the assessee had paid model fee & royalty for the same set of service.

Vis a vis payment of Royalty TPO however held the ALP of the international transaction of payment of royalty to the extent of Rs. 15,00,822/- relatable to export of products to the AE is NIL on the ground that the position of the assessee with regard to manufacturing for the AEs was that of a contract manufacturer.

As regards Payment of export commission, TPO determined ALP of international transactions on payment of export commission of Rs. 1,16,748,507/- at NIL, applying CUP method holding that the transaction of payment of export commission was required to be benchmarked separately and that an independent enterprise would compensate another party for ceding territory to it only when the latter party either withdraws from that territory or some restrictions were placed upon it.

ITAT held that,

(a) Adjustment on account of Royalty is unwarranted since no products had been sold to AE's, rather entire amount of royalty was paid by assesseeon sales made to independent enterprise.
(b) Products are sold to AEs on principal to principal basis at price agreed and the seller cannot be construed as 'contract manufacturer'
(c) Since the operating profit ratio of the assessee @ 10.99% is higher than the average of the operating profit ratio of comparables companies, the international transactions entered into by the assessee were considered as having been entered at arm's length price, applying TNMM.
(d) it is seen that the payment of model fee has been made in terms of License and Technical Assistance Agreement approved by the Government in consideration of license to manufacture "Products" and using technical know how provided by the AEs during the prevalence of the agreement. The payment of model fee is a consideration in terms of agreement with the AE for availing license to use their proprietary technology and it is necessity for the assessee for manufacturing of the products to have knowledge of know-how from the AEs. Thus, payment of royalty is made in consideration for right to

manufacture products and using the technical know-how owned by the AEs. As regards royalty on sales to AEs, from the records it can be seen that the assessee is an independent manufacturer of products in respect of two wheelers and not a contractor manufacturer. The sale of such products made to the AE on principal to principal basis, at price agreed upon by the parties.

(e) As regards payment of export commission, the assessee paid this export commission for providing access by HMCL to the assessee for procuring export orders using their network and infrastructure in relation to export. In fact the export agreement with HMCL impart the consent to the assessee for export of specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such export. By virtue of said payment, the assessee gained the access to new market for its products, which enabled it to enhance sales. Thus, the TPO/DRP was not correct in disallowing these three components in the Transfer pricing additions;

SECTION 37(1) – CAPITAL EXPENDITURE – ROYALTY/MODEL FEES PAID FOR PURPOSE OF USE OF TECHNICAL ASSISTANCE IN THE MANUFACTURE & SALE OF PRODUCTS, WITHOUT ACQUIRING ANY ENDURING BENEFIT/OWNERSHIP OVER CAPITAL ASSET IS ALLOWABLE AS REVENUE EXPENDITURE

Held, as far as running royalty & model fees are concerned, it is pertinent to note that during the currency of the agreement, the assessee only had a limited right to use the technology of Honda. Further, the ownership/proprietary rights in the technical know-how continued to vest in Honda and the assessee was not authorized to transfer, assign or convey the know-how/technical information to any third party as the assessee only acquired limited right to use and exploit the know-how. Thus, royalty/TGF/Model fee payable to Honda is only for the purpose of use of technical assistance in the manufacture and sale of products and the assessee has not acquired any capital asset. Thus, the payment made to simply use the technical know-how/knowledge provided by the foreign collaborator as opposed to acquisition of ownership rights therein are revenue expenditure only and the same should have been allowed by the TPO. The model fees is also allowable as revenue expenditure in previous years. In the present Assessment Year also the facts are similar and are squarely covered with the decision of the Tribunal for A.Ys. 2010-11, 2011-12, 2012-13 and 2013-14.

INCOME TAX ACT – FEE FOR TECHINCAL SERVICES – SECTION 9(1)(VII) - COMMISSION PAID FOR MERE EXPORT OF SPECIFIED GOODS TO THE SPECIFIED COUNTRIES WITHOUT ACQUIRING ANY ASSET/INTANGIBLE RIGHT IN THE NATURE OF A CAPITAL ASSET, IS NOT TAXABLE AS FTS

Held, as far as TDS obligation on export commision is concerned, it is seen that for the A.Y 2006-07, the co-ordinate bench held that by way of export agreement, Honda has only permitted the assessee to export the specified goods to the specified countries and the assessee has not acquired any asset/intangible right in the nature of a capital asset. This has been affirmed by the High Court in ITA No. 923/2015. Besides that for A.Ys. 2006-07, 2007-08 and 2008-09 this issue is decided in favour of the assessee. In the present Assessment year also, the facts remains the identical. Therefore, respectfully following the precedent, the issue is answered in favour of assessee.

18. Gautam Automobiles Pvt. Ltd. v. ITO (ITA No.1942/D/13) (Dated 09/05/2019)

SECTION 143(2) – VALIDITY OF SERVICE OF NOTICE UNDER SECTION 143(2) AT OLD ADDRESS MENTIONED IN PAN – NOTICE UNDER SECTION 143(2) SERVED AT OLD ADDRESS, WHICH PROPERTY WAS SUBSEQUENLTY SOLD BY THE APPELLANT, WAS NOT A VALID SERVICE NOTWITHSTANDING NO INTIMATION FOR CHANGE OF ADDRESS IN PAN – ASSESSEE HAD FILED SUBSEQUENT RETURN AT NEW ADDRESS WHICH WERE DULY PROCESSED AND REFUNDS WERE ISSUED AT NEW ADDRESS – THEREFORE SERVICE OF NOTICE UNDER SECTION 143(2) AT OLD ADDRESS DID NOT CONSTITUTE VALID SERVICE – ASSESSMENT ORDER PASSED ON BASIS OF SUCH INVALID NOTICE, LIABLE TO BE QUASHED.

Held, It is not in dispute that notice dated 28.02.2011under section 143(2) was served upon the assessee whichwas beyond the above statutory period. The assessee filedobjection before A.O. at assessment stage in which assesseedenied service of any notice under section 143(2) within the period of limitation. The assessee also pleaded in the replythat in case any other notice have been served in past, suchdetails may be brought on record and provided to theassessee. The assessee also filed affidavit of Shri RakeshJain, Managing Director of the assessee company in whichthe assessee denied service of any notice under section143(2) prior to notice dated 28.02.2011. Thus, the materialon record have not been disputed or rebutted by theRevenue. The A.O. however, in the remand report before theLd. CIT(A) contended for the first time that notice undersection 143(2) dated 30.08.2010 was sent by speed post on03.09.2010 at 2659/3, Gurudwara Road, Karol Bagh, NewDelhi, within the period of limitation. Copy of the notice andspeed post receipt is filed on record. It was, therefore,claimed that it was served upon the assessee because theoriginal notice did not return back to the Revenue.Therefore, there is a presumption of service of notice uponassessee within the period of limitation. The Ld. D.R. alsofiled PAN data to show that the addresses of Karol Bagh andBengali Market both have been mentioned in the PAN data.The Ld. D.R. also contended that refund was generated atthe same address of Gurudwara Road, Karol Bagh and evenintimation under section 143(1) have been issued at thesame address of Gurudwara Road. Learned Counsel for theAssessee, however, filed copy of the sale deed to show thatproperty at Gurudwara Road Karol Bagh have been sold bythe Managing Director of the assessee company on25.02.2010. Therefore, there is no question of service ofnotice upon assessee at Gurudwara Road, Karol Bagh as isstated by the A.O. in the remand report. The Ld. D.R.contended that since PAN data has not been changed by theassessee, therefore, there is a presumption that noticeunder section 143(2) have been served earlier upon theassessee. Such contention of the assessee have beennegated by the Hon'ble Delhi High Court in the case ofAtlanta Capital Pvt. Ltd., (supra) in which in paras 7 to 10the Hon'ble Delhi High Court…..It is not in dispute that assessee disclosedaddress at 3, Tansen Marg, Bengali Market, New Delhi, in the return of income and such address is also disclosed inthe returns of income filed for A.Ys. 2001-2002 to 2011-2012. Even statutory notices have been issued by the A.O.at the same address for preceding assessment years andsubsequent assessment years. The A.O. also passed theassessment orders for different years under section 143(3)at the address given at 3, Tansen Marg, Bengali Market,New Delhi. Therefore, assessee has been consistentlydisclosing the address to the Revenue Department for thepurpose of service and communication at 3, Tansen Marg,Bengali Market, New Delhi and this fact is also admitted bythe A.O. Therefore, merely notice under section 143(2) forthis year have been issued as per PAN data would not berelevant.

The A.O, therefore, deliberately did not issue noticeunder section 143(2) at the address available to the RevenueDepartment on their record at 3, Tansen Marg, BengaliMarket, New Delhi. Therefore, there is no question of serviceof the notice at Gurudwara Road, New Delhi. The Ld. CIT(A)agreed with the explanation of assessee that notice undersection 143(2) should have been issued at 3, Tansen Marg,Bengali Market, New Delhi, but, ultimately, noted thatCounsel for Assessee agreed that premises at GurudwaraRoad, Karol Bagh is in possession of the assessee, whichfact is contradictory to the fact that property at GurudwaraRoad, Karol Bagh have already been sold by the Director ofthe assessee company. Therefore, there is no question ofany concessional statement made by the Counsel forAssessee before the Ld. CIT(A). Considering the totality ofthe facts and circumstances of the case noted above, we areof the view that notice under section 143(2) have not beenissued to the assessee at the correct address within theperiod of limitation. No notice under section 143(2) havebeen served upon the assessee within the period oflimitation. Therefore, entire assessment order is vitiated andis liable to be set aside and quashed. We, accordingly, setaside the Orders of the authorities below and quash theimpugned order. Resultantly, all additions stand deleted.Appeal of Assessee allowed.**[Paras 9.3, 9.4]**

19. Aftab Ahmed vs. ITO (ITA No. 3040/D/2013) (Dated: 06.05.2019)

Section 145 – ADDITION MADE ON ACCOUNT OF LOW GROSS PROFIT - NO ALLEGATION ON THE ASSESSEE THAT IT HAS MANIPULATED ITS BOOKS OF ACCOUNTS - THE BOOKS OF ACCOUNTS ARE AUDITED U/S 44AB - THERE IS NO ALLEGATION OF ANY SALES MADE OUT OF THE BOOKS OR NONE OF THE PURCHASES HAVE BEEN FOUND TO BE FICTITIOUS - AO DOES NOT HAVE A RIGHT TO DISTURB THE BOOK RESULTS SHOWN BY THE ASSESSEE.

7. We have carefully considered the rival contentions and perused the orders of the lower authorities. The fact shows that the books of accounts of the assessee are audited and the learned assessing officer has made addition only on the basis of the comparable cases. Merely because some other assessee has shown higher profits, the addition cannot be made in the hands of the assessee without rejecting the books of the accounts of the assessee by pointing out latent, patents, and glaring defects in the books of accounts. The learned AO has failed to show that the books of accounts of the assessee are not reliable. The learned CIT – A has also confirmed the addition for the simple reason that there are chances of the manipulation of book results by the assessee as the purchases cannot be verified. This being a mere allegation and on the basis of an allegation the book results of the assessee which are audited under section 44AB of the act and no unaccounted sales or purchases have in fact been found by the lower authorities, rejection of the books of accounts and then making an addition in the hands of the assessee by comparable cases is not justified. Even the AO has not given the details of the comparable cases to the assessee. Therefore the conduct of the assessing officer also lacks fair play. In view of this we do not find any reason to sustain the addition of INR 7 5014 in the hands of the assessee on account of lower gross profit. Accordingly ground number 1 of the appeal of the assessee is allowed.

20. Paras Land Developers Pvt. Ltd. vs. ITO (ITA No. 6522/D/2018) (Date: 30.04.2019)

SECTION 148 - MERE APPENDING OF THE EXPRESSION "APPROVED" SAYS NOTHING, COMMISSIONER OF INCOME TAX HAS TO RECORD ELABORATE REASONS FOR AGREEING WITH THE NOTING PUT UP, AND AT THE SAME TIME, SATISFACTION HAS TO BE RECORDED OF THE GIVEN CASE WHICH CAN BE REFLECTED IN THE BRIEFEST POSSIBLE MANNER.

8. I find that the approval was granted by the Pr. CIT-7, New Delhi by noting "Yes I am satisfied" shows that the approval was given in a mechanical manner without recording proper satisfaction after due application of mind. The Hon'ble Delhi High Court in the case of Pr. CIT Vs N. C. Cables Ltd. (supra) has held that mere appending of the expression "approved" says noting. It is not as if the CIT has to record elaborate reasons for agreeing with the noting put up. At the same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise 8. I find that the approval was granted by the Pr. CIT-7, New Delhi by noting "Yes I am satisfied" shows that the approval was given in a mechanical manner without recording proper satisfaction after due application of mind. The Hon'ble Delhi High Court in the case of Pr. CIT Vs N. C. Cables Ltd. (supra) has held that mere appending of the expression "approved" says noting. It is not as if the CIT has to record elaborate reasons for agreeing with the noting put up. At the same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise appears to have been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer. For these reasons, the Court is satisfied that the findings by the ITAT cannot be distributed.

21. Fiza Educations Society v. ITO (ITA No. 3709/D/18)(ITAT, Delhi)(24.04.19)

SECTION 147 – REASONS TO BELIEF- THE ASSESSING OFFICER IS OBLIGATED TO FORM OPINION OF ESCAPEMENT OF INCOME AFTER PERUSING THE RETURN OF INCOME AND CORRELATING THE MATERIAL/INFORMATION SO RECEIVED – REOPENING CANNOT BE RESORTED TO VERIFY THE FACTS – NOTICE U/S 148 QUASHED

Held, I have heard the rival submissions qua the issue of validity of reopening u/s 147 and also perused the relevant material placed on record. It is an admitted fact that prior to recording of the reasons and issuance of notice u/s 148 dated 18.3.2016 assessee society has filed its return of income on 14.11.2009 and such a return income was also processed u/s 143(1). From the documents attached alongwith the return of income, it is seen that, in the receipt and payment account for the year ending 31st March, 2009, the assessee has disclosed the sale of land. It is also reflected in the income and expenditure account. The assessee being an educational society running an educational institution and all its receipts are from educational activities, therefore, it has claimed deduction u/s 10(23)(iii ad) as the receipts were less than Rs. 1 crore. The entire factum of disclosure of sale of land and claim of 10(23C) was duly available on record. Almost at the fag end of the 6th year from the end of the relevant assessment year, assessee's case has been sought to be reopened on the basis of aforesaid 'reasons recorded' which is primarily based on AIR information that assessee has sold immovable property of Rs. 77 lacs. From the bare perusal of the aforesaid 'reasons' it is seen that, nowhere AO has even mentioned that assessee

has duly disclosed the sale of the land in its income tax return and the documents annexed therewith; and has simply observed that entire sale of Rs. 77 lacs is assessable in the hands of the assessee and therefore, he has 'reason to believe' that such a sale is an income which has escaped assessment. If the entire factum of sale transaction has been disclosed and thereafter any information is received, then AO is require to verify from the assessment record to examine, *firstly*, whether assessee has disclosed the transaction or not; *secondly*, whether such a transaction has been offered to tax or not; and *lastly*, whether any gain on sale has been claimed as exempt under any provision of the Act. If on perusal of assessment record, he finds that either the transaction has not been disclosed or the claim made is not acceptable in law, then based on such material or information he can entertain 'reason to believe' that income chargeable to tax has escaped assessment. From the bare perusal of the 'reasons recorded', it cannot be discerned as to what was the basis for reason to believe, whence the transaction of the sale of the property was already stood disclosed by the assessee. [Para 6]

It is a trite law that Assessing Officer can only acquire jurisdiction if he has 'reason to believe' that Income chargeable to tax has escaped assessment. The 'reason to believe' entertained by the Assessing Officer can only be culled out from the 'reasons recorded' by the Assessing Officer, because, 'reasons recorded' alone is foundation for reopening the assessment which cannot be substituted by some other records or based on certain assumptions of facts, as it is purely a jurisdictional issue, which has to be acquired by the Assessing Officer based on tangible material and independent application of mind on the assessment record with the Assessing Officer. If at the time of recording the reasons, Assessing Officer has not even perused the assessment records and has mechanically reopened the case u/s.147, then it cannot be held that he has any 'reason to believe'. The tangible material coming on record has to be verified from the existing assessment record and then Assessing Officer can reach to prima-facie belief that income chargeable to tax has escaped assessment. He cannot acquire jurisdiction to reopen the assessment u/s.147 on wrong presumption of facts wholly divorced from the record. [Para 7]

22. Nimitaya Hotel & Resorts Ltd v. ACIT (ITA No. 1830, 1831, & 1832/Del/2014) and (ITA No. 1717, 1718, & 1719/Del/2014) (01.04.2019) (ITAT, Delhi)

SECTION 148 - DESPITE REPEATED REQUESTS BY THE ASSESSEE FOR FURNISHING THE REASONS RECORDED FOR REOPENING OF THE CASE - AO DID NOT PROVIDE THE REASONS EVEN BEFORE 13 MONTHS OF THE 1ST REQUEST AND WHEN ASSESSEE FILES OBJECTION TO SUCH REASONS WITHIN 60 DAYS, AO DID NOT DISPOSE THEM BY A SPEAKING ORDER BUT PASSED THE ASSESSMENT ORDER U/S 143 (3) READ WITH SECTION 147 OF THE ACT – THE REASSESSMENT PROCEEDINGS QUASHED –GKN DRIVESHAFT(INDIA) LIMITED 259 ITR 19 (SC) FOLLOWED.

In the present case, notice u/s 148 of the income tax act was first issued on 10/8/2010. It was also received by the assessee on 10/8/2010. On receipt of such notice assessee submitted a letter dated 23/8/2010 wherein it has been stated that the return originally filed by the assessee on 22/4/2010 may kindly be treated as return filed in response to notice u/s 148 of the income tax act.. After

filing the return of income the assessee submitted letter dated 14/10/2010, 10/6/2011 and 28/6/2011 for providing the copy of the reasons recorded u/s 148 (2) of the income tax act. The reasons were provided to the assessee on 10/10/2011. Thereafter the assessee submitted objections against initiation of proceedings under section 147 of the income tax act on 09/12/2011. The AO passed an assessment order u/s 143 (3) read with section 147 of the income tax act on 15/12/2011. Therefore, firstly, that assessee was not provided reasons for almost 13 months, when the assessment was getting time barred on 31/12/2011, shortly before that on 10/10/2011 the assessee was provided the copies of the reasons recorded. The assessee also took almost 60 days to file objections against the reasons of reopening. Assessee also filed such objections only before 21 days of the assessment order getting time barred. The AO also passed an assessment order on 15/12/2011. **(para 26)**

Held, therefore not passing a speaking order rejecting the objections of the assessee but passing an order u/s 147 of the act making the additions based on reasons recorded has caused serious prejudiced to the interest of the assessee. In view of this respectfully following, the judicial precedent cited above the reopening of the assessment is quashed. Therefore, the learned CIT – A was not correct in holding that the reopening has been done in accordance with the law by the assessing officer. Accordingly, ground number 1 of the appeal of the assessee is allowed. **(para 31)**

23. SBS Realtors (P) Ltd. v. ITO (ITA No.7791/Del/2018) (01.04.2019) (ITAT, Delhi)

SECTION 148 - INITIATION OF PROCEEDINGS UNDER SECTION 147 OF THE ACT - INVESTIGATION WING HAS SUPPLIED CERTAIN INFORMATION TO THE ASSESSING OFFICER WITH REGARD TO RECEIPT OF CHEQUES BY THE ASSESSEE FROM VARIOUS COMPANIES WHO ARE CONSIDERED TO BE S.K. JAIN GROUP COMPANIES - MATERIAL FOUND DURING THE COURSE OF SEARCH OF S.K. JAIN GROUP CASES WHICH HAD LED TO FORM THE BELIEF THAT ALL THOSE COMPANIES ARE PROVIDING ACCOMMODATION ENTRIES IS NOT MENTIONED IN THE REASONS RECORDED - ALSO NOT MENTIONED WHETHER ANY OF THE DIRECTORS OF THE ABOVE COMPANIES HAVE PROVIDED ACCOMMODATION ENTRIES TO M/S SBS REALTORS PVT. LTD. - ALSO NOT MENTIONED WHETHER ANY DOCUMENT WAS FOUND WHICH LED TO THE BELIEF OF GIVING OF ACCOMMODATION ENTRIES BY THOSE TWELVE COMPANIES TO THE ASSESSEE – IN THE FIRST TWO LINES, THE ASSESSING OFFICER HAS RECORDED THE FINDING THAT THE SUM OF 2,35,00,000/- HAS ESCAPED ASSESSMENT BUT IN THE LAST TWO LINES, HE HAS RECORDED THAT THE CASE IS BEING REOPENED TO VERIFY THE GENUINENESS, IDENTIFICATION AND CREDITWORTHINESS OF THE AFORESAID TRANSACTION - IF THE CASE IS BEING REOPENED FOR THE PURPOSE OF VERIFICATION OF THE GENUINENESS, HOW CAN THERE BE SATISFACTION OF ESCAPEMENT OF INCOME – FOLLOW HON'BLE JURISDICTIONAL HIGH COURT IN THE CASE OF RMG POLYVINYL (I) LTD. AND MEENAKSHI OVERSEAS PVT.LTD.

Held, the notice issued under Section 148 of the Act to be invalid for two reasons :-

(i) the notice is issued for the purpose of verification of genuineness, identification and creditworthiness of the transaction, which is not permissible;

(ii) the Assessing Officer has recorded his satisfaction on the basis of mere report from the Investigation Wing. There is no crucial link between the information made available to the Assessing Officer and the formation of belief of escapement of income. There is no basis for coming to the conclusion that the assessee received accommodation entries. The Investigation Wing alleged that the companies which issued cheques to the assessee company are companies of Shri S.K. Jain group and they are entry providers. However, the basis for such conclusion is missing. There is no mention that any document was seized from Shri S.K. Jain group or any director of the 12 companies which have given cheques to the assessee has given the statement that they have provided accommodation entries to the assessee. The Assessing Officer has simply reopened the case on the basis of information provided by the Investigation Wing without any independent application of mind. There is no tangible material which formed the basis for the belief that income has escaped assessment **(para 11)**

24. Kamal Kishoree Aggarwal v. ACIT (ITA No. 6628/ Del/2018) (12.04.2019) (ITAT, Delhi)

SECTION 148 - ORIGINAL RETURN WAS ACCEPTED U/S 143(1) OF THE ACT - THE CASE OF THE ASSESSEE WAS REOPENED BY ISSUANCE OF NOTICE U/S 148 OF THE ACT – INFORMATION RECEIVED FROM THE PR DIT (INVESTIGATION), BASED ON THE RESULTS OF SURVEYS CARRIED OUT ON CERTAIN BROKERS, WHEREIN IT HAS BEEN DETERMINED THAT THE FACILITY OF CLIENT CODE MODIFICATION HAS BEEN ALLEGEDLY USED AS A MEANS OF TAX EVASION AND NOT FOR "RECTIFYING GENUINE ERRORS" AS PERMITTED BY SEBI - CIT(A) UPHELD THE REOPENING – ITAT FOLLOWS PRASHANT AGENCIES PVT. LTD. AND PPN PROPERTIES PVT. LTD. VS ITO - NO MATERIAL WHICH HAS BEEN BROUGHT OUT IN THE RECORDED REASONS TO SHOW THAT CLIENT CODE MODIFICATION IN THE INSTANT CASE WAS MALAFIDE OR THE ASSESSEE RECEIVED RS.5,96,176/- IN CASH IN LIEU OF THE SAID CLIENT CODE MODIFICATION - THE ABOVE RECORDING AT BEST IS A REASON TO SUSPECT ONLY - IT IS AN ESTABLISHED POSITION OF LAW THAT THE VALIDITY OF REOPENING IS TO BE DECIDED ON THE BASIS OF RECORDING MADE U/S 148(2) OF THE ACT ALONE AND NOTHING CAN BE ADDED THERETO.

Held, In the circumstances, respectfully following the decision of the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. Vs DCIT (supra) and the above quoted decision of the Tribunal, in our considered opinion, the reasons recorded in the instant case does not satisfy the requirement of law and the same does not constitute the reason to believe for escapement of any income from tax. Therefore, the reason is not valid. The consequential order of reassessment passed in pursuance thereto cannot be sustained. We, therefore, set aside the impugned order of reassessment passed u/s 147 of the Act and allow this ground of appeal of the assessee. **(para 13)**

25. M/s. DS Doors (India) Ltd. v. ITO, (ITA No.389/D/19) (Dated 08/05/2019)

SECTION 147 – NON-SUPPLY OF REASONS RECORDED IS FATAL TO VALIDITY OF JURISDICITON ASSUMED UNDER SECTION 147 OF THE ACT – NON-SUPPLY OF REASONS IS NOT A CUREABLE DEFECT – PROCEEDINGS UNDER SECTION 147 WERE QUASHED.

Held, So, we can safely conclude that the assessee has not beensupplied with "reasons recorded" despite demand rather no reasonhas been recorded by the AO before reopening the assessment byapplying his independent mind. Had there been any reasonsrecorded on the file, the same would have been brought to thenotice of the Bench by the ld. DR along with order sheets andwritten submissions filed at the time of arguments. ... Hon'ble Apex Court in case of M/s. GKN Driveshaft IndiaLtd. vs. ITO – 259 ITR 19 has laid down the law that it ismandatory for the AO to supply the reasons recorded withinreasonable time, to which the assessee is entitled to file the objection to the issuance of the notice and then AO is bound todispose off the objections by passing a speaking order. Operativepart of the Hon'ble Apex Court in the case of M/s. GKN Driveshaft India Ltd. (supra) is extracted.… Ld. DR for the Revenue by relying upon the decision rendered by Hon'ble Apex Court in the case of Home Finders Housing Ltd. vs. ITO – (2018) 94 taxmann.com 84 (SC) dismissing the SLP filed by the assessee contended that noncompliance of the procedure laid down by the Hon'ble Supreme Court in M/s. GKN Driveshaft India Ltd. (supra) would not make the order void and non est and such a violation was a procedural irregularity which could be cured by remitting the matter to the authority. Operative part of the decision rendered by Hon'ble Supreme Court in Home Finders Housing Ltd. vs. ITO (supra) is extracted…. We are of the considered view that facts of the case at handare distinguishable from the case of Home Finders Housing Ltd.vs. ITO (supra) because in that case, reasons recorded weresupplied to which assessee had filed objections which had not beendisposed off by the AO. But, in the instant case, reasons have notbeen recorded by the AO rather based the assessment order on theinformation received from DCIT, CC 2(2), Mumbai along withassessment order of M/s. Avance Technologies Limited passed u/s153C of the Act, so the question of supplying reasons recorded tothe assessee does not arise. ... More particularly, when assessee had made a request forsupply of the reasons recorded and the said request had not beenadhered to and the AO proceeded to pass the assessment order evenwithout providing an opportunity to cross examine the Director ofM/s. Avance Technologies Limited whose statements have beenrelied upon to prove the fact that M/s. Avance TechnologiesLimited, a accommodation entry provider has providedaccommodation entry of Rs.25,00,000/- to the assessee. … So, the very initiation of assessment proceedings u/s 147/148of the Act were void and non est at the very outset because the AOhas not recorded any reasons after applying his mind nor suppliedthe copy thereof to the assessee and as such, in thesecircumstances, question of filing / disposing off the objections byassessee/AO does not arise. ... Hon'ble jurisdictional High Court in case cited as Pr.CIT-16vs. Jagat Talkies Distributors – (2017) 85 taxmann.com 189(Delhi) wherein GKN Driveshaft (India) Ltd. (supra) and othercase laws discussed held that when the assessee has not been givencopy of reasons recorded for issuance of notice u/s 148 by the AO,entire assessment proceedings and resultant assessment orderpassed u/s 143(3)/148 was to be quashed. …. In view of what has been discussed above, we are of theconsidered view that the case law relied upon by the ld. DR is notapplicable to the facts and circumstances of the case. Since the AOhas failed to record the reasons after being satisfied that the incomehas escaped assessment, which he has not supplied to the assesseedespite demand the initiation of

reassessment proceedings at thevery outset were void and non est and as such, consequentassessment order passed by the AO is liable to be quashed withoutgoing into the merits of this case, hence hereby quashed.Resultantly, the appeal filed by the assessee is hereby allowed.**[Paras 12, 13, 14, 15, 16, 17, 18]**

26. ACIT v. M/s. Dhansafal Vyapaar Ltd. (ITA No. 5223/D/15)(ITAT, Delhi)(24.04.19)

SECTION 153A – NO INCRIMINATING MATERIAL FOUND DURING COURSE OF SEARCH – ASSESSMENT MERELY ON THE BASIS OF STATEMENT OF ONE PERSON WHICH WAS LATER ON RETRACTED – ASSESSMENT U/S 153A BAD IN LAW.

Held, It is also not in dispute that the addition in this case u/s 143(3)/153A was made merely on the basis of statement of Shri Santosh Kumar Jain recorded during the search operation carried out at the premises of Minda Group of companies which was subsequently retracted, without bringing on record any material to corroborate the said statement that he has provided accommodation entries to the assessee. [Para 11]

In the backdrop of the aforesaid facts and circumstances of the case, when we examine the legal issue raised by the assesseethat in the face of the fact that no "incriminating material" was found during the course of search, the initiation of assessment proceedings u/s 153A is not maintainable because assessment u/s 143(3)/147 was already framed *"prior to the date of search"* is to be answered in affirmative in view of the decision rendered by the Hon'ble jurisdictional High Court in case of *CIT vs. Kabul Chawla – 380 ITR 173 (Del.).* [Para 12]

27. Sanjiv Singh vs. Pr.CITITA No.1781/Del/2016 –(24.04.2019)- ITAT, DELHI

SECTION 263- ASSESSMENT FRAMED U/S 143(3) – CIT ISSUED NOTICE U/S 263- CERTAIN ISSUES NOT FORMING PART OF THE NOTICE WERE TAKEN UP BY CIT FOR ADJUDICATION- ACTION QUASHED BY ITAT HOLDING THAT ADJUDICATION UNDER 263 TO BE LIMITED TO THE ISSUES MENTIONED IN THE NOTICE

HELD, We have considered the rival arguments made by both the sides and perused the relevant material available on record. We have also considered the various decision cited before us. We find the assessment in the instant case was completed u/s 143(3) on 10th January, 2014 determining the total income at Rs.6,30,545/- and agricultural income of Rs.5 lakhs against the returned income of Rs.1,58,105/- and agricultural income of Rs.5 lacs. We find the ld.CIT issued notice u/s 263 of the IT Act the contents of which have already been reproduced in the preceding paragraph. We find, out of the three issues on which the ld.CIT invoked jurisdiction u/s 263, he has accepted two issues and the only issue that survived for adjudication as per notice u/s 263 is relating to the treatment of Rs.15,39,513/- as unexplained cash deposits. A perusal of the assessment order shows that the Assessing Officer has discussed this issue in the body of the

assessment order and has adopted a net profit rate of 8.06% on the deposit of Rs.15,39,513/-. **[PARA 11-14]**

Now, coming to the other two issues on which the ld.CIT has directed the Assessing Officer to make necessary verification and pass appropriate order is concerned, it is an admitted fact that these two issues were not there in the notice issued u/s 263 of the IT Act. The Hon'ble Delhi High Court in the case of CIT vs. Contimeters Electricals (P) Ltd. (2009) 317 ITR 0249 (Del), has held that revision of an issue not mentioned in the show cause notice is not permissible. The Delhi Bench of the Tribunal in the case of Maxpak Investment Ltd. vs. ACIT (2006) reported in 104 TTJ 0881, has held that revision on a ground not proposed in the notice u/s 263 is invalid because such a course of action deprives the assessee of the opportunity of hearing as contemplated in section 263. The Chennai Bench of the Tribunal in thecase of SSI Limited vs. DCIT (2004) 85 TTJ 1049 has held that the proceedings u/s 263 has to be strictly confined to the notice issued for invoking the jurisdiction under that section for the reasons stated therein. The law does not permit extending the proceedings u/s 263 after its initiation beyond what is stated in the notice itself. The various other decisions relied on by the ld. counsel for the assessee also support his case. **[PARA 15]**

It may be pertinent to mention here that after the order passed u/s 263, theAssessing Officer, in the order passed u/s 143(3)/147 of the Act passed on 9thDecember, 2016, has accepted the explanation of the assessee regarding the cash deposits of contra entries to the tune of Rs.14.28 lakhs as explained. In view of the above discussion, the order passed u/s 263 by the ld.CIT is not sustainable in law. We, therefore, set aside the order of the CIT and the grounds raised by the assessee are allowed. **[PARA 16]**

28. Shri. Iqbal Singh Dahiya v. ITO (ITA No. 7586/D/18)(ITAT, Delhi)(26.04.19)

SECTION 271(1)(C) – ASSESSING OFFICER ACCEPTING RETURNED INCOME FILED IN RESPONSE TO NOTICE U/S 148 WITHOUT ANY FURTHER ADDITION – ORIGINAL RETURN NOT FILED – INCOME DISCLOSED IN THE RETURN ALREADY SUBJECTED TO TDS – PENALTY LIABLE TO BE DELETED.

Held, I have given thoughtful consideration to the orders of the authorities below. I find that there is no dispute that the salary income and rental income were subjected to TDS. It is true that the assessee did not file his return of income and only pursuance to notice issued u/s 148 of the Act, the assessee filed his return of income. It is equally true that the assessment has been framed on the returned income itself though the notice u/s 148 was issued on the information that the assessee has made agreement for purchase of immovable property for a consideration of Rs. 10.21 lakhs with Shweta Estate Pvt Ltd. I find that no addition has been made in this respect as the Assessing Officer himself is satisfied with the reply of the assessee. In my considered opinion, when the assessed income and the returned income are same, I do not find any reason to hold that the assessee has concealed its particulars of income, since both the incomes were subjected to TDS. I do not find this to be a fit case for levy of penalty u/s 271(1)(c) of the Act. [Para 8]

29. The Bank of Tokyo Mitsubishi, UFJ Ltd v. DDIT (ITA No. 3705/DEL/2014 and ITA No. 3757/DEL/2014) (27.03.2019) (ITAT, Delhi)

SECTION 271(1)(C) - SUSTENANCE OF PENALTY LEVIED U/S 271(1)(C) WHEREIN INAPPROPRIATE WORDS IN THE NOTICE ISSUED U/S 274 R.W.S. 271 OF THE ACT HAVE NOT BEEN STRUCK OFF - LAST LINE OF THE SAID NOTICE ONLY SPEAKS OF SECTION 271 AND DOES NOT EVEN MENTION OF SECTION 271(1)(C) OF THE I.T. ACT – FOLLOWS CO-ORDINATE BENCH OF THE TRIBUNAL IN THE CASE OF SAHIWAL INVESTMENT & TRADING CO. VS. ITO

Held, since in the instant case also the inappropriate words in the penalty notice has not been struck off and the notice does not specify as to under which limb of the provisions, the penalty u/s 271(1)(c) has been initiated, therefore, we are of the considered opinion that the penalty levied u/s 271(1)(c) is not sustainable and has to be deleted. Although the Ld. DR has relied on various decisions to the proposition that mere non-striking off of the inappropriate words will not invalidate the penalty proceedings, however, all these decisions are of non-jurisdictional High Court decisions. The decision of the Hon'ble Madras High Court relied on by the Ld. DR is not applicable in the present case as the decision of the Hon'ble Karnataka High Court in the case of SSA'S Emerald Meadows (supra) where the SLP filed by the Revenue has been dismissed. Since there is no decision of the Jurisdictional High Court on this issue, therefore, we find merit in the argument of the Ld. AR that if two views are available on a particular issue, the view which is favourable to the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited (supra). We, therefore, set-aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty so levied. **[para 7]**

30. Amit v. Sabharwal v. ITO (ITA No.886/D/18) (Dated 14/05/2019)(ITAT, Delhi)

SECTION 271B – INITIATION OF PENALTY PROCEEDINGS UNDER SECTION 271B AFTER INORDINATE DELAY – PENALTY PROCEEDING UNDER SECTION 271B WERE NOT INITIAED IN THE ASSESSMENT ORDER PASSED UNDER SECTION 143(3) OF THE ACT – SAID PENALTY PROCEEDING WERE INITIATED FOR THE FIRST TIME AFTER THE REMAND OF THE QUANTUM ORDER BY THE TRIBUNAL – ALTHOUGH THERE IS NO TIME LIMIT TO INITIATE PENALTY PROCEEDING UNDER SECTION 271B, BUT THE SAME CANNOT BE INITIATED AFTER INORDINATE DELAY OF MORE THAN 4 ½ YEARS FROM ORIGINAL ASSESSMENT ORDER – PENALTY ORDER HELD BE BARRED BY LIMITATION.

Held, I have heard the rival arguments made by both the sides and perused the ordersof the authorities below. I have also considered the various decisions cited before me.I find the Assessing Officer completed the original assessment u/s 143(3) on 29thDecember, 2011 determining the total income of the assessee at Rs.30,13,680/-. Atthat time, as appears from para 2 onwards, the Assessing Officer has mentioned in theassessment order that the gross receipt is at Rs.2,29,72,281/- whereas as per theassessee the gross receipts were Rs.2,08,31,714/-. However, the Assessing Officerhas not initiated penalty proceedings u/s 271B of the Act either during the course ofinitial assessment proceedings or thereafter. Only when the matter was set

aside bythe Tribunal to the file of the Assessing Officer that the Assessing Officer initiatedthe penalty proceedings u/s 271B of the IT Act by issue of notice on 24th August,2016. Thus, the penalty notice was issued after more than 4 ½ years from the end ofthe original assessment. As per the provisions of section 275(1)(c), no orderimposing a penalty under this Chapter shall be passed in any case, after the expiry ofthe financial year in which the proceedings, in the course of which action for theimposition of penalty has been initiated, are completed or six months from the end ofthe month in which action for imposition of penalty is initiated, whichever periodexpires later. As per the various decisions relied on by the ld. counsel for theassessee, penalty is not leviable where the penalty proceedings were not initiated longafter the completion of the assessment and the assessment order was silent about thelevy of penalty u/s 271B of the Act. Since the Assessing Officer in the instant casehas initiated the penalty proceedings after a period of more than 4 ½ years from thedate of original assessment order and there was no such mention of the initiation ofpenalty proceedings u/s 271B of the Act and the fact of higher gross receipt was very much available to the Assessing Officer which has been mentioned in the body of theoriginal assessment order, therefore, the penalty proceeding initiated by the AssessingOfficer in the instant case in my opinion is barred by limitation. The decision reliedon by the ld. DR will not help the Revenue since the same relates to initiation ofpenalty proceedings u/s 271B in the course of assessment proceedings. The decisiondoes not speak of levy of penalty after inordinate delay. In view of the abovediscussion, I am of the considered opinion that the penalty proceedings initiated aftera long gap of more than 4 ½ years from the date of original assessment order is not sustainable in law being barred by limitation. Therefore, the order of the CIT(A) is setaside and the grounds raised by the assessee are allowed.