ITAT Bar reporter for the month of August 2019

1. TMW ASPF i Cyprus Holding Company Ltd ITA No. 879/Del/2016 order dated 09-08-2019

SECTION 4 R.W SECTION 92 – ONLY INTEREST INCOME CHARGEABEL TO TAX UNDER INCOME TAX ACT CAN BE SUBJECTED TO TRANSFER PRICING PROVISIONS - ASSESSEE WAS A COMPANY INCORPORATED IN CYPRUS AND WAS ENGAGED IN MAKING INVESTMENTS IN THE REAL ESTATE SECTOR. FOR THE YEAR UNDER CONSIDERATION IT HAS INVESTED IN THIRD-PARTY COMPANIES IN INDIA ENGAGED ON REAL ESTATE DEVELOPMENT. INVESTMENTS MADE WERE IN FORM OF FCCD - AS PER THE AGREEMENTS, THE ASSESSEE WAS ENTITLED TO COUPON RATE OF 4%. DURING THE RELEVANT AY, THE ASSESSEE RECEIVED INTEREST OF ABOUT RS 60.46 LAKHS FROM ONE OF THE THREE INVESTEE COMPANIES, ALBEIT FOR THE FIRST HALF OF THE YEAR. NO INTEREST WAS RECEIVED FROM ANY OTHER COMPANY – ON ACCOUNT OF DOWNTURN IN THE REAL ESTATE MARKET AND THE FACT THAT THE COMPANIES WERE IN BAD FINANCIAL POSITION AND FACING CASH CRUNCH ASSESSEE WAIVED ITS RIGHT TO RECEIVE INTEREST UNDER A MUTUAL AGREEMENT WITH THE INVESTEE COMPANIES – TPO HOWEVER HELD THAT THE ASSESSEE WAS TO EARN AN ASSURED RETURN OF 18% AND DETERMINED THE ALP OF THE COUPON RATE TO BE 18%, INSTEAD OF 4% - HELD TP ADJUSTMENT NOT PERMISSIBLE

On appeal ITAT Held ;

(i) As per the terms of agreements entered between the assessee with the investee companies there were three separate and independent events:
I. Subscription to FCCDs bearing an annual interest of 4%;
II. Conversion of FCCDs into equity at a conversion price on the completion of the specified term or as may be determined by the parties; and
III. Post conversion, sale of equity shares to the promoters at a consideration providing annualized 18%/19% return on investment.
The last two of the events were futuristic and contingent. The sale of converted equity shares to the promoters of the investee companies as per the terms of shareholder's agreement provided an option to the assessee to sell its converted shares to the promoters of the investee companies at an option price that shall fetch the assessee a return on investment of 18%. It has been brought on record that investee companies have requested for the waiver of interest due to bad financial position/cash crunch and delayed project in the real estate and such a request has been accepted by the assessee. Part of the FCCDs held in one of the investee company was sold to a third party during

the year at a loss. Thus, none of the investment bore any premium to the assessee on sale of securities. They were either sold at a loss or at par to third parties. (Para 18)

The aforesaid para envisages that for taxing the interest income in the hands of a non-resident, it is necessary that the interest should arise in a contracting state, i.e., twin conditions of accrual as well as the payment are to be satisfied. If there is no accrual or actual payment received then same is to be decided within the scope of Article 11(1). What the TPO/AO have sought to tax is that, assessee was supposed to receive interest of 18%, if the contingent event would have arisen, i.e., if in the event, the option was exercised by the assessee to sell its converted shares to the promoters of investee company at an option price then it would have given the return of 18%. Thus, entire edifice of the TPO/AO was based on fixation of contingent event which assessee was supposed to receive. It is also matter of record no such conversion was actualised and assessee remained invested even during the year under consideration. The transfer pricing adjustment has been made on this hypothetical amount of interest receivable. Whether such notional income can be brought to tax even under the transfer pricing provision, has been dealt by the **Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd. vs. Union of India (supra), wherein their Lordships have held that even income arising from international transaction must satisfy the test of income under the Act and must find its home in one of the charging provisions.** Here in this case, nowhere the TPO/AO has been able to establish that notional interest satisfy the test of income arising or received under the charging provision of Income Tax Act. If income is not taxable in terms of section 4, then chapter X cannot be made applicable, because section 92 provides for computing the income arising from international transactions with regard to the ALP. **Only the interest income chargeable to tax can be subject matter of transfer pricing in India.** Making any transfer pricing adjustment on interest which has neither been received nor accrued to the assessee cannot be held to be chargeable in terms of the Income Tax Act read with Article 11(1) of DTAA. Here it cannot be the case of accrual of interest also, because none of the investee companies have acknowledge that any interest payment is due, albeit they have been requesting for waiving of interest of even coupon rate of 4%, leave alone the return of 18% which was dependent upon some future contingencies. Assessee despite all its efforts has acceded to such request. Further, in the India Cyprus DTAA wherein similar phrase has been used pertaining to FTS and Royalty in India CyprusDTAA, Hon'ble Bombay High Court held that assessment of royalty or FTS should be made in the year in which amount have actually received and not otherwise. The coordinate bench of Mumbai ITAT in the case of **Pramerica ASPF II Cyprus Holding Ltd. vs. DCIT** (supra) on exactly similar set of facts, addition on account of notional interest was made; the Tribunal has held that the interest income in question can only be taxed on payment /receipt basis. The relevant observation has already been incorporated above. The Hon'ble Bombay High Court has confirmed the said finding. Similar view has been taken by the ITAT Chennai Bench in the case of **DCIT vs. Inzi Control India Limited (supra)**. Thus, in view of Article 11(1) we hold that, only the interest which has actually

been received can only be subject matter of taxation and no TP adjustment can be made on some hypothetical receivable amount which was contingent upon certain event which has actually not been taken place during the year. Thus, the order of the Direction of the DRP is upheld and the grounds raised by the revenue are dismissed. (Para 20)

2. M/s. Adidas India Marketing (P.) Ltd. v. ITO (ITA No.1431/D/15) (Dated 29/07/2019)

SECTION 5 READ WITH SECTION 9(1)(i) – INSURANCE COMPENSATION RECEIVED BY FOREIGN COMPANY IN RELATION TO STOCK LOST AT THE PREMISES OF SUBSIDIARY COMPANY IN INDIA, WHETHER CONSTITUTE INCOME ACCRUING OR ARISING IN INDIA TO BE TAXED IN THE HANDS OF SUBSIDIARY COMPANY IN INDIA – INSURANCE POLICY WAS TAKEN BY THE FOREIGN COMPANY OUTSIDE INDIA – THE INSURANCE POLICY COVERED FINANCIAL INTEREST OF FOREIGN COMPANY IN THE SUBSIDIARY, BUT NOT THE STOCK OR ANY OTHER ASSET – COMPENSATION RECEIVED BY THE FOREIGN COMPANY WAS FOR DIMINUTION IN FINANCIAL INTEREST OF SUBSIDIARY COMPANY, WHICH WAS COMPUTED WITH RESPECT TO LOSS OF STOCK IN FIRE AND CONSEQUENTIAL LOSS OF PROFITS IN RELATION THERETO AND THUS LOSS WAS OF FINANCIAL INTEREST WHICH WAS OUTSIDE INDIA AND DID NOT RELATE TO THE SUBSIDIARY COMPANY – INCOME THEREFORE DID NOT ACCRUE OR ARISE IN INDIA, MUCH LESS IN THE HANDS OF SUBSIDIARY COMPANY - ADDITION TO INCOME MADE IN THE HANDS OF SUBSIDIARY COMPANY WAS DELETED.

Held, In present case, the Zurich insurancehas allowed the claim of insurance under GIP insured by M/sAdidas AG. The insured interest under the general insurancepolicy is financial interest in investment made worldwide by theAdidas AG. As the premium for the insurance policy was incurredby Adidas AG, the said entity was only having right to receive theclaim of insurance and the assessee not being party to the saidinsurance policy in any manner, the assessee was not having anyright to receive the said claim of insurance on or the said claimwas not vested in the assessee. Thus, the contention of the lowerauthorities that the income by way of the claim of GIP accrued infavour of the assessee is devoid of any merit…. Further, it is contended by the lower authorities, that theincome was deemed to accrue or arise in view of provisions ofsection 9(1)(i) of the Act. It is contended that impugned incomewas due to loss sustained in the fire of the stock, profit whichcould have been earned on such stock when sold and the losssuffered on other assets and other incidentals and, therefore, itwas through or from any business connection in India. In ouropinion, this conclusion of the lower authorities is not correct.The claim of GIP was in respect of insured financial interest of theAdidas AG in its subsidiaries and compensation was also settledfor diminution in financial interests of computing of the claimwith reference to

loss on fire of the stock or profit which couldhave been earned if such stock was sold etc in any manner cannot lead to conclusion that the claim was in respect of loss oftangible property in the form of stock of the assessee. The claimwas certainly in respect of the intangible asset in the form offinancial interest of the Adidas AG and thus the claim ofinsurance cannot be said to have any business connection inIndia. Similarly, the insured interest of Adidas AG in itssubsidiaries cannot be said to have through or from any propertyin India or through or from any asset or source of income inIndia. The Adidas AG has entered into contact in Germany forinsuring the intangible asset in the form of financial interest in itssubsidiaries, which is quite distinct from the physical stock-intradeof the assessee, which lost in fire. Thus, the claim receivedby Adidas AG cannot be treated as income deemed to accrue orarise in the hands of the assessee in India….We also do not find any substance in the finding of the lowerauthorities that in email correspondence between employees ofAdidas AG and Zurich insurance indicated as claim of GIPbelongs to the assessee. The Assessing Officer in draftassessment order has reproduced gist of correspondence madethrough emails. On perusal of the said correspondence, we findthat same is related more to explore mode of transfer of moneyfrom the Adidas AG to the assessee, because the Adidas AG wasinterested in restoring the loss in its financial interest in Indiansubsidiary i.e. assessee. Thus, correspondence in emails wasrelated to application of the income and not as under whose handit would be taxable. Further, the issue as to whether the incomeby way of claim under GIP from Zurich insurance is liable to betaxed in the hands of the assessee, cannot be decided by eitherthe employees of the Adidas AG or Zurich insurance. Merely,expressing some advice or opinion by them as how this amount ofclaim received can be transferred to the assessee, should not betreated as admission by the assessee of claim money taxable inits hand. Further, we agree with the contention of the Ld. counselof the assessee that insuring the financial interest in thesubsidiary by M/s Adidas AG is not a tax avoidance scheme andthe policy was taken to cover the contingent losses that may ormay not arise in future. We find that M/s Adidas AG has paid premium in respect of the policy from time to time and also paidtax in Germany in relation to the amount in question of insuranceclaim. We reject the observation of the lower authorities allegingthat colourable device was adopted by the assessee for evadingtaxes in India….In view of above discussion, we are of the opinion that claimof insurance received by M/s Adidas AG is not taxable in thehands of the assessee either under section 5 or under section9(1)(i) of the Act. The grounds of the appeal raised by the assesseeare accordingly allowed.**[Paras 9.2, 9.3, 9.4, 9.5]**

3. DCIT v. Smt. Angoori Devi Educational & Cultural Society (ITA No. 4886/D/16)(05/08/19)(ITAT, Delhi)

SECTION 11 – CARRY FORWARD OF EXCESS APPLICATION OF FUNDS – THE CARRY FORWARD IS ALLOWABLE EVEN WHERE THE RETURN OF INCOME WAS FILED AFTER THE DUE DATE

Held, We have carefully considered the rival contentions and perused the orders of the lower authorities. The first issue regarding the claim of excess application in earlier year whether allowable to a charitable trust for set off is covered in favour of the assessee by the decision of Honourable supreme court in case of COMMISSIONER OF INCOME TAX (EXEMPTION) vs. SUBROS EDUCATIONAL SOCIETY 303 CTR 1. Provisions of section 70-74 applies to aggregation of losses and set off and carry forward of the same. Income of the trust is computed u/s 11 -13 of the act and is not hit by those provisions. Hence, we dismiss this ground of appeal holding that excess application in earlier year should be allowed for set off to the charitable trust in subsequent year against the income of the trust as application of such income. [Para 6]

4. Sh. Anil Kumar Bansal and ors v. ITO (ITA No.2320 to 2022/Del/2017) (02.08.19)(ITAT, Del)

SECTION 28(iv) – WAIVER OF LOAN – INCREASE IN CAPITAL OF THE ASSESSEE WAS ON ACCOUNT OF WAIVER OF LOAN BY THE BANK – THE ASSESSING OFFICER CONSIDERED SUCH WAIVER AS INCOME U/S 28(IV) - THE HON'BLE SC IN THE CASE OF MAHINDRA AND MAHINDRA MILLS 401 ITR 1 (SC) HAS RULED OUT THE APPLICABILITY OF SECTION 28(IV) ON WAIVED OFF LOANS- THE ADDITION WAS DIRECTED TO BE DELETED.

Held, We have given a thoughtful consideration to the orders of the authorities below. In our considered opinion, the decision of the Hon'ble Supreme Court relied upon by the Ld. AO and upheld by the ld. CIT(A) in the case of T.V. Sundaram Iyenger is misplaced and has been wrongly applied. In our considered view that applicability of section 28(iv) of the Act has been discussed by the Hon'ble Supreme Court in the case of Mahindra & Mahindra Mills Ltd. 404 ITR 1, wherein, the Hon'ble Supreme Court has reversed the decision of the Hon'ble Madras High Court in case of CIT vs Ramaniyam Homes Pvt. Ltd. 384 ITR 530. [Para 10]

As mentioned elsewhere, the Ld. CIT(A) has incorrectly applied the ratio laid down by the Hon'ble Supreme Court in the case of T. V. Sundaram Iyenger 222 ITR 344 whereas the ratio laid down by the Hon'ble Supreme Court in the case of Mahindra & Mahindra Mills Ltd. (supra) squarely applied on the facts of the case in hand and also the decision of the Hon'ble Bombay High Court in the case of Xylon Holdings (P.) Ltd. (supra). [Para 12]

Considering the totality of facts in the light of ratio laid down by the Hon'ble Supreme Court in the case of Mhaindra & Mahindra Mills Ltd. (supra), we direct the AO to delete the impugned disallowance from the hands of the all the appellants. [Para 13]

5. Hella India Lighting Ltd. v. DCIT (ITA No.1109/D/15) (Dated 29/07/2019)

SECTION 37(1) - ADVANCE IN RELATION TO CAPITAL EXPENDITURE WRITTEN OFF – SINCE NO CAPITAL ASSET IN CONNECTION WITH IRRECOVERABLE ADVANCE CAME INTO ACQUISITION, SUCH ADVANCE IS ALLOWABLE EXPENDITURE / LOSS IN THE YEAR OF WRITE OFF – DECISION OF DELHI HIGH COURT IN THE CASE OF INDO RAMA SYNTHETICS VS. CIT: 333 ITR 18 FOLLOWED.

Held, We have considered the rival arguments made by both the sides and perusedthe orders of the authorities below. We find the Assessing Officer made addition ofRs.7,26,566/- being the amount written off as advances in the P & L Account on theground that these are capital in nature. We find the DRP upheld the action of theAssessing Officer. It is the submission of the ld. counsel for the assessee that sincesuch advances were given for new capital project of Faridabad unit and the project wasabandoned due to the global economic shut down and its impact on the expected futuredemand and since the suppliers did not refund the amount, therefore, such advanceswere written off and claimed as business expenditure u/s 37(1) of the IT Act. We findthe Hon'ble Delhi High Court in the case of Indo Rama Synthetics (supra) has heldthat where the assessee has incurred certain expenditure for expansion of businesswhich was subsequently abandoned, the amount so spent was allowable as revenueexpenditure. It has further been held in the said decision that since the project wasabandoned no new asset came to be created and it was accordingly held that theexpenditure was deductible. Respectfully following the decision of the Hon'ble DelhiHigh Court cited, supra, we hold that the amount in question has to be allowed as arevenue expenditure. The grounds raised by the assessee on this issue are accordinglyallowed.**[Para 21]**

6. M/s. T.V. Today Network Ltd. v. Addl. CIT (ITA No. 2977 & 2978/D/15)(16.08.19)(ITAT, Del)

SECTION 37(1) – DISALLOWANCE OF EXPENDITURE – EXPENSES INCURRED FOR NEW DESIGN OF THE LOGO OF AAJTAK CHANNEL CANNOT BE TREATED AS CAPITAL EXPENDITURE – THE LOGO WAS ALREADY IN EXISTENCE AND EXPENSE FOR REDESIGNING DOES NOT RESULT IN CREATION OF NEW ASSET – THE DISALLOWANCE WAS DIRECTED TO BE DELETED.

Held, We have given a thoughtful consideration to the orders of the authorities below. The Aaj Tak channel which started from 1999 with a logo needed fresh look because of the passage of time and cut throat competition and for improving the viewership the logo was given a fresh look for which the assessee had incurred impugned expenditure. In our considered opinion the Aaj Tak logo was already there and by incurring the

impugned expenditure the assessee has only enhanced its look by giving fresh and improved technical face. [Para 23]

We are of the considered view that such expenditure is a routine expenditure. No doubt some enduring benefit will accrue to the assessee but giving a fresh look to the existing logo, no new asset was created and there was no addition to or expansion of the profit making apparatus of the assessee. [Para 24]

7. Gayatri Build Associates Pvt. Ltd. vs. DCIT (ITA No. 1888/D/2017)(Dated 31.07.2019)

SECTION 40A(3) - ONCE THE GENUINENESS OF PAYMENT IS NOT IN DISPUTE AND PAYEE IS IDENTIFIABLE FROM WHERE PAYMENT IS DULY CONFIRMED, RIGORS OF SECTION 40A(3) STANDS DISCHARGED.

5. We have considered the rival submissions as well as considered the decision relied upon by the Ld. Counsel for the assessee. We find considerable cogency in the contention of the Ld. Counsel of the assessee that before the lower authorities the assessee has submitted that the factum of genuineness of payment where payee to whom payment made by assessee in prohibited made u/s. 40A(3), is also assessed with ACIT, Circle-2, Meerut where assessee is also assessed at Meerut itself, where there is no doubt on payment being received by identified seller which stands thoroughly uncontroverted. It is further noted that the sale deed are registered which evidences and confirms beyond pale of doubt the genuineness of payment aspect. We further note that once the genuineness of payment is not in dispute and payee is identifiable from where payment is duly confirmed, rigors of section 40A(3) stands discharged. The authorities below have not doubted the identity of the payee and the genuineness of the transaction in the matter. Therefore, the decision of ITAT, Delhi Bench in the case of ACIT, Central Circle-2, Faridabad vs. M/s. Marigold Merchandise (P) Ltd., (supra), is squarely applicable to the facts of the case, wherein the Tribunal vide its Order dated 11.09.2017 has dismissed the Departmental Appeal.

8. DCIT vs. ShriIqbal Chand Khurana (ITA No. 2798/D/2015) (Dated 01.08.2019)

SECTION 51 - WHERE ADVANCE MONEY FORFEITED IS MORE THAN THE COST OF ACQUISITION, IN SUCH A CASE, THE EXCESS OF THE ADVANCE MONEY FORFEITED OVER THE COST OF ACQUISITION OF SUCH ASSET SHALL BE A CAPITAL RECEIPT ONLY. HON'BLE SUPREME COURT IN THE CASE OF TRAVANCORE RUBBER & TEA CO. LTD., VS. CIT [2000] 243 ITR 158 (SC) RELIED - APPEAL IN THE CASE OF CO-OWNER SHRI ASHWANI KHURANA HAVE BEEN DECIDED BY ITAT IN ITA.NO.2799/DEL./ 2015 FOR THE A.Y. 2010-2011 VIDE ORDER DATED 26.02.2019 IS ALLOWED.

9. Smt. Vatsala Asthana v. ITO (ITA No. 5635/D/16)(06.08.19)(ITAT, Del)

SECTION 54F – WHETHER AMOUNT INVESTED IN NEW RESIDENTIAL PROPERTY ON BEFORE DUE DATE PRESCRIBED U/S 139(4) SHALL BE CONSIDERED FOR THE PURPOSE OF CLAIMING EXEMPTION U/S 54 – HELD YES

Held, In view of the above decisions, the payment made by the assessee towards purchase of residential house up to the due date of filing of the return of income prescribed under section 139(4) of the Act i.e. 31/03/2014 is allowable for considering deduction under section 54F of the Act. Respectfully, following the above decisions, we accordingly direct the Assessing Officer to consider amount utilized by the assessee for purchase of the house till 31/03/2014(which includes the payment of Rs.50,36,422/- made up to 31/07/2012) for deduction under section 54F of the Act. [Para 16]

10. Smt. Karuna Garg & ors v. ITO (ITA No. 1069/D/19)(06/08/2019)(ITAT, Del)

SECTION 68 – PENNY STOCK – REJECTION OF CLAIM U/S 10(38) – THE TRANSACTION OF PURCHASE AND SALE OF SHARES WERE CARRIED OUT THROUGH BANKING CHANNELS – THE SALE WAS MADE ON RECOGNIZED STOCK EXCHANGE THROUGH DMAT ACCOUNT – THE ASSESSING OFFICER HAS MADE THE ADDITION ONLY ON THE BASIS OF INVESTIGATION WING REPORT WITHOUT CONDUCTING ANY ENQUIRY – NEITHER THE NAME OF THE ASSESSEE NOR BROKER APPEARED IN SEBI INTERIM ORDER – FURTHER THE ORDER OF SEBI IS OPERATIONAL FROM SUBSEQUENT DATE AND DOES NOT AFFECT VALIDITY OF TRANSACTION UNDERTAKEN PRIOR TO SUCH DATE – THE GAIN ARISING FROM SALE OF SHARES WAS HELD TO BE GENUINE

Held, a perusal of the assessment order clearly shows that the Assessing Officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings. [Para 21]

The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing

the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Organic Food Processing Ltd - a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also. [Para 24]

As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI. [Para 25]

There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void. [Para 26]

As mentioned elsewhere the shares of M/s. Esteem Bio Organic Food Processing Ltd were suspended from trading in the stock exchange but that was from 29.06.2015 which is date of the order of the SEBI. The shares of two companies were purchased by the assessee in the month of February 2013 and November, 2012 which were sold in the month of February/ March 2014 and these transactions took place much before the report of the Investigation Wing and also before the order of the SEBI. [Para 29]

Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions

relied upon by both the sides, though perused, but not considered on the facts of the case in hand. [Para 30]

We accordingly direct the Assessing Officer to accept the long term capital gains declared as such. [Para 31]

11. Mohd. Yunus Qureshi v. ITO (ITA No.4936/Del/2018)(22.08.19)(ITAT,Del)

SECTION 68 – ADDITION OF SUNDRY CREDITORS –THE ASSESSING OFFICER HAS NOT DISPUTED THE TRADING RESULTS, PURCHASES AND SALES – THERE IS NO JUSTIFICATION IN MAKING ADDITION U/S 68 EVEN THOUGH THE NOTICE U/S 133(6) REMAINED UNCOMPLIED WITH BY THE CREDITORS – ADDITION DIRECTED TO BE DELETED.

Held I find the Assessing Officer made addition of Rs.11,69,600/- in respect of five creditors on the ground that the letters issued u/s 133(6) to them were either returned unserved or no reply was received from some of the parties and the assessee failed to produce them or furnish any credible evidence. I find the ld.CIT(A) sustained the addition so made by the Assessing Officer, the reasons for which have already been reproduced in the preceding paragraphs. It is the submission of the ld. counsel for the assessee that when the purchase and sales have been accepted and books were not rejected and when the assessee is having regular transactions with the said parties and in subsequent years the assessments have been completed u/s 143(3) without making any addition, therefore, no addition is called for. In find some force in the above argument of the ld. counsel. A perusal of the ledger account of the above parties for different years, copies of which are placed in the paper book, shows that the assessee is having regular transaction with the said parties. A perusal of the assessment order for assessment year 2011-12 and 2012-13 shows that no such addition has been made by the Assessing Officer in respect of those sundry creditors. It is also pertinent to mention that the assessee before the Assessing Officer had made a request that he was ready to produce all the creditors, however, no such opportunity was granted by the Assessing Officer. It is also noticed from the assessment order that the Assessing Officer has not rejected the book results and thereby has accepted the purchases made from the said parties and the sales have also been accepted. Under these circumstances, it has to be seen as to whether the addition is called for merely because some of the letters issued u/s 133(6) were returned back unserved or in some other cases there was no compliance from the said creditors. The coordinate Bench of the Tribunal in the case of Sudha Loyalka (supra) has held that addition cannot be made u/s 69C in respect of amount payable to creditors towards purchases when such purchases were duly recorded in books of account and sales made against those purchases was not disputed. The Lucknow Bench of the Tribunal in the case of Zazsons Exports Ltd. (supra) has held that when the Assessing Officer has accepted the purchases and trading results has not been disturbed, addition cannot be made u/s 68 of the Act merely on account of non

verifiability of sundry creditors. The Hon'ble Delhi High Court in the case of Ritu Anurag Agarwal (supra) has held that when there was no disallowance for corresponding purchases and the trade results were accepted by the Assessing Officer, no addition can be made u/s 68 in respect of the outstanding sundry creditors related to purchases. The various other decisions relied on by the ld. counsel in his paper book also support his case. In this view of the matter, I hold that the ld.CIT(A) is not justified in sustaining the addition made by the Assessing Officer on account of the sundry creditors in whose cases the letters issued u/s 133(6) were either returned unserved or were not complied with and the assessee failed to produce them. [Para 8]

12. Ramesh Chand Prop. vs. ITO (ITA No. 2980/D/2019) (Dated 01.08.2019)

SECTION 69 - THE AO MADE THE ADDITION BECAUSE THE STOCK STATEMENT SUBMITTED TO THE BANK ON 28.02.2014 SHOWS EXCESS STOCK IN THIS STATEMENT - THE AO HAS NOT REJECTED THE BOOKS OF ACCOUNTS - THE GP RATE IS BETTER AS COMPARED TO PRECEDING ASSESSMENT YEAR - THE VALUE OF THE STOCK FURNISHED TO THE BANK AS ON 31.03.2014 TALLIES WITH THE AUDITED BOOKS OF ACCOUNTS OF THE ASSESSE - FIGURES FURNISHED TO THE BANK WERE ON ESTIMATE BASIS AND NOT ON ACTUAL BASIS - FURTHER, THE BANK OFFICIALS HAD ALSO NOT VERIFIED THE PHYSICAL STOCK AT THE PREMISES OF THE ASSESSEE NOR VALUE THE STOCK AS ON 28.02.2014 – ADDITION TO BE DELETED.

11. I have considered the rival submissions. It is not in dispute that assessee maintained books of accounts which are duly audited. The AO has not pointed out any specific defect in maintenance of the books of account by the assessee. The books of accounts by the assessee have not been rejected by the AO. It is also admitted fact that the turnover and GP ratio is better in assessment year under appeal as compared to preceding assessment year. The AO made the addition because the stock statement submitted to the bank on 28.02.2014 shows excess stock in this statement. The authorities below have heavily relied upon the information provided by the Punjab National Bank vide letter dated 28.11.2016, copy of which is reproduced in the impugned order. In this reply the bank has stated that due to renovation of the branch the file containing stock statement of assessment year under appeal is not traceable at present. However, as per banking practice whenever the party submitted stock statement same is checked/verified by the bank officials. It would, therefore, show that the stock statement submitted by the assessee to the bank was not produced before the AO. The bank has merely explained their general practice for verifying the stock statement. However, what happened in the case of the assessee has not been clarified by the bank. Thus, the authorities below merely relied upon the general practice of the bank instead of verifying the actual fact of the case of the assessee. The assessee submitted that as on the closing of the financial year the closing stock was of Rs. 1,88,17,001/- which is also reported to the bank on the

same date which is also certified by the bank (PB-11). It would, therefore, show that the stock statement tally with the stock statement submitted to the bank at the end of the financial year on 31.03.2014. The assessee, therefore, rightly contended that the stock statement submitted on 28.02.2014 prior to close of the financial year was on estimate basis and not on actual basis. The assessee also rightly contended that since assessee deals in controlled items like fertilizer and chemicals, therefore, it is subject to physical verification by Agriculture Department. No enquiries have been done by the AO from the concerned Agriculture Department with regard to discrepancy in the stock. It may also be noted here that in the preceding AY 2013-14 the similar addition was deleted by the Ld. CIT(A) following the judgment of the Hon'ble Punjab & Haryana High Court in the case of Sidhu Rice & General Mills (supra). Therefore, Ld. CIT(A) should not have taken a contrary view in assessment year under appeal. The decisions relied upon by Ld. Counsel for assessee squarely applied to the facts and circumstances of the case. The issue is, therefore, covered by these decisions in favour of the assessee. It is well settled law that Revenue authorities are bound to follow the rule of consistency. In view of the above, I am of the view that the addition is wholly unjustified. I, accordingly, set aside the orders of authorities below and delete the entire addition.

13. Beam Global Spirits & Wine [India] P. Ltd. v. DCIT (ITA No. 1604/D/14 & 1214/D/17)(21.08.19)(ITAT, Del)

I. SECTION 92C – AMP EXPENSES – BRIGHT LINE TEST – THE REVENUE NEEDS TO ESTABLISH WITH MATERIAL OR EVIDENCE THAT THERE EXIST INTERNATIONAL TRANSACTION FOR BRAND BUILDING – MERE AGREEMENT TO USE BRAND DOES NOT LEAD TO INCURRING OF AMP EXPENSES – FURTHER WHERE OPERATING MARGIN OF ASSESSEE IS HIGHER THAN OF COMPARABLE NO FURTHER ADJUSTMENT ON ACCOUNT OF AMP EXPENSES IS WARRANTED

II. SECTION 92C – REIMBURSEMENT OF EXPENSES – THE ADJUSTMENT ON ACCOUNT OF MARK UP ON REIMBURSEMENT OF EXPENSES INCURRED TOWARDS MARKETING SUPPORT SERVICES – ASSESSEE NEITHER MADE ANY VALUE ADDITION NOR UNDERTOOK ANY RISK – PURE REIMBURSEMENT OF COST – ADJUSTMENT DIRECTED TO BE DELETED.

Held,

I. Considering the facts of the case in hand, in the light of judicial decisions discussed hereinabove, we are of the considered opinion that the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction for provisions of brand building services between the assessee and the AE. [Para 27]

In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses. [Para 29]

The aforesaid view that existence of an international transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income / expenditure must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises. [Para 30]

The Hon'ble High Court of Delhi in the case of Soni Ericsson Mobile Communications India Pvt Ltd [supra] has held that if an Indian entity has satisfied Transactional Net Margin Method (TNMM), i.e., as long as the operating margins of the Indian enterprise are higher than the operating margins of comparable companies, no further separate compensation for AMP expenses is warranted. [Para 31]

II. On perusal of the agreement between the assessee and the AE, and considering the scope of activities provided for marketing support services by the assessee to its AE, we are of the considered opinion that such reimbursement of expenditure at actual cost by the AE do not call for any mark-up on account of profit by the assessee. We find that for marketing support and coordination activity undertaken by the assessee for its overseas AEs, it is compensated by commission basis of sales. [Para 45]

Therefore, as far as these costs are concerned, the assessee does not add any value and does not undertake any risk whatsoever and acts only as a pass through agent. Even the OECD Guidelines at clause 7.3637 provides that it would be sufficient for the AEs to reimburse such costs to the assessee without any mark-up for efforts expended by the assessee in undertaking marketing support and coordination activity for which it is already getting commission paid on sales. Moreover, it is not the case of the revenue

that the assessee is in the business of providing advertisement, marketing and sales promotion services to unrelated parties. We, further find that the costs of running marketing support services and coordination services plus costs reimbursed considered together do not comprise a significant proportion of the total cost of the assessee. In our considered view, any benefit arising to the AEs is purely incidental and not intentional so as to warrant any mark up on the costs incurred by the assessee. Considering the facts of the case in the light of the agreement, we do not find any merit in the adjustment on account of mark-up on reimbursement of marketing support services and the same is directed to be deleted. [Para 46]

14. Bain & Company India Pvt Limited ITA No. 378 & 379/Del/2015 order dated 25-07-2019

SECTION 92C - INCOME TAX - ALP – ROYALTY PAID TO AE - BENEFIT TEST –- ASSESSEE WAS ENGAGED IN THE BUSINESS OF PROVIDING MANAGEMENT CONSULTANT SERVICES TO/FROM ITS OVERSEAS GROUP ENTITIES - TPO DID NOT DRAW ANY ADVERSE INFERENCE WITH RESPECT TO ANY OF THE TRANSACTIONS, BUT FOR PAYMENT OF ROYALTY BY THE ASSESSEE TO BAIN USA AND MADE AN UPWARD ADJUSTMENT UNDER CHAPTER X - TPO VALUED TRANSACTION AT NIL – CIT(A) DELETED THE ADDITION

ITAT held that,

i. Ld. CIT(A) following the decision of the Hon'ble Delhi High Court in the case of *EKL appliances Ltd in ITA No. 1068/2011 and ITA No. 1070/2011* wherein it was held that in case an expense has been incurred for the purpose of business, there is no need to link it up with the profit arising from the same. Ld. CIT(A) observed that it is important to appreciate that both assessee and the Ld. TPO have applied CUP method and not TNMM where the disallowance can be based on profitability of business and therefore in line with the judgement in EKL appliances (supra) the approach of the Ld. TPO cannot be sustained. (Para 12)

ii. On the aspect of the application of CUP method as comparable uncontrolled transaction, Ld. CIT(A) observed that based on the harmonious reading of rule 10 B, tenancy, the OECD guidelines and the plethora of judicial precedents are available on the issue, the application of CUP method a comparable uncontrolled transaction in comparable circumstances is a necessary condition and the use of benefit to test and not an actual transaction as the CUP to determine the a LP of royalty paid as nil, by the Ld. TPO cannot be sustained. On this aspect Ld. CIT(A) held that the Ld. TPO was not justified in applying CUP method using "benefit test" for the purpose of benchmarking the international transaction undertaken by the assessee.(Para 13)

iii. We have also gone through the judgement of the Hon'ble Delhi High Court in the case of Sony Ericsson mobile communications India private limited (supra) and it is clearly held by the Hon'ble High Court that the question of payment of royalty cannot be determined on the basis of profitability or earnings of the assessee, once it is accepted that know-how and technical information was provided. Hon'ble High Court rejected the findings of the Ld. TPO that the assessee had not derived any commercial benefit as technology and know-how had not resulted in any substantial profit increase as totally unsustainable and the profitability of the assessee could have been lower are varied due to various reasons and lower profitability in one or more years cannot lead to the conclusion that no benefits were derived or technology was unproductive.(Para 14)

iv. We find it difficult to ignore the contention of the assessee has been that the assessee had a compounded annual growth rate of 31.31% from FY 2006-07 to FY 2012-13 and the sale had been rapidly growing over the past few years, whereas, the growth in royalty payment to Bain USA has been negligible in comparison at 1% on domestic Revenue and 2% on foreign Revenue (affecting royalty of 1.18%) paid to Bain USA, for there is no evidence to disprove the same. On a perusal of the result of the search carried out by the taxpayer from the SIA database summarised by the Ld. CIT(A) in his order at page No. 14 we are satisfied that the payment made by the assessee to Bain USA is far less than the list percentage paid by E.Merck (India) Ltd at 2%. Further as is evident from the order of the Ld. TPO at page No. 5, the Bain USA said to have provided the specialised expert eyes and vide spectrum of consulting capability which are running into dozens.(Para 15)

15. Attar Singh and ors v. ITO (ITA No. 2682/D/18)(08.08.19)(ITAT, Del)

SECTION 127 AND SECTION 124 – ISSUE OF NOTICE BY AO NOT HAVING JURISDICTION OVER THE CASE – THE ASSESSEE WAS DELHI POLICE EMPLOYEE AND WAS EMPLOYED AND REGULARLY ASSESSED IN DELHI – THE NOTICE U/S 148 WAS ISSUED BY ITO GURGAON ON THE BASIS OF PAN DATABASE – ITO GURGAON WAS AWARE OF THE FACT THE ASSESSEE WAS ASSESSED IN DELHI – NON FILING OF OBJECTION U/S 124(3) IS INCONSEQUENITAL WHERE ITO HAS NO JURISDICTION – THE NOTICE U/S 148 WAS HELD TO BE WITHOUT JURISDICTION

Held, Since, admittedly, in the instant case, the assessee was regularly filing his return of income at Delhi with his PAN No. linked with the Assessing Officer at Delhi and he was residing at PS, Dwarka-Sector-9, South West District, New Delhi, in government accommodation and was getting salary from the Delhi Police, therefore, merely because the assessee has received the notice, which was sent in his Gurgaon address and has participated in the assessment proceedings will not give jurisdiction to the Assessing Officer at Gurgaon to have jurisdiction over the assessee. So far as the argument of the

ld. DR that the assessee has participated in the assessment proceedings and, therefore, has apparently given his consent to the transfer of jurisdiction to the Assessing Officer of Gurgaon is concerned, the same, in our opinion, would not confer jurisdiction upon the Assessing Officer who otherwise was not the Assessing Officer of the assessee. The Hon'ble Bombay High Court in the case of CIT vs. Lalitkumar Bardia (supra) as held that mere participation in proceedings or acquiescence would not confer jurisdiction upon the Assessing Officer who otherwise was not the Assessing Officer of the assessee. The Hon'ble Apex Court in the case of Kanwar Singh Saini (supra) has held that there can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the party nor by a superior court. [Para 30]

So far as the argument of the Revenue that the assessee has not raised any objection to the jurisdiction within the prescribed time period is concerned, we find merit in the argument of the ld. counsel that the issue to lack of jurisdiction can be raised at any stage in a case where the return has been filed in response to notice u/s 148/158BC/153A. [Para 31]

In view of the above discussion and considering the fact that the assessee was employed with Delhi Police and was regularly filing his return of income at Delhi under ITO, Ward 64(3) [earlier ITO, Ward 40(3)] and since this fact was known to the ITO at Gurgaon, therefore, in absence of any transfer of jurisdiction u/s 127, we hold that the ITO, Gurgaon has no jurisdiction over the assessee. Therefore, respectfully following the decision of the Hon'ble Punjab & Haryana High Court, which is the jurisdictional High Court in view of the assessment order being passed by the ITO at Gurgaon, we hold that the Assessing Officer, Gurgaon had no jurisdiction over the assessee to issue notice u/s 148 and consequently pass the order u/s 147/143(3). Therefore, the notice issued u/s 148 is quashed. [Para 32]

[Note : Decisions of Delhi High Court in the case of Abhishek Jain and S.S. Ahluwalia discussed and distinguished on facts]

16. Sarvajit Bhatia v. ITO (ITA No. 6695/D/18)(21.08.19)(ITAT,Del)

SECTION 143(3) – LIMITED SCRUTINY – THE ASSESSING OFFICER CANNOT GO BEYOND THE SUBJECT MATTER OF LIMITED SCRUTINY WITHOUT OBTAINING MANDATORY APPROVAL OF SUPERIOR AUTHORITY – THE ADDITION OUTSIDE THE SCOPE OF LIMITED SCRUTINY DIRECTED TO BE DELETED.

CLAIM OF LOSS ON SALE OF SHARES NOT CLAIMED IN ORIGINAL RETURN – THE ASSESSEE CLAIMED THE LOSS IN THE REVISE RETURN FILED BEFORE THE AO – WHERE THERE IS BONAFIDE MISTAKE IN THE ORIGINAL RETURN WHICH WAS SUBSEQUENTLY RECTIFIED BY WAY OF REVISED RETURN, THE AO IS BOUND TO CONSIDER THE REVISE RETURN.

Held

I. I have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the case of the assessee was selected for limited scrutiny to examine the issue of commodity transaction/ derivatives (futures) transactions as mentioned by the Assessing Officer in the body of the assessment order itself. However, the Assessing Officer in the instant case converted the limited scrutiny case to a fullfledged scrutiny case which is evident from the assessment order. I find the CBDT vide Instruction No.5/2016 dated 14.07.2016 and instruction No.225/402/2018 dated 28.11.2018 has issued certain guidelines for converting a limited scrutiny case to complete the scrutiny which is binding on the department. The Board has clearly mentioned that in a limited scrutiny case the Assessing Officer cannot travel beyond the issues for which the case was selected and in case the Assessing Officer wants to expand its scope of enquiry/investigation other than the issues on which the case was selected for scrutiny, then in that case mandatory approval from the PCIT or CIT or PDIT or DIT has to be obtained. [Para 12]

A perusal of the Assessment Order shows that no such approval has been taken. I, therefore, deem it proper to restore the issue to the file of the Assessing Officer with a direction to verify as to whether such approval has been taken and in case no such approval has been taken then the addition so made by the Assessing Officer and upheld by the CIT(A) stands deleted.[Para 13]

II. However, in the instant case, I am of the considered opinion that it is not a deliberate omission but an inadvertent error. Further, there is no decision of the Hon'ble Jurisdictional High Court on this issue. It is the settled proposition of law that when two views are possible on an issue, the view which is favourable to the assessee has to be followed. In this view of the matter I hold that the Ld. CIT(A) should not have upheld the action of the Assessing Officer in not considering the revised return filed. I, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to consider the revised return as in accordance with law. [Para 17]

17. M/s. Neelkanth Plywood P. Ltd. v. ITO (ITA No. 6702/D/18)(21.08.19)(ITAT, Del) (SMC bench)

SECTION 147 – REOPENING OF ASSESSMENT ON THE BASIS OF REPORT FROM INVESTIGATION WING - ACCOMMODATION ENTRY FROM S.K. JAIN GROUP – THE REASONS RECORDED WERE MERELY ON THE BASIS OF INVESTIGATION WING REPORT WITHOUT ANY INDEPENDENT APPLICATION OF MIND –THE REOPENING U/S 148 QUASHED.

Held, I have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. A perusal of the reasons for reopening of the case for the impugned assessment year, copy of which is placed at paper book page No. 20-21 shows that the reopening was made on the basis of the report of the investigation wing and there is no independent application of mind by the Assessing Officer for such reopening. The Hon'ble Delhi High Court in a number of cases has held that the reopening on the basis of report of investigation wing without independent application of mind by the Assessing Officer is not valid. Accordingly the reassessment proceedings which were based on the report of the investigation wing and without independent application of mind by the Assessing Officer have been held to be illegal. Since the Assessing Officer in the instant case has reopened the assessment on the basis of report of the investigation wing and there appears to be no independent application of mind by the Assessing officer for reopening of the case, therefore, the reassessment proceeding initiated by the Assessing Officer are not proper. I, therefore, hold that the reassessment proceeding initiated by the Assessing Officer is illegal and accordingly the subsequent proceedings also become illegal and void. [Para 10]

18. Gopal Chand Mudhra and Sons vs. ITO (ITA No. 1375/D/2019)(Dated 21.08.2019)

SECTION 147 - REASSESSMENT PROCEEDINGS BASED ON THE INFORMATION PROVIDED BY THE INVESTIGATION WING WITHOUT ANY INDEPENDENT APPLICATION OF MIND - SUCH REOPENING IS MADE ON THE BASIS OF BORROWED SATISFACTION – REOPENING NOT IN ACCORDANCE WITH LAW.

25. I find the coordinate Bench of the Tribunal in the case of M/s SBS Realtors (P) Ltd. vs. ITO, vide ITA No.7791/Del/2018, order dated 1st April, 2019, has also quashed the reassessment proceedings based on the information provided by the Investigation Wing without any independent application of mind. It was held that there was no tangible material which formed the basis for the belief that income has escaped assessment. The various other decisions relied by the ld. counsel also supports his case. Since, in the instant case, the reopening of the assessment has been made on the basis of information received from the Investigation Wing and there is no independent application of mind by the Assessing Officer and such reopening is made on the basis of borrowed satisfaction, therefore, such reopening is not in accordance with law and ha to be quashed. Accordingly, such reassessment proceedings have to be treated as not in accordance with law and has to be quashed.

19. DCIT Vs Senorita Enterprises Pvt. Ltd. (ITA No 5388/Del/2015)(AY 2007-08)(26.07.2019)

SECTION 147- REOPENING OF ASSESSMENT ON BASIS OF INFORMATION RECEIVED FROM INVESTIGATION WING- ASSESSING OFFICER DID NOT MAKE FURTHER INQUIRY AND RECORDED REASON ON BASIS OF SUSPICION AND DOUBT- HELD, AO HAS WRONGLY ASSUMED THE JURISDICTION U/S 147

Held, AO has not applied his mind on the information received from the Investigation Wing. He has produced the content of the letter of the Investigation Wing. There is no reason to believe for escapement of any income. Content of the letter clearly indicates that this company has not started a business how it has charged a premium of Rs.240/- per share? This creates a suspicion and the documents of the investing companies also indicate that they have received a huge amount as a share capital and that amount is forwarded to the assessee company as a share application money. On the basis of this fact, Investigation Wing was having doubt about the identity of the allottees companies, genuineness of the transaction and creditworthiness of the allottee companies. The content of the letter clearly indicates that Investigation Wing was having some suspicion and doubt and it was forwarded to the Assessing Officer. Without making any enquiries, Assessing Officer recorded the reason on the basis of only suspicion anddoubt. Even Assessing Officer has not formed his own opinion based on any information gathered or based on any information after perusal of the return filed by the appellant. From the return of income filed by the appellant, it is clearly mentioned that the share capital amount alongwith premium was only Rs.4.60 crores, however, in the reasons recorded Assessing Officer has mentioned the share capital amount as Rs.4,65,98,000/-. Assessing Officer has copied this figure from the letter of the Investigation Wing. This clearly indicates that AO has not formed its own reason of belief and he has only believed the content of the letter of the Investigation Wing. This content also clearly indicates that while granting the satisfaction by the Addl. CIT, he has not gone through the records and not verified the facts sent by the Investigation Wing. The mismatch of the figure of share capital, whether or its Rs.4,65,98,000/- has not been looked into by the Addl.CIT, at the time of giving approval for issuing the notice u/s 148 of the IT Act. Therefore, the Ld. CIT(A) has agreed with the contention of the AR of the assessee that there is no tangible material available at the time of recording the reasons for reopening the case. The main observation of the Investigation Wing is that assessee company has charged share premium @Rs.240/- per share which is very high but how this charging of heavy share premiums indicate the escapement of income is not narrated in the letter. AO has also not applied his mind to find out how there is an escapement of income in the form of share capital and share premium. After considering these facts, we find that AO has wrongly assumed the jurisdiction u/s 147 of the IT Act. The sequence in the chart which is appearing on page 13 of this order also clearly indicates that AO has not given proper opportunity to the assessee to file the objection against the issue of notice u/s 148 of the Act. The objections disposed off by

the AO are also not a speaking one. AO has relied upon the case of Hon'ble Supreme Court CIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 500 (SC) and rejected the claim of the assessee on the basis of this judgement and also information received from the Investigation Wing. He has not considered the facts, objections and case laws cited by the Ld. AR of the assessee. (para 6)

The judicial decisions relied upon by the Ld. DR have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in hand. Therefore, in view of these facts and circumstances of the case, the grounds raised against the assumption of jurisdiction u/s 147 were rightly allowed by the ld. CIT(A), which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the legal issue and reject the ground no. 1 raised by the Revenue before us.(para 6.1)

SECTION 68 - INVESTIGATION CONDUCTED BY INVESTIGATION WING - ASSESSEE HAD TAKEN SHARE CAPITAL OF RS. 465.98 LACS FROM INVESTEE COMPANIES, BUT IDENTITY, GENUINENESS AND CREDITWORTHINESS OF THE INVESTORS REMAINED DOUBTFUL- ADDITION U/S 68- ASSESSEE HAS FILED ALL THE NECESSARY DOCUMENTS BEFORE THE INVESTIGATION WING TO PROVE THE IDENTITY OF THE COMPANIES, THEIR CREDITWORTHINESS AND GENUINENESS OF THE TRANSACTION-AO SAID SINCE REASSESSMENT PROCEEDING IS DIFFERENT FROM THE PROCEEDINGS OF THE INVESTIGATION WING, APPELLANT HAS NOT DISCHARGED ITS ONUS- HELD ASSESSE DISCHARGED ITS ONUS U/S 68 – HENCE NO ADDITION

We find that the remarks of the AO clearly indicate that assessee has filed all the necessary documents before the Investigation Wing to prove the identity of the companies, their creditworthiness and genuineness of the transaction. AO has rejected these documents on the ground that these are routine documents. Regarding the charging of premium @Rs.240/- per share, AO commented that this explanation was filed before the Investigation Wing, since reassessment proceeding is different from the proceedings of the Investigation Wing, appellant has not discharged its onus. From the comments mentioned in Para 8 reproduced above clearly indicates that assessee has given explanation for charging the high rate of premium. Without considering those facts and explanation, he has just set aside the explanation on the ground that these explanations were filed before the Investigation Wing. However, the AO was supposed to give reasons for not accepting those explanations. AO has relied upon the case of (i) CIT v. Nupur Builders & Developers Pvt. Ltd. ITA No.120/2012, Delhi High Court (ii) CIT v. NR Portfolio Pvt. Ltd. ITA NO.1018 of 2011, Delhi High Court. The facts of these cases are entirely different from the facts of this case. In the present case, AO has proceeded entirely on the findings of the Investigation Wing and no investigation was made by him. He has not made any enquiry during the re-assessment proceedings. He has even not disclosed the facts on which he has treated that amount of Rs. 4.60 crores

as a deemed income of the assessee. Charging of high rate of premium, even if assessee has not started its business has no bearing on the acceptance of the share application money and share premium. Only the companies which have applied for the shares and paid the premium can explain the reasons for paying so much high premium. AO has not made any enquiries from those companies. The enquiries conducted by the Investigation Wing also do not indicate any adverse findings against the assessee. After considering the whole issue, the assessee has established all the ingredients required u/s 68 of the IT Act(Para 6.3).

The judicial decisions relied upon by the Ld. DR have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in hand. Therefore, in view of these facts and circumstances of the case, the addition made by the AO was rightly deleted by the Ld. CIT(A), which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 2 raised by the Revenue.(para 6.5)

20. Hameeda Begum v. ITO (ITA No. 7403/D/18)(01.08.19)(ITAT, Del)

SECTION 147 – REOPENING OF ASSESSMENT - THE REOPENING MERELY ON THE BASIS OF INFORMATION OF CASH DEPOSIT IS NOT SUFFICIENT – THE DEPOSIT IN THE BANK ACCOUNT PER SE CANNOT BE CONSIDERED AS INCOME - THE INQUIRY LETTER ISSUED BEFORE INITIATION OF PROCEEDINGS IS NON EST AS NO PROCEEDING WAS PENDING AND ASSESSEE IS NOT OBLIGED TO RESPOND THE SAME - THE REOPENING WAS HELD TO BE INVALID

Held, The facts are identical as have been considered in the case of Tajendra Kumar Ghai Vs ITO (supra), in which it was held that since no proceedings were pending before the AO when he issued the letter of inquiry to the assessee, therefore, such inquiry letter was not valid in the eyes of law. It was further held that the assessee was not required to respond to this invalid and non est inquiry letter issued by the AO. The deposit in the bank account per se cannot be income of assessee. In this case, reopening of assessment was quashed. Following the order of the Tribunal in the case of Tajendra Kumar Ghai Vs ITO (supra), I set aside the orders of authorities below and quash the reopening of assessment. Resultantly, all additions are deleted. [Para 8]

21. Masroor Bag Mirza vs. ITO (ITA No. 5182/D/2018) (Dated 21.08.2019)

SECTION 148 - IT IS THE SETTLED PROPOSITION OF LAW THAT WHEN A CASE IS REOPENED ON AN ISSUE, BUT, NO ADDITION HAS BEEN MADE BY THE ASSESSING OFFICER ON THAT VERY ISSUE, THE ASSESSING OFFICER IS

PRECLUDED FROM MAKING ANY OTHER ADDITION WITHOUT ISSUING FRESH NOTICE U/S 148.

8. However, a perusal of the assessment order shows that no addition has been made by the Assessing Officer on account of transaction in commodity exchange and he has made addition of Rs.3 lakhs being the unexplained source of cash deposit in the bank account. It is the settled proposition of law that when a case is reopened on an issue, but, no addition has been made by the Assessing Officer on that very issue, the Assessing Officer is precluded from making any other addition without issuing fresh notice u/s 148. Since, in the instant case, no addition has been made by the Assessing Officer on account of which the case of the assessee was reopened, therefore, the Assessing Officer cannot make addition on some other issue. Therefore, the very basis of addition made by the Assessing Officer is not legally sustainable. I, therefore, delete the entire addition. The appeal filed by the assessee is accordingly allowed.

22. Mr. Trilok Chand Chaudhary,v.ACIT (ITA No.5870/D/17) (Dated 20/08/2019)

SECTION 153A VS. 153C WHERE SEARCH IS CONDUCTED UPON THE PREMISES OF ASSESSEE AND THE ASSESSMENT IS BEING UNDERTAKEN UNDER SECTION 153A - WHETHER THE ISSUE ARISING FROM MATERIAL FOUND IN COURSE OF SEARCH OF 3RD PARTY COULD BE COVERED UNDER THAT ASSESSMENT NEED TO BE SEPARATELY COMPLETED UNDER SECTION 153C OF THE ACT – HELD, SECTION 153C AND 153A ARE MUTUALLY EXCLUSIVE AND THEREFORE THE ISSUE COVERED IN THE SCOPE OF FORMER SECTION CANNOT BE COVERED UNDER THE SCOPE OF ASSESSMENT UNDER SECTION 153A OF THE ACT.

Held, The facts of the case of Vinod Kumar Gupta (supra) aredistinguishable with the facts of the instant case. In the case ofVinod Kumar Gupta (supra) material found from Sh. S.K. Guptawas used in assessment proceeding under section 153A of the Actin the case of Sh. Vinod Kumar Gupta. But in that case warrantin fact was issued in the name of Sh. SK Gupta, Gaurav Gupta,Sh. Vinod Kumar Gupta, Ms. Veena Gupta, Sh. Vikas Gupta, andMs. Madhu Gupta. The Panchnama drawn was also signed byboth the assessee (Sh. Vinod Kumar Gupta) and SK Gupta. Thestatements of both Sh. S.K. Gupta and Sh. Vinod Gupta wererecorded on the same date. The Hon'ble High Court held that assearch and seizure was conducted through one authorization,there was no requirement of issuing separate notice under section153C of the Act and following separate procedure under section153C of the Act. But in the instant case, separate search warranthas been issued in the case of the assessee as well in the case ofSh. Ashok Chowdhary and the Assessing Officer has used thematerial found in the course of search at the premise of Sh.Ashok Chowdhary, which is not permitted in view of the expressprovision of the law.The addition made by the Assessing Officer in violation ofthe procedure provided in the Act is bad in law and void-ab-initioand cannot be

sustained. Accordingly, the addition of Rs.3.3crore, made protectively on the basis of the documents foundfrom the premises of the third party, by the Assessing Officer andupheld by the Ld. CIT(A) on substantive basis, is deleted. Theground No. 6.2 of the appeal is accordingly allowed.6. Other grounds No. 6 to 6.1 & 7 are accordingly allowed. **[Para5.9, 5.10]**

23. Hella India Lighting Ltd. v. DCIT (ITA No.1109/D/15) (Dated 29/07/2019)

SECTION 195 –OBLIGATION TO DEDUCT TAX AT SOURCE ON REIMBURSEMENT OF EXPENSES – NETWORKING AND GUARANTEE CHARGES PAID TO PARENT COMPANY ON COST TO COST BASIS, WITHOUT ANY ELEMENT OF MARK UP / PROFIT THEREON – THE ASSESSEE WAS NOT OBLIGED TO DEDUCT AT SOURCE THEREFROM SINCE IT WAS ONLY REIMBURSEMENT ON EXPENDITURE – DECISION OF SUPREME COURT IN THE CASE OF A.P. MOLLER MAERSK AS: 392 ITR 186 FOLLOWED.

Held, We find the AssessingOfficer, in the instant case, made addition of Rs.33,58,048/- on account of networkingcharges of Rs.20,90,737/- and guarantee charges of Rs.12,67,311/- paid to foreigncompanies without deducting TDS thereon which was upheld by the DRP. It is thesubmission of the ld. counsel for the assessee that there is no element of profit onaccount of payment of networking charges since it is merely a reimbursement ofexpenses. From the various pages of the paper book, we find the ld. counsel for theassessee has demonstrated before us that the networking charges of Rs.20,90,737/- ismerely a reimbursement of expenses and, therefore, we find merit in his argument thatthere is no element of profit and, therefore, deduction of tax at source is not required…Since this is also a reimbursement without any element of profit, we agreewith the contention of the ld. counsel that no tax is required to be deducted from suchpayment to the foreign company. In view of the above discussion, since both thepayments made to foreign companies are reimbursement of expenses, we hold that theassessee is not liable to deduct tax from the remittances so made. Grounds No.5 and 6are accordingly allowed.**[Paras 14, 15]**

24. DCIT v. M/s. GGC Constructions Pvt. Ltd. (ITA No.1258/D/16) (Dated 30/07/2019)

SECTION 250 READ WITH SECTION 139(5) – POWER OF CIT(A) TO ENTERTAIN ADDITIONAL CLAIM TAKEN IN THE REVISED RETURN BEYOND TIME LIMIT UNDER SECTION 139(5) – DECISION OF SUPREME COURT ON GOETZE INDIA LIMITED ONLY IMPINGES ON THE POWER OF ASSESSING OFFICER TO ENTERTAIN THE CLAIM, BUT DOES NOT IMPINGE ON THE POWER OF APPELLATE AUTHORITY TO ENTERTAIN SUCH CLAIM, EVEN IF THE SAME WAS FILED BEYOND THE TIME LIMIT TO FILE REVISED RETURN UNDER

SECTION 139(5) OF THE ACT – DECISIONS OF BOMBAY HIGH COURT IN THE CASE OF CIT v. PRUTHVI BROKERS AND SHAREHOLDERS PVT. LTD.: 349 ITR 336 AND DELHI HIGH COURT IN JAI PARABOLIC SPRINGS LTD.: 306 ITR 42 FOLLOWED.

Held, We do not find any infirmity in the order of theLd. CIT(A) in allowing the claim of the assessee on account of lossof future and option by filing a revised computation during theassessment proceedings instead of filing a revised return ofincome. The Hon'ble Bombay High Court in the case of CIT Vs.Pruthvi Brokers and Shareholders Pvt. Ltd. reported in 349 ITR336 has held that the appellate authorities have power toconsider a claim not made in the return of income. While doingso, the Hon'ble High court has relied on various decisionsincluding the decision of Hon'ble Supreme Court in the case ofGoetze (India) Ltd. Vs. CIT reported in 284 ITR 323 and thedecision of Hon'ble Delhi High Court in the case of CIT Vs. JaiParabolic Springs Ltd. (2008) reported in 306 ITR 42. It has beenheld by the Hon'ble Delhi High Court in the case of Jai ParabolicSprings Ltd. (supra) that the Hon'ble Supreme Court in the caseof Goetze (India) Ltd. (supra) has made it clear that the decisionwas limited to the power of the assessing authority to entertain aclaim for deduction otherwise than by a revised return and didnot impinge on the powers of the appellate authority. It has beenheld by the Hon'ble Delhi High Court that there was noprohibition on the powers of the Tribunal to entertain anadditional ground which according to the Tribunal arose in thematter and for the just decision of the case. In view of the abovediscussion and in view of the reasons given by the CIT(A) we donot find any infirmity in his order in directing the AssessingOfficer to delete the disallowance on account of set off of thelosses claimed by the assessee without filing a revised return.**[Para6]**

25. Mitesh Parvin Vador v. ITO (ITA.No.1176/Del./2019)(01/08/19)(ITAT, Del)

SECTION 271(1)(c) – PENALTY ON ADDITION U /S 68 IN RESPECT OF PENNY STOCK – THE ASSESSEE DISCLOSED COMPLETE PARTICULARS DURING THE COURSE OF ASSESSMENT AND TRANSACTIONS WERE UNDERTAKEN ON RECOGNISED STOCK EXCHANGE AND THROUGH BANKING CHANNEL – SURRENDER BY THE ASSESSEE WAS NOT BUY PEACE OF MIND AND AVOID LITIGATION – PENALTY WAS HELD TO BE BAD IN LAW

Held, In this case, assessee has declared the transaction in question in the computation of income and return of income. The AO examined the issue of long term capital gains and long term capital loss claimed by the assessee. The assessee conducted the entire transaction through banking channel through stock exchange. The AO on the basis of the evidences produced by the assessee on record presumed that the transactions are bogus. These facts clearly show that assessee disclosed the entire facts to the Revenue Department and did not conceal anything to the AO. The assessee never claimed profit in the matter but claimed short term capital loss. The issue is, therefore, covered by

order of ITAT 'Delhi Bench' in the case of Deepti Agarwal vs. ITO (supra) in which in the similar circumstances penalty was cancelled. [Para 6]

26. Bloomfield Properties and Holdings P. ltd. v. ACIT (ITA No. 7417/D/18)(30/07/19)(ITAT, Del)

SECTION 271(1)(C) – THE ASSESSEE OFFERING SUO MOTU DISALLOWANCE OF EXPENSES BEFORE HAVING BEEN POINTED OUT BY THE ASSESSING OFFICER – THE CASE WAS SELECTED FOR LIMITED SCRUTINY AND THE DISALLOWANCE OFFERED BY THE ASSESSEE WAS OUTSIDE THE SCOPE OF LIMITED SCRUTINY – THE DISALLOWANCE OFFERED ON OWN VOLITION DOES NOT ATTRACT PENAL PROVISIONS - THE PENALTY SO LEVIED DIRECTED TO BE DELETED.

Held, After considering the rival submissions and on perusal of the material placed on record, we find that assesse has filed its return of income u/s. 139(1) declaring loss of Rs.31,20,289/- filed digitally on 30.09.2014. As stated above, the assessee's case was selected for limited scrutiny on the points enumerated above and there was no reference of any allowability or otherwise verification of expenses. Notice u/s. 143(2) was issued on 28.08.2015 and another notice u/s.142(1) dated 05.04.2016 was issued with certain questionnaire. However, as pointed out by the ld. Counsel there is no specific query with regard to the disallowance of expenses. Thereafter, assessee suo motu vide letter dated 19.04.2016 had withdrawn certain losses and offered for disallowance in the revised computation on the reasons as incorporated above. It has been stated by the assesse before the authorities below that such a disallowance was suo motu at the commencement of assessment proceedings and when accounts were examined by the counsel, then assessee itself offered for the disallowance and has revised a computation. Thus, it cannot be held that the assesse had offered for disallowance only when assesse was cornered on specific issues relating to expenses. If the assessee offers any disallowance on its own volition without being confronted by with material or any query by the Assessing Officer then on such a disallowance no penalty u/s.271(1)(c) can be levied. Moreover, the disallowance of expenses were beyond the scope of limited scrutiny for which assessee's case was selected and hence it cannot be held that simply because assessee's case was selected for scrutiny, therefore, assessee was persuaded for offering the disallowance of expenses. Under these facts and circumstances of the case, the penalty levied by the Assessing Officer is directed to be deleted. [Para 8]

27. Harish Kumar (HUF) v. DCIT (ITA No.1469/D/19) (Dated 19/08/2019)

SECTION 271(1)(c) – PENALTY ON VOLUNTARY SURRENDER OF INCOME ON ACCOUNT OF BONAFIDE MISTAKE OF ACCOUNTANT – THE CORRETION WAS VOLUNTARY AND NO INACCURATE PARTICULARS WERE FURNISHED BY THE ASSESSEE – PENALTY STANDS DELETED

Held, We have heard both the counsel and perused the relevant recordsespecially the orders passed by the Revenue authorities as well as the PaperBooks filed by both the parties and the case laws relied by them therein. Onthe merits of the case, we find that assessee filed its return Income ofRs. 35,29,470/- with income from investments i.e. dividends, capital gainsand interest and AO taken the return for scrutiny u/s. 143(2) of the Act underCASS and no income escaping based on the information on section 94(7) of theAct disallowance on information based on AIR. We further note that AO hasissued various notices u/s 143(2)/142(1) of the Act, but has not made anyenquiry for the disallowance in the case of the assessee u/s. 94(7) of the Act.AO on the basis of the query for dividend income on 07.12.2017 issued a noticeu/s. 142(1) and asked the assessee to file the detail of all dividend / bonusincome earned by the assessee in a specified format and filed all the details inthe original return of income. In compliance of the same on 13.12.2017 Ld.Counsel for the assessee appeared and took adjournment for 15.12.2017 andexamined all details of dividend / bonus income and found that there is aninadvertent clerical error committed by the Chartered Accountant and on theadvice of Senior Chartered Accountant, the assessee filed voluntary revisedcomputation of income wherein a Long Term Capital Gain (LTCG) of Rs.1,43,53,921/- has been increased to Rs. 3,42,05,795/- due to the disallowanceof Rs. 1,98,51,874/- u/s. 94(7) of the Act at the first opportunity as soon as itcame to the notice of the assesee. We note that Assessee has committed thismistake for furnishing of inaccurate particulars in the return due to theinadvertent bonafide error in the claim due to one entry by the accounts staffposted at wrong date due to huge voluminous transactions and dividendcoupons for dividend from same security punched at one voucher i.e. entry oftwo dividend received on same security (Rs. 1,98,51,874/- received on28.1.2015 and Rs. 3,38,62,717/- received on 25.3.2015 made cumulatively on26.3.2015 i.e. date of sale of investments (26.3.2015) and receipt date ofsecond dividend. We further note that AO has completed the assessment onthe basis of details furnished by the assessee, hence, under the circumstancesassessee has not furnished inaccurate particulars of income. It is noted thatAssessee has paid voluntary taxes on disallowance u/s. 94(7) of the Act andnot filed the appeal against the assessment order passed by the AssessingOfficer. It is an admitted fact that assessee has not filed any false claim. Wefurther note that the assessee fully disclosed all the information asked for andhas nowhere furnished any inaccurate particulars. We find that there is noconclusive proof that the assessee has furnished inaccurate particulars ofincome. The AO has not brought enough incriminating material for furnishing ofinaccurate particulars and there

is no material for establishing the same andtherefore in the given facts and circumstances of the penalty is not leviable,because all the documents submitted by the assessee were neither rejected bythe AO as false or incorrect facts nor AO had clinched any further evidence forfurnishing of inaccurate particulars of income. We also find that section271(1)(c) postulates imposition of penalty for furnishing of inaccurateparticulars and concealment of income. On the facts and circumstances of thiscase the assessee's conduct cannot be said to be contumacious so as to warrantlevy of penalty.**[Para7]**