ITAT BAR reporter -March 2020

1. M/s Cargill Asia Pacific Holding Pvt. Ltd. vs. ADIT (ITA No. 1437-38/D/2012 & 5444/D/2010) (AY 2007-08) Dtd: 23.03.2020

SECTION 5 - PAYMENT RECEIVED BY ASSESSEE IS NOT LIABLE TO TAX AS FEE FOR TECHNICAL SERVICES IF PAYMENT RECEIVED IS MERELY A REIMBURSEMENT OF PAYMENT MADE TO THIRD PARTY ON BEHALF OF OTHER PARTY AND NO SERVICE HAVE BEEN RENDERED BY ASSESSEE

15.5 However, on perusal of the above details of the payment and corresponding invoices, we find that the assessee has paid certain payments to 3rd parties in Singapore on behalf of the branch of Cargill India Private Limited (CIPL). One of the major payment of USD 33,849.56 (Indian Rs.15,19,599) is of payment of the Singapore Income-taxes of branch of CIPL. The another major payment is payment to KPMG (a consultancy firm) for audit services, tax filing and handling tax matter of branch of CIPL in Singapore. The supporting letters of payment and corresponding invoices raised for reimbursement by the assessee are available on page 20 to 45 of the Paper-Book. It is evident from the invoices and supporting letters that no services have been rendered by the assessee and the assessee has merely made payment to 3rdparties on behalf of the branch of CIPL and subsequently raise invoices on the CIPL. The CIPL has accordingly made the payment for cost of reimbursement of payment made to 3rd parties by the assessee. In our opinion, the payment received by the assessee are merely reimbursement of the payment made to 3rd parties on behalf of the 'CIPL' .The said payment was obligation of the CIPLVand no services have been rendered by the assessee and thus the payments received do not constitute an income in the hands of the assessee and cannot be termed as FTS.
15.8 In view of our observation above, as the payments beingobligation of the CIPL and the assessee paid to 3rd parties and noservices have been rendered by the assessee to CIPL under theservice agreement, the payment received by the assessee from theCIPL are merely reimbursement and not liable to be taxed as Feefor technical services (FTS). The ground No. 1 to 1.3 of the appealare accordingly allowed.

2. ACIT v. Indiabulls Real Estate Ltd. (ITA No. 6602/D/16) (11/03/2020) (ITAT, Delhi)

I. SECTION 14A – THE ASSESSING OFFICER IS OBLIGATED TO RECORD SATISFACTION ON THE BASIS OF BOOKS OF ACCOUNT OF THE ASSESSEE THAT SOME EXPENDITURE HAS BEEN INCURRED FOR EARNING EXEMPT INCOME BEFORE INVOLVING RULE 8D – WHERE NO SATISFACTION IS RECORDED, THE DISALLOWANCE AS PER RULE 8D IS NOT SUSTAINABLE.

II. SECTION 32 – DEPRECIATION – SOFTWARE IS INTEGRAL PART OF COMPUTER AND IS ELIGIBLE FOR HIGHER RATE OF DEPRECIATION @ 60%

III. SECTION 37 – ESOP - DISCOUNT GIVEN TO EMPLOYEES IN ESOP IS IN THE NATURE OF INCENTIVE TO EMPLOYEES AND IS PART OF EMPLOYEE COST AND ALLOWABLE U/S 37 – THE DISCOUNT SO OFFERED ON ESOP IS ELIGIBLE TO BE CLAIMED AS DEDUCTION OVER THE VESTING PERIOD ON STRAIGHT LINE BASIS.

I. Held, Having gone through the facts on record and applicability of the case laws quoted by the ld. DR to the case before us, we find that the cases referred are mostly where the revenue has gone through the books of accounts, not satisfied with the disallowance made by the Assessing Officer and the reasons of such non-satisfaction has been mentioned in detail in the orders, whereas in the instant case, the books of account have been produced before the Assessing Officer which have been examined on test check basis. (refer Assessing Officer above) While re-computing the disallowance, the Assessing Officer has not followed the provisions of Section 14A(2) of the Income Tax Act, 1961 wherein it is mandated that, if the Assessing Officer having regard to the accounts of the assessee is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to which does not form part of the total income under the Act, then the Assessing Officer shall determine the amount of expenditure incurred in relation to such income. Further, the Act also mandates that such recomputation also applies in relation to a case where the assessee claims that no expenditure has been incurred by him in relation to the income which does not form part of the total income. From the reading of the judgment of the Hon'ble Apex Court in the case of Maxopp Investment Ltd. Vs CIT in CA Nos. 104-109 OF 2015, we find that having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the accounts of the assessee suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment, in that eventuality, the Assessing Officer will have to record its satisfaction to this effect. [Para 10]

11. In the instant case, we find that no such satisfaction has been recorded by the A.O to come to the conclusion to invoke the provisions of Section 14A(2). Hence, we decline to interfere with the order of the ld. CIT (A) and the disallowance is directed to be deleted.

II. Held, Having gone through the record, we find that the nature of the software acquired were licenses, which do not confer any enduring right and could be used for the duration as acquired for by the licensor. The taxpayer's objective was to use computer software to maximize its performance and streamline efficiency. The Hon'ble Bombay High Court in the case of M/s IFlex Solutions Ltd. reported in 225 Taxmann 37 held that there is no reason to differentiate the computer and the software as the latter is an integral part of the former. The software cannot be seen in isolation delinked from the computers. Similar view has been taken by the Co-ordinate bench of ITAT in the case of Make My Trip (India) Pvt. Ltd. Vs DCIT in ITA No. 6055/Del/2010 and Globe Capital Market Ltd. Vs CIT in ITA No. 2926/Del/2012. The issue of depreciation @60% on the software is now a settled issue beyond any perplexity. Hence, we decline to interfere with the order of the ld. CIT (A). [Para 14]

III. Held, The Special Bench held that the discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees. There is no difference in the situations,

(a) when the companies issues shares to public at market price and a part of premium is given to the employees in lieu of their services,

General

(b) When the shares are directly issued to employees at a reduced rate. [Para 21]

22. Held, In both the situations, the employees stand compensated for their efforts. ESOP is one such mode of compensating the employees for their services. Since, it is an expenditure for the company, the same needs to be allowed u/s 37(1) of the Act. [Para 22]

23. As to when and how much deduction is to be claimed, the Special Bench observed that the period from grant of option to the vesting of option is the vesting period and it is during such period that an employee is supposed to render the service to the company so as to earn and entitlement to the shares at a discounted price. If the vesting period is, say, four years with equal vesting at the end of each year, then it is at the end of the vesting period or during the exercise period, which in turn immediately succeeds the vesting period, that the employee becomes entitled to exercise 100 options or qualify for receipt of 100 shares at discount. Though the shares are allotted at the end of the vesting period, but it is during such vesting period that the entitlement is earned. It means that 25 options vest with the employee at the end of each year on his rendering service for the respective year. If during the interregnum, he leaves the service, say after one year, he will still remain entitled to exercise option for 25 shares at the discounted premium at the time of exercise of option. In that case, the benefit which would have accrued to him at the end of the second, third and fourth years would stand forfeited. Thus, it becomes abundantly clear that an employee becomes entitled to the shares at a discounted premium over the vesting period depending upon the length of service provided by him to the company. In all such schemes, it is at the end of the vesting period that option is exercisable albeit the proportionate right to option is acquired by rendering service at the end of each year.

24. The contra situation to the company is such that the obligation falls on the company to allot shares at the time of exercise of the option depending upon the length of the service rendered by the employee during the vesting period. The Special Bench held that such discount is deductible over the vesting period on straight line basis.

25. To sum up, it was held that the discount under ESOP is in the nature of employee cost and hence deductible during the vesting period.

3. DCIT vs. Hind Industries Ltd. (ITA No. 3535/D/2016) (A.Y 2011-12) Dtd 18.03.2020

SECTION 14A READ WITH RULE 8D WILL NOT APPLY IF NO EXEMPT INCOME IS RECEIVED OR RECEIVABLE DURING THE YEAR –

DISALLOWANCE OF PURCHASES - ONCE THE SALES HAVE BEEN ACCEPTED BY THE AO AND ASSESSEE ALSO DISCLOSED QUANTITATIVE TALLY OF PURCHASE, THEN IT WOULD BE IMPROBABLE TO PERCEIVE THAT SUCH A HUGE QUANTITY OF PURCHASES HAS NOT BEEN MADE

Held. 7. We have heard both the parties and perused the material available on record. As regards to Ground No. 1, the CIT (A) has given a categorical finding that there is no exempt income received by the assessee during the year under consideration. This fact was not disputed by the Revenue. Therefore, the CIT(A) has rightly deleted this disallowance in view of

the Cheminvestment Ltd. 61 taxman.com 118 Delhi. Thus, Ground No. 1 of the Revenue's appeal is dismissed.

Held, As regards to Ground No. 2, it is pertinent to note that the sale of the assessee was never doubted by the Assessing Officer. As regards the purchase from the records as mentioned in the Assessment Order itself, was found that quantitative tally of purchases of meat and exports and the same was reflected in the credit column of the bank account of the assessee. It is not a case of the Assessing Officer that payments against purchases have been made by the assessee out of books of accounts. The contention of the Ld. DR are also not tenable as the assessee filed the details of the parties from whom purchases were made and the same is mentioned in the Assessment Order itself. The CIT(A) has also given categorical finding that only 20% of the purchases where disallowed on account of cash payment which was duly reflected in the books of account of the assessee. The case laws referred by the Ld. DR are factually not relevant in the present case and are distinguishable. Thus, there is no need to interfere with the findings of the CIT(A). The appeal of the Revenue is dismissed.

4. Chowdry Associates v. ACIT (ITA No. 3298/Del/2019) (11/03/20) (ITAT, Delhi)

SECTION 28 / SECTION 43(5) – CLAIM OF BUSINESS LOSS – THE ASSESSEE ENTERED INTO COMMODITY TRANSACTION ON NSEL FOR WHICH ADVANCE WAS PAID TO BROKER – THE SAID ADVANCE BECAME IRRECOVERABLE DUE TO COLLAPSE OF NSEL – THE ASSESSING OFFICER AFTER TREATING THE TRANSACTION ON NSEL AS SPECULATIVE IN NATURE DISALLOWED THE CLAIM OF BUSINESS LOSS - HELD – THE TRANSACTION ENTERED ON NSEL WHICH IS RECOGNIZED ASSOCIATION IS NOT SPECULATIVE TRANSACTION U/S 43(5) – THE WRITE OFF OF IRRECOVERABLE ADVANCE PAID TO BROKER WAS IN THE COURSE OF BUSINESS OF THE ASSESSEE AND THE CLAIM OF BAD DEBT WAS HELD TO BE ALLOWABLE

Held, The matter before us deals with the non-recovery of the advances given to the brokers. The AO, for the instant year held that the assessee is dealing in speculative transactions and invoked provisions Section 43(5) of the Act. The AO has also held that the assessee has been carrying trade in commodity derivatives. Section 43(5)(e) considers an eligible transaction in respect of trading in commodity derivatives carried out in a recognized association shall not be deemed to be a speculative transaction. Hence, we hold that the transactions of the assessee shall not be deemed to be speculative transactions. Chapter VII of the Finance Act, 2013 w.e.f. 01.04.2014, details as to what is a commodity derivative in the Commodities Transaction Tax (CTT). As per the CTT commodity derivative means a contract for delivery of goods which is not a ready delivery contract or a contract for differences which derives its value from the prices of such underlying goods. Thus, we find that the assessee is in the business of commodity derivatives but not in the speculation transaction as held by the AO. The revenue has also accepted the income from the transactions of the assessee as business income but not as income from speculation for all the earlier years. (Owing to collapse of the NSEL, no further trading could be conducted by the assessee in the latter years). It is also an undisputed fact that the trade advances given by the assessee stands irrecoverable. [Para 31]

32. In conclusion, keeping in view the facts of the case, a tax history of the assessee , treatment given by the revenue to the transactions undertaken by the assessee, finding of the AO that the

assessee is into commodity derivatives, provisions of the Section 43(5) invoked by the AO, provisions of Section 43(5)(e) relied upon by the ld. AR, Explanation (2) of Section 43 as to what constitutes commodity derivatives, Para 5 of Chapter VII of Finance Act, 2013, CBDT Circular No. 3/2006 dated 27.02.2006, orders of the Co-ordinate Bench of ITAT in Megh Sakariya International (supra), Omni Lens Pvt. Ltd. (supra), judgment of the Hon'ble Apex Court in the case of TRF Ltd. (supra), we hereby hold that the business loss claimed by the assessee is allowable u/s 28 of the Act.

5. Sumesh Kumar vs ITO (ITA No. 5207/D/2017) (A.Y 2014-15) Dtd 05.03.2020

SECTION 45 -THAT INTEREST AWARDED U/S 28 OF THE LAND ACQUISITION ACT IS CAPITAL RECEIPT AND IS NOTHING BUT AN ACCRETION TO THE VALUE OF COMPENSATION. THUS, IT IS PART AND PARCEL OF THE COMPENSATION, HENCE IS NOT TAXABLE.

7. We have heard both the parties and perused the material available on record. From the perusal of the order of the CIT(A), it can be seen that the CIT(A) has not given a separate finding as to why the Assessing Officer is justified in making an addition. The Assessing Officer as well as the CIT(A) have not given any finding as to the fact that the assessee has not received interest u/s 28 of the Land Acquisition Act, 1894. This issue has been decided by the 4 ITA No. 5207/Del/2017 Hon'ble Apex Court in case of Union of India Vs. Hari Singh (Civil Appeal No. 15041/2017 order dated 15th September 2017) wherein it is held that on agricultural Land no tax is payable when the compensation/enhanced compensation is received by the assessee as their land were agricultural land. The compensation was received in respect of agricultural land belonging to the assessee which had been acquired by the state government. The CIT(A) has not taken cognizance of the decision of the Apex Court in case of Hari Singh (supra). The ratio of the said decision is applicable in the present case. Thus, the appeal of the assessee is allowed.

6. Ramphal Hooda v. ITO [ITA No. 8478/Del./2019] [Dated: 02.03.2020]

SECTION 54/54F – EXEMPTION OF LONG-TERM CAPITAL GAIN ON INVESTMENT IN THE NAME OF SPOUSE – CORRECT JURISDICTION OF THE BINDING HIGH COURT DECISION -ORIGINAL ASSESSMENT ORDER PASSED BY THE ASSESSING OFFICER AT HARYANA -SUBSEQUENTLY ASSESSEE SHIFTED TO DELHI AND ALSO TRANSFERRED PAN FROM HARYANA TO DELHI – AT THE TIME OF APPEAL, THE JURISDICTION OF ASSESSEE WAS WITH THE HIGH COURT OF DELHI – THEREFORE, THE DECISION OF DELHI HIGH COURT WAS TO BE CONSIDERED AS THE BINDING JURISDICTIONAL HIGH COURT DECISION IN PREFERENCE OVER THE DECISION OF PUNJAB AND HARYANA HIGH COURT – ON MERITS, IN VIEW OF THE BINDING DECISIONS OF DELHI HIGH COURT, THE INVESTMENT IN THE NAME OF SPOUSE SHALL BE ELIGIBLE FOR EXEMPTION UNDER SECTION 54/54F OF THE ACT

Held, 6. We have considered the rival submissions. Theabove decisions of the Hon'ble Delhi High Court havesquarely apply to the facts and circumstances of the case.In the case of the assessee, the jurisdiction and PAN of theassessee have been admittedly transferred to Delhi. Theappeal of the assessee was decided by the Ld. CIT(A)-28,New Delhi. Therefore, Ld. CIT(A)

is bound to follow theJudgments of the Hon'ble Delhi High Court. The jurisdictionin the case of assessee since transferred to Delhi even at thefirst appellate stage, therefore, the jurisdiction lies withtheHon'ble Delhi High Court. The issue is squarely covered bythe above decisions of the Hon'ble Delhi High Court reliedupon by the Learned Counsel for the Assessee. Since theentire sale amount of long term capital gain have beeninvested in purchase of other property in the name of wifeofassessee, assessee would be entitled for exemption onaccount of long term capital gains. In this view of thematter, we set aside the Orders of theauthorities below anddelete the entire addition. The A.O. is directed toallowexemption of assessee.**[Para 6]**

7. Mr. Deepak Bhardwaj v. ITO (ITA No.4684/Del/2016) (20/03/20) (ITAT, Delhi)

SECTION 54 – ASSESSEE FAILED TO INVEST CAPITAL GAIN IN CONSTRUCTION OF HOUSE PROPERTY WITHIN 3 YEARS - THE CAPITAL GAIN SO ARISING FROM SALE OF PROPERTY SHALL BE TAXABLE IN THE YEAR OF EXPIRY OF 3 THREE YEARS AND NOT THE YEAR OF CAPITAL GAIN.

Held, We have gone through the record in the light of the submissions made on either side. There is no dispute as to the facts involved in this matter. Only question that arises for our consideration is whether the unutilised portion of capital gains is liable for tax either in the year in which such long term capital gains arose or in the year in which the period of 3 years for such utilisation expires. Under identical facts circumstances, where the assessee had invested the long term capital gains in purchase of land towards construction of house but could not complete the construction before the expiry of 3 years as to pretend under law, the Hyderabad Bench of Tribunal in the case of Sri Prasad Nimmagadda (supra) held that on examination of section 54 and 54F of the Act, it is found that the provisions contained in section 54 including the proviso are pari materia with section 54F of the Act and the proviso to section 54 lays down that if the amount of capital gain is not utilised towards construction of residential house within a period of 3 years from the date of transfer of original asset, then, it will be charged to capital gain under section fortify of the Act in the year in which the period of 3 years from the date of transfer of the original asset expires. [Para 6]

8. Shri Riaz Munshi v. ACIT (ITA.No.8314/Del./2018) (11/03/20) (ITAT, Delhi)

SECTION 68 /SECTION 10(38) – PENNY STOCK – ASSESSEE PURCHASES SHARES OF M/S. ESTEEM BIO ORGANIC FOOD PROCESSING LTD. (EBFL) AND SOLD THEM ON BSE FOR SUBSTANTIAL GAIN AND CLAIMED EXEMPTION U/S 10(38) - THE ASSESSING OFFICER DISALLOWED THE CLAIM OF EXEMPTION AND MADE ADDITION U/S 68 ON THE GROUND THAT SHARE OF EBFL WERE USED TO PROVIDE BOGUS CAPITAL GAIN – THE SCRIP OF EBFL WAS SUSPENDED BY SEBI AND THERE WAS ADVERSE REPORT OF KOL INVESTIGATION WING REGARDING MODUS OPERANDI OF FEW BROKERS – HELD – THE CLAIM OF THE ASSESSEEW AS SUPPORTED BY DOCUMENTARY EVIDENCES AND THERE IS NO ADVERSE MATERIAL ON RECORD TO DISPROVE THE CLAIM – THE INTERIM ORDER OF SEBI WAS REVOKED AGAINST EBFL AND IN ABSENCE OF CROSS EXAMINATION OF REPORT OF INVESTIGATION WING , THE CASE OF ASSESSING OFFICER REMAINED WEAK – THE ASSESSEE WAS A REGULAR INVESTOR ON STOCK EXCHANGE AND

THE ASSESSING OFFICER HAS FAILED TO PROVE THE CASE – ADDITION WAS DELETED

Held, In the present case, the assessee submitted sufficient documentary evidences before A.O. to prove genuineness of the transaction. The assessee purchased the shares through banking channel and actually got the shares transferred in his name. The purchases are supported by bank statements. The transaction of the sale have been made through Demat Account which is corroborated by contract note and other details and transaction is carried out through banking channel through stock exchange through Demat Account on which Security Transaction Tax have also been paid. The A.O. merely relied upon interim order of the SEBI to make addition against the assessee, otherwise, there were no evidence or material on record to disprove the claim of assessee. Since the interim order of the SEBI have been revoked against the assessee and M/s EBFL, therefore, nothing survives in favour of the A.O. The A.O. did not make any further investigation or enquiry into the matter and merely relied upon the interim order of the SEBI and investigation carried out by the Kolkata Wing. Further, it is not clear from the assessment order whether Investigation Wing report have been confronted to the assessee or any right of cross-examination have been allowed to any statement recorded at the back of the assessee. The assessee asked for the cross-examination of any statement which is used against the assessee for making the addition. But, the assessment order is silent on this aspect. Therefore, the above facts clearly show that assessee entered into the genuine transaction and as such the profit on sale of scrip was exempt from tax. The Ld. D.R. relied upon decisions of the ITAT, Delhi Benches, Delhi in the cases of Suman Poddar vs., ITO (supra) and Udit Kalra vs., ITO (supra), in which the findings of the Tribunal had been that these are cases of penny stock companies which fact is not there in the present case. Therefore, these decisions would not support the case of the Revenue as having distinguishable on facts. The authorities below have not rebutted the explanation of assessee that he has indulged in dealing in scrips in earlier year as well as in subsequent years. It would, therefore, show that assessee is regularly dealing in scrips. The A.O. has not brought any adverse material against the assessee so as to make the above additions. Considering the totality of the facts and circumstances of the case and financials of M/s EBFL as reproduced above and other years [PB-76], we set aside the Orders of the authorities below and delete both the additions. [Para 6.1]

9. <u>Navkaar Traders v. ITO [ITA No. 194/Del./2020] Dated 17.03.2020</u>

SECTION 68 – CASH DEPOSITED AND ACCOUNTED AS CASH SALES -CASH DEPOSITED IN THE BANK ACCOUNT AND DISCLOSED AS CASH SALE, WHICH WAS INCLUDED AS PART OF INCOME UNDER SECTION 44AD OF THE ACT AS ALSO DULY REPORTED IN THE VAT RETURN, STOCK REGISTER, ETC. – GENUINENESS OF THE TRANSACTION STANDS ESTABLISHED – CASH DEPOSITED CANNOT BE ADDED AS UNDISCLOSED INCOME UNDER SECTION 68 OF THE ACT

Held, "5. I have heard both the parties and perused the records especiallythe orders of the authorities below and the submissions and thePaper Book containing pages 1-72 in which the assessee hasattached the copy of assessment order dated 25.12.2018 for AY2016-17 alongwith notice of demand and rectification request undersection 154 of the Act; copy of the order dated 28.11.2019 passedby the Ld. CIT(A)-14, New Delhi; copy of the ITR and computationfor AY

2016-17; copy of bank statement; bank book; details of cashdeposited in bank; purchase details; credit confirmation; VATreturn; VAT Surrender Certificate; Cash Sales Bills and StockRegister. I note that the entire cash sales have been disclosed bythe assessee u/s. 44AD of the Income Tax Act where the assesseehas shown gross receipts of Rs. 46,58,849/- including cash sale ofRs. 23,65,264/-. It is also noted that the entire sales including thecash sales were duly reported in the VAT return and the assesseehad collected and deposited VAT on the same. However, the Ld.CIT(A) sustained the addition solely on the basis of the pattern ofcash deposit followed by the assessee. It is further noticed that cashsales to the extent of Rs. 10,00,000/- during the year have notbeen disputed, however, Ld. CIT(A) has not properly appreciatedthe bank statement, bank book, details of cash deposited in thecurrent bank account, ITR, computation of income, stock register,details of cash sales, VAT return, creditor confirmation, cash salesbills and other documentary evidences submitted by the assessee.In view of above, I am of the considered opinion that assessee hasfully discharged its onus and prove the identity, creditworthinessand genuineness of transaction by providing sufficient documentaryevidences and despite that Ld. CIT(A) has only given partly reliefand restrict the addition to the tune of Rs. 10,00,000/-, which isnot tenable in law and in view of the facts and circumstances of thecase, hence, the same needs to be deleted. Therefore, I hold anddirect accordingly and allow the grounds of appeal raised by theassessee." **[Para 5]**

10. Meenu Kapoor vs The ACIT (ITA No. 8333/Del/2019)(AY 2016-17)

SECTION 68: WHETHER ONCE ASSESSEE HAS PROVED IDENTITY, CREDITWORTHINESS AND GENUINENESS OF TRANSACTION, INTIAL BURDEN ON THE ASSESSEE IS DISCHARGED- HELD YES- SINCE NO FURTHER INVESTIGATION HAVE BEEN CARRIED OUT BY THE A.O. ON THE DOCUMENTARY EVIDENCES FILED BY ASSESSEE, THEREFORE, A.O. CANNOT FASTEN THE ASSESSEE WITH LIABILITY U/S 68

Held, Considering the above discussion in the light of totality of the facts and evidences on record, it is clear that assessee produced sufficient documentary evidences on record to prove identity of the creditors, their creditworthiness and genuineness of the transaction. The A.O. did not make any enquiry with regard to asset and amount held by the creditors in their bank accounts with their source. Therefore, A.O. could not draw any adverseinference against the assessee. We may also note here thatin the Law assessee need not to prove source of the sourceas is held by Hon'ble Delhi High Court in the case of CIT vs.Dwarakadhish Investment P. Ltd., [211] 330 ITR 298 (Del.)and Judgment of Hon'ble Allahabad High Court in the caseof Zaffar Ahmed & Co. 30 taxmann.com 269 (All.). Theassessee however, in the present case has even provedsource of the source of the creditors. Therefore, there is noquestion of considering it to be unexplained credits in thehands of the assessee. The A.O. suspected the loan amountbecause the assessee filed return of income at Rs.30 lakhsonly and made investment of Rs.11.65 crores. Since theassessee explained that sufficient loan amount have beentaken from the family for purchase of property for family,ten in that event, A.O. shall have to consider theexplanation of assessee in the light of fact that assesseemade investment in purchase of property from the familysource. In the absence of any investigation from the side ofthe A.O. on the documentary evidences filed on record,there were no justification to make the addition. We,accordingly, set aside the Orders of the authorities belowand delete the entire addition.

General

11. DCIT vs Isha Decor Solutions India Pvt Ltd (ITA No. 2366/DEL/2016) (A.Y 2011-12)

SECTION 68: AO CONFIRMED ADDITION US 68 OF RS. 2,21,64,928/- FOR LACK OF CONFIRMATION BY THE CREDITOR- HELD, THAT THE CREDITOR IS A BRANDED MANUFACTURER AND SUPPLIER OF READY TO ASSEMBLE FURNITURE ANDTHE COMPANY IS A FRANCHISEE- THEREFORE SUCH TRANSACTION DOES NOT COME WITHIN THE PURVIEW OF SECTION 68

9. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that Bo Concept, Denmark is the sole supplier of goods to the assessee company. Bo Concept is a branded manufacturer and supplier of ready to assemble furniture and the company is a franchisee, having retail outlet at Palladium Mall, Mumbai. Details of purchases are exhibited at pages 43 to 51 of the paper book and balance outstanding in the name of Bo Concepts, Denmark is out of purchases made from it by the assessee. These transactions are continuous transactions. In our considered opinion, such transactions do not come within the purview of section 68 of the Act. Considering the facts of the case in totality, we do not find any error or infirmity in the findings of the ld. CIT(A).

12. Shri Kundan Lal Sachdev, ITA No.1589/DEL/2018, Assessment Year 2013-14

INCOME TAX ACT – SECTION 68 – INTEREST FREE UNSECURED LOAN - AO ISSUED NOTICES U/S 133(6) WAS ISSUED TO THE LENDER COMPANY - AS PER AO NOTICES WAS RECEIVED BACK AS UNSERVED - ASSESSE WAS CONFRONTED WITH THE THIS FACT, FIND A DETAILED REPLY AND SUBMITTED THE CONFIRMATION OF ACCOUNT ALONGWITH BANK STATEMENT, BALANCE SHEET AND THE OTHER DOCUMENTS OF M/S SIDHESHWARI COMMOTRADEPVT. LTD. – AO DEPUTED ITO WHO REPORTED THAT NO SUCH ENTITY EXISTED AT THE ADDRESS MENTIONED AND THE SAID PREMISE WAS VACANT – AO MADE ADDITION U/S 68 – HELD – THE NOTICE U/S 133(6) WERE REPLIED THROUGH EMAIL – THE LENDER COMPANY HAD SUFFICIENT NET WORTH – THE PURPOSE OF LOAN AND THE FACT THAT SAME WAS REPAID WITHIN SIX MONTHS PROVES GENUINENESS OF TRANSACTION – LOW INCOME IN THE RETURN OF INCOME OF LENDER CANNOT BE A CRITERIA FOR DRAWING ADVERSE INFERENCE – ADDITION DELETED

Held,

(a) During the course of assessment proceedings itself has made due compliance of notice u/s 133(6) and also through e-mail directly communicated to the Assessing Officer and assessee. Along with the said letter, the lender company has filed the desired details which included balance sheet, bank statement, profit and loss account, etc.

(b) Apart from that, it was also brought on record that the lender company had net worth of more than Rs.60 crores and it has turnover / revenue from operations was at Rs.95 crore which was entirely from trading, therefore, it cannot be held that the lender company was merely a paper company.

General

(c) The facts and circumstances clearly point out that assessee has taken a loan for purchasing a residential house and thereafter within the span of six months he has sold his property to repay back the loan. If these factors are taken into consideration, then genuineness of the loan cannot be doubted. When the factum of repayment of loan in the next financial year has not been doubted, no adverse inference has been drawn by the AO nor any comment has been given in the subsequent assessment year nor has any adverse comment been given in the impugned assessment order, then all these factors proves the genuineness of the transaction.

(d) Simply drawing an adverse inference about the creditworthiness based on return of income and value of return of per share cannot be the parameter for examining the creditworthiness of the lender company. What needs to be seen whether the lender company had source of funds available to lend the money or not.

13. Sanjay Jain v. ITO (ITA No.3314/Del/2019) (06/03/20) (ITAT, Delhi)

SECTION 69A - PEAK CREDIT – THE ASSESSEE IS A TRADER AND CASH DEPOSIT IN THE BANK ACCOUNT OVER AND ABOVE THE DISCLOSED TURNOVER WAS TREATED AS INCOME U/S 69A – THERE WAS SYSTEMATIC CASH DEPOSIT AND WITHDRAWAL IN THE BANK ACCOUNT – THE ASSESSING OFFICER WAS NOT JUSTIFIED IN TREATING ENTIRE DEPOSIT AS INCOME WITHOUT TAKING INTO ACCOUNT CORRESPONDING WITHDRAWALS – THE AO WAS DIRECTED TO MAKE ADDITION ON THE BASIS OF PEAK CREDIT IN THE BANK ACCOUNT

Held, I have considered the rival arguments made by both the sides and perused the record. It is an admitted fact that as against the total deposits in the bank account of Rs. 35,36,835/-, the assessee has shown a turnover of only Rs. 13,50,125/- for which the AO made the addition of Rs.22,16,710/- which was upheld by the CIT(A). It is the submission of the ld. Counsel for the assessee that the assessee has shown a GP rate of 20.89% and, therefore, the same rate should be applied to the entire deposits since such deposits are nothing, but, suppressed turnover. It is the alternate contention of the ld. Counsel for the assessee that only the peak credit should be added and not the entire deposits in the bank account since the corresponding withdrawals from the said bank account have not been considered. A perusal of the deposit and withdrawals in the said bank account filed by the assessee shows that there are systematic deposits as well as withdrawals. The assessee is engaged in the business of readymade garments, therefore, taxing only the deposits without giving corresponding credits to the withdrawals, in my opinion, will be not justified in the instant case especially when the assessee is a small trader. Since the peak credit comes to Rs.7,70,390/-, I, therefore, modify the order of the CIT(A) and restrict the addition to Rs.7,70,390/-. [Para 8]

14. Miten garg v. DCIT (ITA No.3734/DEL/2017) (20/03/20) (ITAT, Delhi)

SECTION 132(4) – ADDITION SOLELY ON THE BASIS OF POST SEARCH SURRENDER STATEMENT –THERE IS NO CORROBORATING MATERIAL OR EVIDENCE FOUND IN SEARCH IN SUPPORT OF SUCH SURRENDER – HELD - THE SURRENDER MADE BY THE ASSESSEE WAS ON AD HOC BASIS AND IN ABSENCE OF ANY MATERIAL OR

CORROBORATIVE EVIDENCE, NO ADDITION CAN BE MADE ON THE BASIS OF ISOLATED SURRENDER STATEMENT.

Held, Lastly, in so far as addition of Rs.14 lakhs is concerned, from the perusal of the assessment order as well as the appellate order, we find that this addition is not based on any specific evidence or material found during the course of search, albeit it is based on statement given by the assessee on 28.11.2013 u/s. 131 which was during the course of post search proceedings. The assessee has made an adhoc surrender on account of undisclosed business income. During the course of assessment proceedings, the assessee had submitted that in fact there is no such income of Rs.14 lakhs earned by the assessee and there is no record or evidence found that assessee had any kind of undisclosed income of Rs.14 lakhs. He has mainly made an adhoc surrender even though there was no corroborative evidence or material. We agree with the contention of the Ld. Counsel that in absence of any corroborative evidence, such adhoc surrender cannot be the basis of addition. Apart from that we find that in the case of Subhash Chandra (Supra), the Tribunal has held that if there is no material or corroborative evidence to support the statement made u/s 132(4), then no addition could be made. [Para 14]

15. Here in this case, though there is no such surrender in the statement recorded at the time of search u/s 132(4) albeit it was u/s 131, but even during extensive search no evidence or material has been found that assessee has earned any kind of undisclosed income from business. Secondly, there is no basis of Rs.14 lakhs which is just an adhoc estimate. Thus, we hold that this addition is not based on any material or corroborative evidence and therefore, no addition can be made merely on the statement recorded. This has been held so by the Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Harjeev Agrawal ITA No.8/2004 also, which has been referred and relied upon by the Tribunal in the aforesaid case. Accordingly, the addition of Rs.14 lakhs is directed to be deleted.

15. Shimbhu Dyal v. ITO [ITA No. 6117/Del./2018] [Dated: 25.02.2020]

SECTION 143(3)/LIMITED SCRUTINY -THE ASSESSING OFFICER CANNOT RAISE ISSUES BEYOND THE ISSUE SELECTED FOR LIMITED SCRUTINY – APPROVAL OF HIGHER AUTHORITY IS REQUIRED FOR CONVERTING LIMITED SCRUTINY INTO DETAILED SCRUTINY – IN THE ABSENCE OF SUCH APPROVAL, THE ASSESSMENT ORDER PASSED ON THE BASIS OF DETAILED ENQUIRY WAS HELD AS BAD IN LAW AND VOID-AB INITIO.

Held, 8. We have heard both the parties and perused the material available onrecord. It is pertinent to note that the Assessing Officer has categoricallypointed out that the case is selected for scrutiny on the basis of largeagricultural income. But as regards to cash deposits, there is no scrutiny bythe Assessing Officer which can be seen from the notice u/s 143(2) dated2/8/2016. But the addition was made on the basis of cash deposits. In-fact,the RTI reply dated 26/9/2019 also stated that this aspect of cash depositswas not at all in the scrutiny process. As per Instruction No. 7/2014 issued bythe CBDT, in limited scrutiny cases, if the Assessing Officer has to conduct comprehensive scrutiny, then the Assessing Officer has to take approval of thePr. CIT/DIT concerned and such an approval shall be accorded by the Pr.CIT/DIT in writing after being satisfied about merits of the issue(s)necessitating wider and detailed scrutiny in the case. Cases so taken up fordetailed scrutiny shall be monitored by the Jt. CIT/Addl. CIT

concerned.Therefore, the Assessing Officer acted beyond the scope of the scrutiny withoutthe prior approval from the proper authorities which is not at all permissibleunder the Income Tax Act. Thus, the Assessment order itself becomes bad inlaw and void-ab-initio. The additional grounds of appeal of the assessee areallowed. Therefore, there is no necessity to adjudicate the other grounds. TheAppeal of the assessee is allowed.**[Para 8]**

16. Bothra Financial Services vs ITO (ITA No. 2023/D/2019) (A.Y 2015-16) Dtd 02.03.2020

SECTION 143(3) - IN CASE OF ASSESSMENT OPENED UNDER LIMITED SCRUTINY THE SCOPE CANNOT BE EXTENDED TO OTHER ISSUES WITHOUT WRITTEN APPROVAL OF THE CONCERNED COMMISSIONER - CBDT INSTRUCTION NO.7/2014, DATED 26-09-2014 DID NOT PERMIT THE AO TO EXTEND THE SCOPE OF SCRUTINY TO ISSUES WHICH ARE AUTHORISED BY THE BOARD.

7. We have heard both the parties and perused the material available on record. It is an undisputed fact that the reason for which the case was picked up for limited scrutiny relates to the AIR information on the cash deposits in the savings bank account. It is also an undisputed fact that the Assessing Officer did not obtain the written approval of the concerned Commissioner before extending the scope of scrutiny in respect of disallowance under Section 14A of the Income Tax Act, 1961. Further, it is on record that the CBDT Instruction No.7/2014, dated 26-09-2014 did not permit the Assessing Officers to extend the scope of scrutiny to the issues other than the ones which are authorised by the Board in this regard under CASS. It is pertinent to note that this case was for limited scrutiny and in respect of Section 14A disallowance, no scrutiny was made by the Assessing Officer. This can be seen from the assessment order itself. Therefore, the assessment order itself is bad in law and void ab initio. Consequently, we find adjudication of other grounds by the assessee on merits becomes academic, hence not adjudicated at this juncture. Thus, the appeal of the assessee is allowed.

17. North Shore Technologies Pvt. Ltd. vs ITO(ITA No.6380/Del/2015) (AY 2011-12)

SECTION 144C: AO ISSUED A DRAFT ASSESSMENT ORDER DATED 31.03.2014- THEREAFTER AO ISSUED A CORRIGENDUM ON 05.05.2014 TO TREAT DRAFT ASSESSMENT ORDER AS FINAL ASSESSMENT ORDER- HELD, DRAFT ASSESSMENT ORDER DATED 31.03.2014 CANNOT BE TREATED AS FINAL ASSESSMENT ORDER SIMPLY BY WAY OF ISSUING CORRIGENDUM ON 05.05.2014

Held, such a corrigendum cannot validate the draft assessment order passed by the Assessing Officer, where he had clearly mentioned that, order passed u/s.143(3)/144C, is a draft assessment order and even his forwarding letter further clarifies the same and the intention of the Assessing Officer. It is an undisputed fact that limitation for passing the assessment order, if it was not draft assessment order was 31.03.2014. However, as noted above, the Assessing Officer has passed the draft assessment order and has forwarded thesame to the assessee stating that if the assessee does not agree with the transfer pricing adjustment, then he can file objection before the DRP within 30 days of the said order. It is only when assessee intimates to the Assessing Officer that he has accepted the variation order he has no objection within 30 days then Assessing Officer has to complete the assessment order on the basis of draft assessment order. Here in this case, there was international transaction anddeviation arises out of transfer

pricing adjustments though without referring to TPO in terms of Section 92CA, the Assessing Officer was obliged to follow the procedure u/s.144C, which he has not.

Thus, draft assessment order dated 31.03.2014 cannot be treated as final assessment order simply by way of issuing corrigendum on 05.05.2014 and since no final assessment order has been passed as on 31.03.2014 and only draft assessment order has been passed, therefore, the said draft order has no consequence and is null and void. Accordingly, on this ground, appeal of the assessee is allowed

18. Pee Empro Exports Pvt.Ltd. v. ACIT (ITA No.6589/Del/2019) (20/03/20) (ITAT, Delhi)

SECTION 145 – VALUATION OF STOCK – THERE SHOULD BE CONSISTENCY IN METHOD ADOPTED FOR VALUATION OF OPENING AND CLOSING STOCK FOR AN ASSESSMENT YEAR – IN CASE VALUATION OF CLOSING STOCK IS ALTERED, THE SIMILAR ADJUSTMENT IS REQUIRED TO BE MADE TO OPENING STOCK AS WELL.

Held, We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal is the value of closing stock to be adopted in the case of the assessee. The assessee was engaged in the business of manufacturing and export of garments. The closing stock was declared by the assessee at Rs.13,78,58,320/-. The value of the semi finished goods/finished goods was determined on the basis of sale value less 25%. The raw material was valued at cost. The Assessing Officer questioned the method of valuation adopted by the assessee. In reply, it was pointed out that the said method has been adopted from year to year by the assessee. The Assessing Officer rejected the same and noted that the G.P. rate declared by the assessee in Assessment Year 2014-15 was 9.38% and in Assessment Year 2015-16 was 9.07% and adopting the average of 9.22%, the Assessing Officer worked out the value of closing stock at Rs.16.68 crores (approx.). This resulted in an addition of 2.90 crores (approx.). The plea of the assessee before us is that where consistent method has been followed from year to year then the same should not be disturbed. However, the assessee is unable to point out the basis for adopting 25% as the benchmark for working out the value of closing stock; though, the said benchmark was applied from year to year but the same has no basis. Accordingly, we find no merit in the methodology adopted by the assessee in valuing its closing stock. On the other hand, the Assessing Officer had applied the G.P. rate of 9.22% in order to compute the value of closing stock i.e. sale value less 9.22%. We are of the view that the value of closing stock as computed by the Assessing Officer needs to be accepted as such. However, same method is to be applied for valuation of opening stock, which is to be re-determined by reducing the value of opening stock by 9.22%. It is an admitted position that same rate needs to be applied to compute the value of opening stock and/or closing stock. It may also be pointed out that the value of closing stock as on the close of the year would be the value of opening stock as on the opening day of next Assessment Year. Accordingly, we hold so. The grounds raised by the assessee in this appeal are thus allowed. [Para 8]

19. Bhagwan Swroop Pathak vs ITO (ITA No. 2754/DEL/2019) (A.Y 2010-11) Dtd 05.03.2020

SECTION 148 - THOUGH, THE ASSESSEE HAS NOT FILED ANY RETURN AND NEVER CLAIMED DEDUCTION U/S 54, ONCE THE REOPENING U/S 148 HAS BEEN ISSUED,

THE ASSESSE CANNOT BE DENIED HIS ENTITLEMENT /CLAIM FOR DEDUCTION OR EXEMPTION UNDER INCOME TAX STATUTE ON THE SOLE GROUND THAT NO RETURN WAS FILED.

SECTION 54 - SON OF THE ASSESSEE IS A DIRECT RELATION TO ALLOW DEDUCTION U/S 54 IN CASE OF INVESTMENT IN NAME OF SON IN NEW PROPERTY AS PER THE HON'BLE DELHI HIGH COURT DECISION IN CASE OF CIT(A) VS. KAMAL VAHAL 351 ITR 4

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the assessee has demonstrated before the Assessing Officer as well as the CIT(A) that the purchase of property in the name of the son was acquired by the assessee himself through the consideration received from the sale deed of earlier old property. The bank statement and the cheque issued to the builder as well as the confirmation received from the builder demonstrated that the payment was made by the assessee for purchase of new property within the stipulated time as prescribed u/s 54. Though, the assessee is not filed any return and at that stage never claimed Section 54, once the reopening u/s 148 has been issued, the assessee cannot be denied his entitlement /claim for deduction or exemption under income tax statute on the sole ground that no return was filed. The benefit of income tax act and its provisions related to exemption and deduction has to be taken into account while computing the income of the assessee and it is the proper procedure on the part of the Assessing Officer to follow all the aspect of taxation within the corners of Income Tax Act. As regards the name under whom the property is purchased, it can be seen that the son of the assessee is a direct relation and as per the Hon'ble Delhi High Court decision in case of CIT(A) Vs. Kamal Vahal 351 ITR 4 where assessee purchased new house in name of his wife, the claim under Section 54 is held valid. Thus, the exemption could not be denied if entire investment had come out of proceeds of old property. Thus, the order of the CIT(A) is not justified in light of the decision in case of Kamal Vahal (supra). Therefore, the appeal of the assessee is allowed.

8. In result, the appeal of the assessee is allowed.

20. Harish Tyagi v. ITO (ITA No. 3849/D/19) (19/03/2020) (ITAT, Delhi)

SECTION 147 – REOPENING ON THE BASIS OF AIR INFORMATION OF CASH DEPOSIT – THE ASSESSING OFFICER MUST HAVE REASONS TO BELIEVE THAT INCOME HAS ESCAPED ASSESSMENT – THE INFORMATION REGARDING CASH DEPOSIT IN THE BANK ACCOUNT IS NOT SUFFICIENT TO FORM BELIEF REGARDING ESCAPEMENT OF INCOME- NOTICE U/S 148 WAS HELD TO BE BAD IN LAW

Held, On perusal of the above order, it is evident that the AO reopened the case of the assessee merely on the basis of suspicion that the income of the assessee has escaped assessment. It is a settled that notice u/s 148 of the Act cannot be issued merely on the basis of the insufficient compliance to the letters issued by the department. There must be a something which indicates, even if it does not establish, the escapement of income from assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection of an income escaping assessment, cannot be reason enough to hold the view that the income has

escaped assessment. Thus, in the present case also, the AO issued notice u/s 148 of the Act merely on the basis of suspicion that the cash deposited in the bank account of the assessee has escaped assessment. To support this view, I draw support from the the decision of the ITAT Delhi Bench in the case of Bir Bahadur Singh Sijwali vs. ITO, in I.T.A. No. 3814/Del/2011, vide order dated 20.01.2015. [Para 6]

21. **Nawal Oils and Containers P. Ltd. vs ITO (I.T.A. No. 852/DEL/2019)(AY 2009-10) Section**

SECTION 153C:WHETHER ONCE REASSESSMENT PROCEEDINGS WAS INITIATED ON THE BASIS OF INCRIMINATING MATERIAL FOUND IN THE SEARCH OF THIRD PARTY THEN THE PROVISIONS OF SECTION 153C OF THE I.T. ACT WERE APPLICABLE WHICH EXCLUDE THE APPLICATION OF SECTION 147 AND 148 OF THE I.T. ACT-HELD, YES

7.1 After going through the aforesaid finding of the ITAT, SMC, Delhi Bench decision dated 08.08.2017 passed in ITA No. 1500 & 1501/Del/2017 (AY 2007-08) in the cases of Sushil Gaur vs. ITO, Ward 2(3), Ghaziabad and Shelly Agarwal vs. ITO, Ward 2(3), Ghaziabad, I am of the considered view that ground no. 3 of this appeal has already been adjudicated and decided by the various Benches of the ITAT, which I have mentioned in the aforesaid paragraphs and I am of the view that this issue has already been adjudicated and decided in favour of the assessee by holding that on the basis of incriminating material found, once reassessment proceedings was initiated on the basis of incriminating material found in the search of 3rd party then the provisions of section 153C of the I.T. Act were applicable which exclude the application of section 147 and 148 of the I.T. Act and notice u/s. 148 of the Act and proceeding u/s. 147 are illegal and void ab initio. Therefore, respectfully following the aforesaid order of the Tribunal dated 08.08.2017, the reassessment in question is accordingly quashed. Since I have already quashed the reassessment, there is no need to adjudicate the other grounds. Ld. DR has not brought to my notice any contrary decision on exactly similar facts and circumstances of the case mentioned in para no. 8 of the Tribunal order dated 08.08.2017, as reproduced above. Therefore, there is no help can be given to the revenue on the issues mentioned in the written submissions by the Ld. DR.

22. Shri Ajay Sharma vs The DCIT (ITA.No.3554/Del./2015)(AY 2010-11)

SECTION 153D- ORDER OF ASSESSMENT UNDER SECTION 153A COULD BE PASSED BY THE A.O. BELOW THE RANK OF JCIT EXCEPT WITH THE PRIOR APPROVAL OF THE JOINT COMMISSIONER-SINCE IN THE PRESENT CASE NO PRIOR APPROVAL TAKEN, THEREFORE ASSESSMENT ORDER UNDER SECTION 153A IS NULL AND VOID

Held, According to this Section, no order of assessment under section 153A could be passed by the A.O. below the Rank of JCIT except with the prior approval of the Joint Commissioner. In the present case, the assessment order have been passed by the DCIT, CC, Ghaziabad. Thus, the A.O. is below the Rank of JCIT, therefore, before passing the order under section 153A of the I.T. Act under appeal, the A.O. shall have to obtain prior approval of the JCIT. It is the condition

General

precedent before passing the assessment order under section 153A of the I.T. Act. Learned Counsel for the Assessee filed copy of the order sheet of the A.O. which does not mention if A.O. has sent any proposal to the JCIT/Addl. CIT for obtaining prior approval before passing the impugned assessment order. Learned Counsel for the Assessee filed several letters obtained under RTI and others which clearly prove that the approval under section 153D of the I.T. Act is not available to the A.O. or the Officer who has provided information under RTI Act. Even no such approval was found in the assessment record. The ITO, Ward-1(5), Ghaziabad, also intimated the Ld. CIT-D.R. that such approval of Addl. CIT Dated 28.03.2019 under section 153D could not be traced-out from the record of the assessee available presently with this Office and assessee has also intimated the same fact under RTI Act. The Ld. CIT-D.R. during the course of arguments has also admitted that approval under section 153D of the I.T. Act Dated 28.03.2013 is not available for inspection of the Bench. These facts, therefore, clearly prove that no prior approval under section 153D by JCIT/Addl. CIT before passing the impugned assessment order have been obtained. Therefore, A.O. was not competent to pass the assessment order under section 153A of the I.T. Act, 1961. The assumption of jurisdiction of the DCIT, CC, Ghaziabad to pass the impugned appellate order is thus vitiated. The entire assessment order under section 153A is null and void and is liable to be quashed. In view of the above discussion, we set aside and quash the entire impugned appellate orders. Resultantly, all the additions stand deleted. Additional ground of appeal of assessee is allowed. In view of the above findings on the additional ground, we do not propose to decide the other grounds on merits which are left with academic discussion only. Appeal of the Assessee is allowed.

23. M/s Sunray Cotspin (P) Ltd. Vs Pr. CIT (ITA no. 5239/Del/2019)(AY 2014-15)

SECTION 263- PROVISIONS OF SECTION 263 CAN BE INVOKED ONLY WHEN THE ASSESSMENT ORDER IS ERRONEOUS AND PREJUDICIAL TO THE INTEREST OF THE REVENUE- HELD YES-THEREFORE, MERELY BECAUSE THE PCIT DOES NOT AGREE WITH THE OPINION OF THE ASSESSING OFFICER, HE CANNOT INVOKE THE PROVISIONS OF SECTION 263 OF THE ACT TO SUBSTITUTE HIS OWN OPINION- HELD YES

Held, Considering the facts of the case in the light of judicial decisions discussed hereinabove and on perusal of the facts, we have no hesitation in holding that the assessment framed u/s 143(3) of the Act was after detailed enquiries and verification and merely because the assessment order is silent, the same cannot be considered as erroneous and prejudicial to the interest of the revenue, as held by the Hon'ble High Court of Bombay in the case of Gabriel India Ltd [supra].

In the instant case, the Assessing Officer, after considering the various submissions made by the assessee, has taken a possible view. Therefore, merely because the PCIT does not agree with the opinion of the Assessing Officer, he cannot invoke the provisions of section 263 of the Act to substitute his own opinion. It has been further held in several decisions that when the Assessing Officer has made enquiry to his satisfaction and it is not a case of no enquiry and the PCIT wants that the case should have been investigated/probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act.

General

24. In view of the above discussion, we set aside the order of the PCIT and restore that of the Assessing Officer dated 18.08.2016 framed u/s 143(3) of the Act

24. Arihant Technology Pvt. Ltd. vs Pr. CIT (ITA No.5473/Del/2019)(AY 2009-10)

SECTION 263:ASSESSING OFFICER HAS REOPENED THE ASSESSMENT ON THE BASIS OF THE INFORMATION RECEIVED FROM THE INVESTIGATION WING THAT ASSESSEE HAS RECEIVED ACCOMMODATION ENTRY- THEREAFTER, PR. CIT INITIATED ACTION U/S 263- WHETHER, MERELY BECAUSE THE LD. PR. CIT DOES NOT AGREE WITH THE MANNER OF ENQUIRY CONDUCTED BY THE AO HE CANNOT SUBSTITUTE HIS OWN REASONS AND HOLD THE ORDER TO BE ERRONEOUS AND PREJUDICIAL TO THE INTEREST OF THE REVENUE- HELD YES

12. We find some force in the arguments of the Ld. Counsel for the assessee. We find the AO in the instant case has reopened the assessment on the basis of the information received from the Investigation Wing that assessee has received accommodation entry of Rs. 40 lacs from M/s. Sri Amarnath Finance Pvt. Ltd., acompany controlled by Sh. Surinder Kumar Jain and Sh. Virender Kumar Jain who are known entry operators. We find the AO during the course of assessment proceedings has called for information from the assessee who filed the requisitedocuments such as the ITR, bank statement, PAN number, confirmation etc. of the lender company. We find the AO had issued notice u/s. 133 (6) to M/s. Sri Amarnath Finance Pvt. Ltd. who responded to such notice and filed the requisite documents as called for by the AO. We, therefore, find force in the arguments advanced by the Ld. Counsel for the assessee that the AO has examined the documents / confirmation in detail and adopted a possible view that the assessee has established the identity and creditworthiness of the lender and the genuineness of the transaction. It has been held in various decisions that actionu/s. 263 can be taken only when there is lack of enquiry or no enquiry. However, in the instant case necessary enquiry was conducted. Therefore, merely because the Ld. Pr. CIT does not agree with the manner of enquiry conducted by the AO he cannot substitute his own reasons and held the order to be erroneous and prejudicial to the interest of the revenue.

14. Since the facts of the instant case are identical to the facts of the case decided by the Tribunal in the case of DwarkadhishBuildwell Private Limited (supra), therefore, following the aforementioned decision we quash the proceedings initiated by the Ld. Pr. CIT u/s. 263 of the IT Act, 1961. The various decisions relied on by the Ld. DR are distinguishable and are not applicable to the facts of the present case. In this view of the matter the proceedings u/s. 263 are quashed and the grounds raised by the assessee are allowed.

25. M/s AVV Enterprises Pvt Ltd vs The Dy. CIT (ITA No. 2312 to 2322/DEL/2017)(AY 2013-14 & 2014-15)

SECTION 234E: WHETHER SINCE AMENDMENT HAS BEEN BROUGHT IN THE ACT W.E.F 01.06.2015 U/S 234E OF THE ACT AND BEFORE THAT THERE WAS NO AUTHORITY OR COMPETENCE ORJURISDICTION ON THE PART OF THE

General

CONCERNED OFFICER OR DEPARTMENT TOCOMPUTE AND DETERMINE THE FEE U/S 234E OF THE ACT -HELD YES, THEREFORE FEE LEVIED U/S 234E FOR AY 2013-14 & 2014-15 IS DELETED

7. Moreover, if there is a divergence of opinion between different Hon'ble High Courts on an issue, the one in favour of the assessee needs to be followed as laid down by the Hon'ble Supreme Court in the case of Vegetable Products Ltd 88 ITR 192.

8. In light of the effective date of amendment i.e. 01.06.2015, and considering the decision of the Hon'ble High Court of Karnataka, we direct the Assessing Officer to delete the fee levied u/s 234E of the Act in all the above captioned appeals of the assessee.

26. M/s. JCDecaux SA v. ACIT (ITA No. 1630/D/15)(20/03/20) (ITAT, Delhi)

CHARGE OF SURCHARGE AND EDUCATION CESS ON RATES SPECIFIED UNDER DTAA – IT WAS HELD THAT RATES MENTIONED UNDER DIFFERENT ARTICLES OF INDIA-FRANCE DTAA ARE INCLUSIVE OF SURCHARGE AND CESS AND AS SUCH NO FURTHER LOADING OF SURCHARGE AND EDUCATION CESS IS WARRANTED.

[Note : This judgment also contains elaborate discussion on meaning of make available clause present in various DTAA's]

Held, In ground No. 5 in both the appeals the assessee has raised the issue that education cess and secondary and higher education cess is not applicable while taxing the income on gross basis under the India France DTAA.

8.1 Before us, the learned Counsel of the assessee relied on the decision of the Tribunal, Kolkatta bench in the case of DCIT Vs BOC Group Ltd reported in (2015) 64 taxmann.com 386 (kolkatta-Trib) and submitted that tax rate prescribed in the DTAA shall have to be followed strictly without any additional taxes thereon in the form of surcharge or education cess.

8.2 The learned DR, on the other hand, supported the action of the lower authorities, but could not produced any decision of the Tribunal or the court wherein such cess or surcharge on the Income-tax under the DTAA has been upheld.

8.3 We have heard the rival submission of the parties on the issue in dispute. We find that the Tribunal in the case of BOC Group Ltd. (supra) has considered various decisions on the issue in dispute and then adjudicated the issue as under:

'…….'

8.4 We find that in the instant case in India France DTAA also the Income-tax include any surcharge thereon and tax rates have been prescribed on the FTS as under:

"[2. However, such royalties, fees and payments may also be taxed in the Contracting State, in which they arise and accordingy to the laws of that contracting state, but if the recipient is the beneficial owner of these categories of income, the tax so charged shall not exceed 10 per cent of the gross amount of such royalties, fees and payments]"

8.5 In view of the provisions of the India France treaty on the issue being similarly worded with the provisions of the India UK DTAA, following the finding of the Tribunal in the case of BOC

group Ltd.(supra), we direct the Assessing Officer to delete the education cess and secondary and higher education cess levied on the Income-tax on the gross basis under the India France DTAA. The ground No. 5 in both assessment year is thus allowed.

General