ITAT Bar Case reporter - June 2019

1. Triple Ess Infrastructure P. Ltd.v. Addl. CIT, (ITA No.2444/D/19) (Dated 28/05/2019)

SECTION 2(42A) R.W. SECTION 48 – DATE OF ALLOTMENT OR DATE OF POSSESSION TO BE CONSIDERED FOR THE PURPOSES OF DETERMINING THE NATURE OF RESIDENTIAL HOUSE AS SHORT TERM CAPITAL ASSET OR LONG TERM CAPITAL ASSET – DATE OF ALLOTMENT / BUILDER BUYER AGREEMENT, WHEN ASSESSEE GETS SUBSTANTIAL RIGHTS IN THE PROPERTY IS TO BE TREATED AS DATE OF ACQUISITION OF PROPERTY AND ACCORDINGLY THE PERIOD OF HOLIDNG, DETERMINING THE NATURE OF ASSET AS SHORT TERM AND LONG TERM, TO BE DETERMINED WITH RESPECT TO THE DATE OF SAID AGREEMENT – INTEREST ON BORROWED LOAN PAID UPTO THE DATE OF SALE OF PROPERTY TO BE CONSIDERED AS PART OF COST OF ACQUISTION / COST OF IMPROVEMENT OF PROPERTY UNDER SECTION 48

Held, We have heard the rival submissions, perused the relevantfindings given in the impugned orders as well as the material referredto before us at the time of hearing. From the facts as discussed in theforegoing paragraphs, it is an undisputed fact that assessee hadacquired a flat being 50% owner with DLF Ltd. The acquisition of flathas been stated by way of allotment letter dated 13.10.2005 by whichassessee was allotted a particular unit with specified priceconsideration and immediately after the allotment of the letter theassessee has made the entire payment of the flat. Thereafter, Buyer'sagreement was entered into with DLF Limited, whereby assesee got allthe rights on the same flat vide agreement dated 8.3.2006 and theentire consideration was paid much prior to the agreement datedwhich has also been acknowledged by the party in the saidagreement. This is evident from not only the buyer's agreement butalso from the sale agreement dated 29th January, 2015, the details ofwhich are given at pages 56-57 of the paper book. Now in the yearunder consideration assessee alongwith the other co-owner had soldthe property and the assessee's 50% share was offered to tax as longterm capital gain after computation u/s 48 and Indexation. …The moot question before us is whether the sale and transactionof the capital asset is to be taxed as short term capital gain or longterm capital gain. The revenue has calculated the date from the dateof possession, that is, July 2012, whereas assessee is taking the datefor determination of the period from 13.10.2005 which is the date ofallotment of letter. Here in this case both the authorities haveacknowledged that assessee had the right in the property from thedate of allotment / buyer's agreement and such right was convertedinto property only in July, 2012, hence that is the date of acquisitionof asset. Such a view cannot be sustained, because right in theproperty has been recognised as capital asset under the Act for whichthere cannot be any dispute. The right in the property has beentreated as transfer in relation to a capital asset in terms of clause (ii)of sub-section 47 of section 2. the Hon'ble Delhi High Court in thecase of Gulshan Malik vs CIT (supra) after analysing the provision ofsection 2(14), 2(42A) and 2(47) have held that the capital asset underthe act is a property of 'any kind' which is held by the assessee andsuch capital asset must be transferrable.

Enjoyment of immovableproperty, possession as well as any right or interest in any asset areall transferrable capital asset and the reference to acquisition by wayof an agreement or in any arrangement or in any manner whatsoeverestablishes the enforceable rights for the purpose of Income Tax Act.Booking rights or rights to purchase apartment or right to obtain thetitle to the apartment is also a capital asset that can be transferred.Hon'ble High Court held that date of agreement has to be taken as adate and not the allotment. If the ratio and principle of the Hon'ble Delhi High Court is to be applied to the facts of the present case, thenthe assessee has acquired the capital asset on the date of buyer'sagreement dated 8.3.2006. It was by virtue of this agreement only theassessee had acquired the flat and in pursuance thereof, letter ofpossession of flat was given. If revenue's stand is taken intoconsideration, then, if assessee would have sold the flat prior to thepossession i.e. July, 2012 would it not have been reckoned as longterm capital gain taxable as long term capital gain and whether afterthe possession of the flat the nature of capital assets gets changed.Such a view cannot be accepted, because possession of the flat isflowing from the terms and conditions mentioned in the buyer'sagreement itself. Thus, in our opinion the date of possession cannotbe reckoned as a date of the acquisition of the flat for the purpose ofcomputing the period of short term or long term. We are in tandemwith the contention of Mr. Ajay Wadhwa that, even if the date ofallotment is not to be treated as the date of acquisition, but the date ofbuyer's agreement dated 8.3.2006 is the date in which the assesee hasacquired the rights in the property. Accordingly we direct the AO totreat the date of acquisition of the flat / property on 8.3.2006. …Coming to the issue of interest expenses on the interest paid onloan borrowed to the extent of the assessee's share in the property upto the date of possession, as raised in ground No. 8, the same alsogets covered in view of our finding given above. We find that, reasonfor disallowing of interest cost by the AO is as under :-i. "Cost of improvement consists of only interest paid tothe financial institutions and not payment to M/s. DLF for any addition or alteration.ii. The Assessee raised excess loan from ICICI to pay onbehalf of Sh. Satish Batraiii. Excess amount of Rs. 1,11,94,655/- was shown asadvance to Sh. Satish as on 31.3.2006iv. Advance repaid by Sh. Satish Batra on 27.02.2008was not used to repay excess loan but was investedin share of M/s. Vimal Plast.v. Assessee was paying huge interest on loan andmaking interest free advances to sister concerns.vi. Loans granted to the related parties were not forbusiness purpose." … Ld. CIT(A) has upheld the action of the AO to allow the interest of ownership of the property in July 2012 and also directed the AO toverify the actual figure of interest disallowance. …. After hearing both the parties and on perusal of the relevantfindings given in the impugned order as well as material referred to atthe time of hearing, we find that there is no dispute that there is nodispute that the loan was taken to purchase the property and itsinterest cost has to be included in the cost of acquisition /improvement while calculating long term capital gain. The assesee hasclaimed interest cost up to the date of sale i.e 29.1.2015 and the Ld.AO as well as Ld. CIT(A) allowed the interest portion up to the date ofpossession of the property. Both the authorities have tried to co-relatethe ownership of the property way back in 8.3.2006 for which he hasmade fully payment after taking loan from the bank. The Act which provides that any expenditure incurred wholly and exclusively inacquisition of asset or cost of any improvement therein has to beallowed by deducting from the full value consideration received oragreed as a result of transfer of the capital asset. If the capital assethas been transferred in this year , then up to the date of transfer, thecost of acquisition and improvement has to be allowed. This issue isalso covered by the other decision of the Hon'ble Delhi High Court inthe case of CIT vs. Mithlesh Kumari (1973) 92 ITR 9, wherein theHon'ble High Court has allowed the full interest paid from the periodup to the date of sale and therefore,

the ratio will apply as bindingprecedence. Now there are other judgments of Hon'ble High Court,wherein similar proposition has been laid down for instance CIT vs.Sri Hariram Hotels (P.) Ltd. (2010) 325 ITR 136 Karnataka; andCIT vs. K. Raja Gopala Rao(2002) 252 ITR 459 (Madras). Thus, wedirect the AO to allow the interest up to the date of sale.**[Paras 11, 12, 14, 15, 16]**

2. MDLR Builders P. Ltd. v. DCIT (ITA No. 8214/D/18)(11.06.19)(ITAT, Del)

SECTION 2(47) – TRANSFER OF CAPITAL ASSET – SHARE IN PARTNERSHIP FIRM – RETIRING PARTNER TOOK CASH TOWARDS HIS VALUE OF SHARE IN THE FIRM – NO CASE OF DISTRIBUTION OF ASSETS OF THE FIRM – NO CAPITAL ARISE IN THE HANDS OF THE PARTNER U/S 45(4) OF THE ACT

Held, Therefore, the question that arises for our consideration is as to whether the amount received by the assessee M/s. MDLR Builders Private Limited on account of its retirement from the partnership firm will attract capital gain tax. [Para 25]

We find an identical issue had come up for consideration before the Hon'ble Bombay High Court in the case of Prashant S. Joshi Vs. ITO (supra). [Para 26.1]

We find, the Hon'ble AP High Court in the case of Chalasani Venkateswara Rao Vs. ITO (supra) held that amount received by a partner in full and final settlement of its shares on dissolution of the firm does not result in transfer. [Para 26.2]

Respectively following the above decisions cited (supra) we hold that the assessee is not liable to any capital gain tax on account of the sum received by it as a partner on retirement from the partnership firm. [Para 30]

3. ONGC vs. DCIT (ITA No. 3524/D/2016) (Dated 12.06.2019)

Section 9(1)(vii) –THAT WHETHER PROFESSIONAL LEGAL FEES PAID BY ASSESSE TO DEWEY AND LEBOEUF INTERNATIONAL COMPANY LLC, USA (NON-RESIDENT), ENGAGED FOR REPRESENTING ONGC BEFORE RUSSIAN COURTS IN REGARD TO THE LITIGATION BETWEEN ONGC AND AMUR SHIPBUILDING YARD IS TAXABLE IN INDIA.

As regards ITA No. 3524/Del/2016, the assessee provided of professional legal services before a foreign court, which cannot be brought to tax as FIS under Article 12 of the India-USA DTAA, because there is no make available of any particular knowledge or skill to ONGC before the courts which can enable ONGC to represent its case in future. Under Section 9(1)(vii) legal services cannot be treated as FTS as it is a professional services which is outside the scope of Section 9(1)(vii) of the Act. In A.Y. 2009-10, the Tribunal held that the said legal services is not taxable as FTS u/s 9(1)(vii) of the Act. Therefore, appeal of the assessee being ITA No. 3524/Del/2016 is allowed.

4. ITO v. Fish Poultry and Egg Marketing Committee (ITA No. 4187-89/D/16)(31.05.19)(ITAT, Del)

SECTION 10(26AAB) – EXEMPTION TO AGRICULTURAL PRODUCE MARKET COMMITTEE OR BOARD – THE ASSESSING OFFICER DISALLOWED THE CLAIM ON THE GROUND THAT INCOME FROM REGULATION OF MARKET OF FISH, POULTRY AND EGGS IS NOT ELIGIBLE TO CLAIM EXEMPTION U/S 10(26AAB) AS THE SAME IS ONLY APPLICABLE TO AGRICULTURAL PRODUCE - IT IS HELD THAT EXEMPTION IS AVAILABLE TO COMMITTEE OR BOARD CONSTITUTED UNDER THE LOCAL LAWS WHICH ENGAGED IN REGULATION OF MARKET OF AGRICULTURAL PRODUCE – THE DEFINITION OF TERM "AGRICULTURAL PRODUCE" IS TO BE PICKED FROM RELEVANT LOCAL ACT/STATUTE – AS FISH, POULTRY AND EGGS ARE COVERED UNDER DEFINITION OF AGRICULTURAL PRODUCE REFERRED IN DELHI AGRICULTURAL PRODUCE MARKETING (REGULATION) ACT, 1998 – THE CLAIM OF EXEMPTION IS ALLOWABLE.

Held, Section 10(26AAB) provides exemption to Agricultural Produce Marketing Committee (APMC) or Board constituted under the law in force for the purpose of regulating the marketing of Agricultural Produce. For the State of Delhi the relevant law is the Delhi Agricultural Produce Marketing (Regulation) Act, 1998 (Hereinafter referred to as DAPM). This Act empowers notification of any area in Delhi for the purpose of regulating marketing of agricultural produce under sections 3 and 4 of DAPM. [Para 5.2]

It is a fact that the word 'agricultural produce' has not been defined under the Income Tax Act. The Assessing Officer held that since fish, poultry and eggs did not constitute agricultural commodity it could not fall under the term of agricultural produce. However, at this juncture, it is important to note the context in which the term agricultural produce has been used. It has been used in the context of the activities of APMC (from which it derives income) constituted under the DAPM for the purpose of regulating and marketing. It is therefore, incumbent to see the relevant Act which empowers the committee to undertaken the regulating and marketing of commodities. Delhi Agricultural Produce Marketing (Regulation) Act, 1998, defines the terms agricultural produce. [Para 5.6]

From a plain reading of the definition, it is apparent that DAPM Act does not restrict the constitution of committee only for marketing of agricultural produce. It has within its scope various other commodities like decorative plants production of honey and silk etc. It also includes the marketing of forest products which would otherwise not fall within the definition of 'agriculture'. The DAPM Act, therefore, has given very wide meaning to the word agricultural product. Apparently, Income Tax Act has also imported the word agricultural produce from the DAPM Act, 1998 to cover APMCs notified under it to provide the benefit to all APMCs provided in the DAPM Act or similar Acts in other states. It could not have been the intention of the Act to leave out some of the committees, notified under the DAPM especially when all the committees were rendering similar services in respect of various products. Therefore, in view of the expanded meaning given to the term 'agricultural produce' by the DAPM Act, it is our considered opinion that the word 'agricultural produce', used in connection with APMC connotes a very wide meaning bringing within its preview a large gamut of commodities besides agricultural products. Since the income accrues to the APMCs from pursuing these activities, the

Income Tax Act, also perceives a wider meaning by referring to the DAPM. Therefore, if the term 'agricultural produce' is given a wider meaning in terms of the definition of 'agriculture produce' as defined in section 2 (a) of the DAPM Act and as specified in the Schedule of the said Act, fish, poultry and eggs would also be covered under the definition of 'agriculture produce' as they have been specified in the Schedule to the DAPM Act. On reaching such conclusion, the benefit of exemption u/s 10(26AAB) will automatically follow. The Ld. CIT (A) has also reached a similar conclusion by importing the definition of 'agriculture produce' from the DAPM Act and we find his reasoning and logic to be perfectly in order. Therefore, we find no reason to differ with the findings of the Ld. CIT (A) and while upholding the same, we dismiss the grounds raised by the Revenue in all the three years under appeal which are identical. [Para 5.8]

5. Deepak Nagar v. ACIT (ITA No. 3212/Del/19)(12.06.19)(ITAT, Delhi)

SECTION 10(38) – LONG TERM CAPITAL GAIN (PENNY STOCK) – AO AND CIT(A) DISALLOWED THE CLAIM MERELY BE RELYING UPON INFORMATION FROM INVESTIGATION WING – NO SPECIFIC INVESTIGATION OR ENQUIRY WAS CONDUCTED AGAINST THE ASSESSEE – DECISION OF DELHI HIGH COURT IN THE CASE OF UDIT KALRA NOT APPLICABLE AS IN THAT CASE COMPANY WAS DELISTED FROM STOCK EXCHANGE WHEREAS NO SUCH ACTION WAS TAKEN IN THE CASE IN HAND – THE ASSESSEE BEING A HABITUAL INVESTOR, THE CASE LAWS REGARDING HUMAN PROBABILITIES ARE NOT APPLICABLE – ADDITION IS MERELY ON THE BASIS OF CONJECTURES AND SURMISES – ADDITION DELETED.

Held, facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the first appellate authority are devoid of any such enquiry. The Assessing Officer and the CIT(A) heavily relied upon the alleged report of the INV Wing Kolkata wherein ETTL has been purportedly identified as one of the penny stock companies whose share prices had been artificially rigged by promoters/brokers/operators to create non genuine LTCG. The Assessing Officer failed to bring on record any part of the said report wherein the name of the appellant or his broker has even been named or implicated. The lower authorities have failed to bring on record any evidence to prove that the transactions carried out by the assessee were not genuine or that the said documents furnished in support thereof were not authentic. It would not be out of place to mention here that no specific enquiry or investigation was conducted in the case of the assessee and/or his broker either by the INV Wing or by the Assessing Officer during the course of assessment proceedings. [Para 16]

It is a matter of fact that SEBI looks into irregular movements in share prices and range and warns investors against any such unusual increase in share price. No such warning was issued by SEBI nor there is any evidence that the company ETTL was ever delisted by SEBI or that the transactions in the shares of ETTL were ever suspended by SEBI. The Assessing Officer, by making the impugned addition, has acted merely on suspicions and surmises and failed to produce any evidence whatsoever to prove that the proceeds received against the sale of shares represented the assessee's undisclosed income. The Assessing Officer has also failed to produce any material/evidence to dislodge or controvert the genuineness of the conclusive documentary

evidences produced by the assessee in support of his claim. Surprisingly, neither the assessee nor his broker are named as illegitimate beneficiary to bogus LTCG in any of the alleged statements of the operators/brokers or reports/orders of SEBI or INV wing. In our considered view, the additions made by the Assessing Officer and confirmed by the CIT(A) are heavily guided by surmises, conjectures and presumptions and therefore, has no legs to stand on. [Para 17].

For the sake of repetition, 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 INV Wing as well as information received from the INV Wing. It is apparent from the assessment order that the Assessing Officer has not conducted any independent and separate enquiry in this case of the assessee. Even the statement recorded by the INV Wing has not been got confirmed or corroborated by the person during the assessment proceedings. The Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the INV Wing is required to be corroborated and reasserted/reaffirmed during the assessment proceedings by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. [Para 22]

There is no dispute that the statement which was relied upon by the Assessing Officer was not recorded by the Assessing Officer in the assessment proceedings but it was pre existing statement recorded by the INV 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 evidence to disprove the evidences produced by the assessee.[Para 23]

6. DCIT vs. Michelin India Tyre Pvt. Ltd. (ITA No. 3166/D/2013) (Dated: 30.04.2019)

RULE 10B(1)(B) MAKES IT CLEAR THAT RPM IS BEST SUITED FOR DETERMINING ALP OF AN INTERNATIONAL TRANSACTION IN NATURE OF PURCHASE OF GOODS FROM AE, WHICH IS RESOLD. ORDINARILY, THIS METHOD PRE-SUPPOSES, NO OR INSIGNIFICANT VALUE ADDITION TO GOODS PURCHASED FROM FOREIGN AE.

13.1. Rule 10B(1)(b)(i) deals with identifying the price at which goods purchased from AE is resold, sub clause (ii) talks of reducing amount of normal gross profit margin of comparable uncontrolled transactions from such resale price of the assessee, Sub-clause (iii) states that result of sub-clause (ii) is further reduced by expenses incurred in connection with purchase of goods and sub-clause (iv) provides that amount so deduced under sub-clause (iii) is adjusted on account of differences in international transaction, and comparable uncontrolled transactions which materially affect gross profit margin in open market. Finally, sub-clause (v) provides that adjusted price found under sub-clause (iv) is taken as arm's length price in respect of purchase of goods from the AE. When we consider methodology given under RPM more specifically sub-clauses (i) and (v), it becomes patent that sub-clause (i) refers to property purchased by assessee

is resold and subclause (v) refers to arm's length price in respect of purchase of property by assessee.

13.2. A close scrutiny of above Clauses of rule 10B(1)(b) makes it clear that RPM is best suited for determining ALP of an international transaction in nature of purchase of goods from AE, which is resold. Ordinarily, this method pre-supposes, no or insignificant value addition to goods purchased from foreign AE. In case goods so purchased are used either as raw material for manufacturing finished products, or are further subjected to processing before resale, then RPM cannot be characterized as proper method for benchmarking international transaction of purchase of goods by assessee from its AE.

7. DCIT vs. DivyaYogMandir Trust (ITA No. 5612/D/2015) (Dated: 30.04.2019)

SECTION 11 - INTER-TRUST DONATION BY ONE CHARITABLE TRUST TO ANOTHER FOR UTILIZATION BY THE DONEE TRUST TOWARDS CHARITABLE OBJECTS IS PROPER APPLICATION OF INCOME FOR CHARITABLE PURPOSE.

8. So, following the order passed by the coordinate Bench of the Tribunal for AY 2009-10, we are of the considered view that inter-trust donation by one charitable trust to another for utilization by the donee trust towards charitable objects is proper application of income for charitable purpose in the hands of donee trust and it will not affect the exemption claimed by the assessee u/s 11 of the Act in any manner whatsoever nor inter-trust donation can be termed as deviation from its objects as it is nowhere the case of the Department that the donee trust has not applied such sums for charitable purpose by deviating its funds, hence relief granted by ld. CIT (A) needs no interference at the ends of the Tribunal being based upon the findings of the Tribunal pertaining to AY 2009-10. So, ground no.1 of the Revenue's appeal is determined against the Revenue.

8. M/s. Urmila Devi Charitable Trust v. CIT(E) (ITA No. 4136/Del/2017)(13.06.19)(ITAT, Del)

SECTION 12AA – CANCELLATION OF REGISTRATION OF TRUST –WHERE THE ASSESSEE TRUST HAS RECEIVED DONATION FROM ONE PARTY THE GENUINENESS OF WHICH IS UNDER DOUBT – IT IS NOT A SUFFICIENT GROUND TO CANCEL REGISTRATION AS THE GENUINENESS OF ACTIVITIES OF THE TRUST ARE NOT IN DISPUTE - THE REGISTRATION U/S 12AA CAN ONLY BE CANCELLED ON THE GROUND THAT ACTIVITIES OF THE TRUST EITHER NOT GENUINE OR NOT IN ACCORDANCE WITH ITS OBJECTS – THE ORDER OF CIT(E) CANCELLING THE REGISTRATION WAS SET ASIDE

THE CIT(E) CANNOT CANCEL THE REGISTRATION WITH RETROSPECTIVE EFFECT.

Held, The CIT(Exemption)'s finding, that the assessee was not carrying out activities in accordance with the objects of the society and no genuine activities are being carried out by the

society, is solely based upon the allegation that the assessee received the donation of `85 lakhs in lieu of cash. As we have already stated, there is no basis for the Department to hold that the assessee received the donation of `85 lakhs from HHBRF in lieu of cash. Further, merely because the genuineness of one donation in one year is doubted, it cannot be a ground to draw the inference that the activities of the assessee society are not being carried out in accordance with the objects of the society or that no genuine activities are being carried out by the assessee. That if the genuineness of a donation in one year is doubted, the addition, if any, can be made in the assessment of the relevant assessment year in accordance with law. However, that, by itself, would not be sufficient to withdraw the registration under Section 12AA(3). If the genuineness of a donation is doubted, at the most, it can be a ground to examine deep into the activities of the society so as to ascertain whether the activities of the society are being carried out in accordance with the objects of the society. However, a conclusion cannot be drawn that the activities of the society are not being carried out in accordance with the objects of the society or that no genuine activity is being carried out by the assessee merely because the genuineness of one donation in one year is doubted. [para 16]

Learned counsel for the assessee has also relied upon the decision of Hon'ble Jurisdictional High Court in the case of Agra Development Authority (supra) to support his contention that Section 12AA(3) does not authorize the Commissioner to cancel charitable registration with retrospective effect. He pointed out that the show cause notice was given in this case by the CIT on 25th January, 2016 while the CIT cancelled the registration from 1st April, 2010, which is not permissible in view of the decision of Hon'ble Jurisdictional High Court in the case of Agra Development Authority (supra). We find the contention of the learned counsel to be justified. [Para 17]

9. M/s. Saint Kabir Education Society v. CIT(E) (ITA No. 6449/Del/2019) (13.06.19)(ITAT, Del)

SECTION 12AA – REGISTRATION OF TRUST - WHILE CONSIDERING APPLICATION FOR GRANT OF REGISTRATION , THE CIT(E) IS ONLY REQUIRED TO EXAMINE THE OBJECTS AND ACTIVITIES OF THE TRUST - THE CIT(E) WAS NOT JUSTIFIED IN REJECTING THE REGISTRATION ON THE GROUND THAT BALANCE SHEET OF THAT SOCIETY HAS SHOWN CARS LIKE BMW AND ENDEAVOR.

Held, the requirement of Section 12AA registration is only to the extent that the Commissioner has to satisfy himself about the objects of the trust or institution and the genuineness of its activities. Further, it is of great importance that the activities of such institutions be looked at carefully whether the activities are genuine or not. The Revenue authorities also have to look into the said activities whether the same are carried out in accordance with law or not. In the present case, the applicant society is not deviating from its main object to utilize the resources of society for propagation of education, to establish and run education institutions for promotion of modern education in Haryana, to prepare buildings, hostels, sports ground and library for institutes of society. The Commissioner of Income Tax, at no point of time has pointed out that the applicant society is not doing these activities. The case laws referred by the Ld. AR are apt in the present case. Thus, Commissioner of Income Tax has not followed the proper guidelines given by

Section 12AA when should be applied. Therefore, we are of the opinion that registration should have been granted u/s 12AA of the Act to the Applicant Society as the objects are charitable in nature and as there are no violations of either sec. 11(5) or Sec. 13 during this year or in the next year and possibility of the applicant society contravening the provisions is not a ground to reject the registration. Therefore, we direct the Commissioner of Income Tax (Exemption) to grant the registration to the Applicant Society u/s 12AA of the Act. Hence, appeal of the applicant society is allowed. [Para 8]

10. DCIT v. Royal Beverages P. Ltd. (ITA No. 5214/D/15)(25.06.19)(ITAT, Del)

SECTION 28 – TRADING ADDITION – ESTIMATION OF GP RATE – THE ASSESSING COMPARING DISCOUNT AND SALES FIGURES OF SUCCEEDING YEARS AND MADE ADDITION WITHOUT POINTING OUT ANY SPECIFIC DEFECT IN THE BOOKS OF ACCOUNT – THE BOOKS OF ACCOUNT WERE NOT REJECTED – ADDITION ON ACCOUNT OF ESTIMATED GP LIABLE TO BE DELETED.

Held, We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case, the learned assessing officer has made addition to the book results of the assessee without rejecting the books of accounts. To reject the books of accounts the learned assessing officer must find out latent, patent, and glaring defects in the books of accounts. In the present case, the learned assessing officer has not found any defect in the books of accounts. Merely on the basis of comparison of gross profit with other parties, he has made the addition to the gross profit of the assessee. The learned departmental representative could not point out any infirmity in the order of the learned CIT – A and further failed to justify that without rejecting the books of accounts by finding out the latent, patent and glaring defects in the books of accounts whether the book results which are audited can be disturbed or not. On perusal of the order of the learned assessing officer, we did not find that the learned assessing officer has pointed out any defect in the books of accounts of the assessee. [Para 7]

The findings of the learned CIT – A are in accordance with the law as the learned assessing officer has failed to point out any defect in the books of accounts. The learned AO also did not make any verification of various expenditure but has merely compared the gross profit of other entities without giving any benefit of difference in the business model, product dealt with, geographical area operated in et cetera. In view of this, we dismiss ground number 1 and 2 of the appeal of the learned assessing officer. [Para 8]

11. Bikanervala Foods Pvt. Ltd. vs. DCIT (ITA No. 6357/D/2015) (Dated: 06.06.2019)

S. 32(1)(iia) - THE ADDITIONAL DEPRECIATION CANNOT BE DENIED TO THE ASSESSEE FOR INSTALLING THE ITEMS OF THE ASSETS AT RETAIL OUTLETS, BECAUSE RETAIL OUTLETS ARE NOT EITHER OFFICE PROMISES OR RESIDENTIAL ACCOMMODATION IN THE NATURE OF THE GUESTHOUSE AS PER THE PROVISO TO SECTION 32(1)(IIA) - THAT "TOP SEALER" ARE USED

FOR SEALING CONTAINERS FOR SUPPLY OF FOOD TO THE CUSTOMERS, WHICH IS PART OF THE PROCESS OF MANUFACTURING AND DELIVERY OF THE PRODUCTS OF THE ASSESSEE AND THUS ADDITIONAL DEPRECIATION ON THE SAME IS ALLOWABLE.

9. On perusal of the above order of the Tribunal(supra) in the case of the assessee, we find that in para-7 the Tribunal has held the activity of the assessee as manufacturing and found the assessee eligible for claim of additional depreciation on plant and machinery. In paras-8 and 9, the Tribunal (supra) has held that the additional depreciation cannot be denied to the assessee for installing the items of the assets at retail outlets, because retail outlets are not either office promises or residential accommodation in the nature of the guesthouse as per the proviso to section 32(1)(iia) excluding the additional depreciation. In the year under consideration, also the items of fixed assets have been installed at various retail outlets and there is no dispute between the assessee and the Revenue on this factual aspect. Thus following the finding of the Tribunal, the additional depreciation in the year under consideration also cannot be disallowed on the ground that those items were not installed at the factory premises of the assessee. The second ground for rejection of additional depreciation is that these items are not involved in the actual process of manufacturing of food products/sweets/namkins. In the assessment year 2010-11, also the Tribunal(supra) in paras- 9 observed that items of assets like air conditioners, electricity distribution panel etc are part of plant and machinery engaged for manufacturing of food products/sweets/ namkin etc. The items of fixed asset in the year under consideration are listed in the table above reproduced by us. There is no doubt that "TOP sealer" are used for sealing containers for supply of food to the customers, which is part of the process of manufacturing and delivery of the products of the assessee and thus additional depreciation on the same is allowable. The Canopy of Generator is part of the entire plant and machinery engaged for manufacturing. The Tribunal (supra) in assessment year 2010-11 allowed the additional depreciation on electrical panels, thus following the same finding; the additional depreciation on canopy of the generator is also allowable. Similarly, there is no doubt that the items Mixi, Lassi machine, Grinder Machine, Charcoal Griller, Table top burner, Gas Plant SS Double Body Tandoor, SS "Kadahi" Table, SS Selves Barcket Big and small are the items of assets engaged in manufacturing of food products/sweets/namkins etc. The trollys are also used for transferring of raw materials or finished products in the process of manufacturing of food products carried out by the assessee at the retail outlets. Thus, in view of the above discussion, we do not find the action of the Ld. CIT(A) in upholding the disallowance of additional depreciation as justified and accordingly, we reject the contention of the Ld. CIT(A) in upholding the disallowance. Respectfully following the finding of the Tribunal in the immediately preceding assessment year 2010-11 and our discussion above, we allow the claim of the additional depreciation of the assessee in the year under consideration also. The grounds of the appeal of the assessee are accordingly allowed.

12. **DCIT v. HCL Comnet Ltd. (ITA No. 4809/D16)(06.06.19)(ITAT, Del)**

SECTION 37(1) – FOREIGN EXCHANGE FLUCTUATION LOSS – FLUCTUATION LOSS ON LOAN TAKEN FOR REVENUE PURPOSE IS ALLOWABLE AS BUSINESS LOSS IN ACCORDANCE WITH AS-11 AND SC JUDGEMENT IN THE CASE OF WOODWARD GOVERNOR INDIA P. LTD. 312 ITR 254 (SC).

Held, It is pertinent to note that a detailed explanation was submitted by the assessee before the Assessing Officer in support of allowability of unrealized foreign exchange loss of Rs. 68,63,845/- which assessee incurred on account of re-statement of foreign currency denominated trade assets/liabilities. The foreign exchange loss had been provided for by the assessee pursuant to the mandatory Accounting Standard (AS-11) issued by the ICAI. The assessee is consistently followed the this policy of restating foreign exchange assets/liabilities as per the exchange rate prevailing on the last day of previous year and accounting for the resultant profit/loss. The Assessing Officer totally ignored this fact as well as the decision of the Hon'ble Apex Court in case of CIT vs. Woodward Governor India Pvt. Ltd. 312 ITR 254. [Para 7]

13. AT & T Global Network Services (India) Pvt. Ltd. v.JCIT (ITA No.5535/D/16& 7115/D/17) (Dated 27/05/2019)

SECTION 40(a)(ia) / 194I – OBLIGATION OF TDS ON PAYMENT OF LEASE LINE CHARGES – PAYMENTOF LEASELINE CHARGES IS FOR USE OF TELECOM SERVICE AND NOT FOR USE OF ANY ASSET – ACCORDINGLY PAYMENT MADE THEREFOR IS OUTSIDE THE AMBIT OF SECTION 194I OF THE ACT – FAILURE OF THE ASSESSEE TO DEDUCT TAX AT SOURCE UNDER SECTION 194I DOES NOT WARRANT DISALLOWANCE UNDER SECTION 40(a)(ia) OF THE ACT.

Held,We find the Assessing Officer disallowed an amount ofRs.6,50,79,639/- paid by the assessee on account of leaseline expenses which werepaid to other telecom operators for provision of telecom connectivity service requiredfor transmission of data on the ground that the assessee failed to deduct tax at sourceas per the provisions of section 194I of the Act. It is the submission of the ld. counselfor the assessee that the leaseline charges are paid to the telecom service provider forfaster connectivity service through dedicated leaseline and, therefore, such payment has been made for availing the facility of connectivity services from vendors required for transmission of data and is not for use of any asset involved in provision of suchfacilitycovered u/s 194I of the IT Act. It is also the submission of the ld. counsel forthe assessee that the assessee was neither in possession nor control of the equipmentswhich were used for providing internet and communication facilities and, therefore,there was a clear absence of the element of leasing of equipments and, therefore, theprovisions of section 194I cannot be applied. We find merit in the above argument ofthe ld. counsel. We find identical issue had come up before the coordinate Bench ofthe Tribunal in the case of Global One India (P) Ltd.(supra)…. The various other decisions relied on by the ld. counsel for the assessee alsosupport its case. In view of the above discussion, we hold that the assessee is notliable for withholding tax u/s 194I of the Act on account of payment of leaseline (supra). charges to other telecom operators for provision of telecom connectivity servicesrequired for transmission of data. Accordingly the Assessing Officer is directed todelete the disallowance. The ground raised by the assessee on this issue is accordinglyallowed.**[Para 42, 44]**

14. DCIT v. M/s. Pasupati Fabrics Ltd. (ITA No. 6650/D/16)(04.06.19)(ITAT, Del)

SECTION 41(1) – CESSATION OF LIABILITY – THE ASSESSEE WAS UNDER WINDING UP PROCEEDINGS AND THE LIABILITIES WERE NOT WRITTEN BACK – THE ADDITION U/S 41(1) IS NOT JUSTIFIED.

Held, After perusing the aforesaid finding of the Ld. CIT(A), we find that Assessee is a sick industrial unit and BIFR has recommended for winding up of the company. It is also noted that at present, the matter is subjudice before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) which has stayed the order of Hon'ble Delhi High Court till further orders. Therefore, it cannot be said that liability has ceased to exist in Assessee's case as neither the liability has been written back by the Assessee in its Profit and Loss Account nor the winding up process has been completed. We further note that the Hon'ble Delhi High Court in the case of CIT vs. Vardhman Overseas Ltd., 343 ITR 408 has held that there is no cessation of liability when Assessee has not unilaterally the written back the amounts on account of sundry creditors in its P&L account. It is also noted that the facts of the judgment of Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar are different as in that case, because the Assessee had written back the amounts as income in its Profit & Loss Account. Therefore, in view of the aforesaid judgement of Hon'ble Delhi High Court and the facts and circumstances of the case, the addition of Rs. 2,78,25,006/- made by Assessing Officer was rightly deleted by the Ld. CIT(A), and therefore, there is no illegality or infirmity in the finding of the Ld. CIT(A) on the issues in dispute, hence, we uphold the action of the Ld. CIT(A) on the issues in dispute and reject the grounds raised by the Revenue. [Para 5.1]

15. ACIT vs. Samtel Glass Ltd. (ITA No. 2587/D/2015) (Dated: 29.05.2019)

IN THE ABSENCE OF ANYTHING TO SHOW THAT THE INTEREST FREE LOAN GIVEN BY THE ASSESSEE COMPANY TO ITS SUBSIDIARY COMPANY WAS FOR PERSONAL BENEFIT OF ANY DIRECTOR OR FOR ANY OTHER PERSONAL REASONS, IT HAS TO BE HELD THAT THE LOAN WAS GIVEN FOR THE PURPOSES OF BUSINESS AND COMMERCIAL EXPEDIENCY AND, THEREFORE, NO PORTION OF THE INTEREST PAID BY THE ASSESSEE ON ITS BORROWED FUNDS CAN BE DISALLOWED ON THE GROUND THAT A PART THEREOF HAS BEEN DIVERTED TO THE SUBSIDIARY COMPANY - CIT VS. DALMIA CEMENT BHARAT LTD. 330 ITR 595 FOLLOWED.

S. 41(1) - WHEN THE LIABILITY IS SHOWN BY THE ASSESSEE IN ITS BOOKS OF ACCOUNT, THE ASSESSING OFFICER COULD NOT HAVE MADE ADDITION U/S 41 (1).

18. After hearing both the sides we do not find any infirmity in the order of the CIT(A) deleting the addition. From the various details furnished by the assessee we find the outstanding amount is due to M/s. Cumins India Limited since April 2007 against supply of generator sets on hire purchase basis. Due to some technical problems in the generator sets, dispute arose between the assessee company and the supplier i.e. M/s. Cumins India Limited Pune. From the copy of the account filed at paper book page 45 to 50 we find M/s. Cumins India Limited has filed suit against the assessee company on account of bouncing of cheques which were issued to the said

company in advance. Therefore, when the liability is shown by the assessee in its books of account, the Assessing Officer in our opinion could not have made addition u/s 41 (1). Accordingly, the order of CIT(A) on this issue is upheld and the ground raised by the revenue is dismissed.

16. **ACIT v. M/s Escorts Heart Institute and Research Centre, (ITA No.3709/D/15) (Dated 11/06/2019)**

SECTION45 READ WITH SECTION 47 – CONVERSION OF AOP/FIRM INTO COMPANY – ON COVERSION OF AOP/FIRM INTO COMPANY UNDER PARA IX OF THE COMPANIES ACT, A COMPANY CAME INTO EXISTENCE ONLY AFTER CONVERSION OF AOP AND NOT PRIOR THERETO – FOR A TRANSFER OF CAPITAL ASSET WITHIN THE MEANING OF SECTION 2(47), A TRANSFEROR AND A TRANSFEREE NEEDS TO BE IN EXISTENCE – IN THE ABSENCE OF EXISTENCE OF THE TWO ENTITIES IN CASE OF CONVERSION, IT CANNOT BE SAID TO BE "TRANSER" WITHIN THE MEANING OF SECTION 2(47) TO ATTRACT CAPITAL GAINS UNDER SECTION 45 OF THE ACT.

Held,That the above observation of their Lordships would be squarelyapplicable to the case of the assessee because in this case also, theassessee AOP was converted into a company under Part IX of theCompanies Act. Thus, till the time of conversion, the AOP remained inexistence and the moment conversion took place, the company cameinto existence. However, the AOP and company never remained inexistence simultaneously. Section 45(1) would be applicable ontransfer of a capital asset. The transfer of a capital asset is possibleonly when there is a transferor and the transferee. In the absence ofexistence of the two entities, the transferor and the transferee, therecannot be any transfer. Similarly, in the absence of two entities, theconsideration cannot pass from transferor to the transferee. In view ofthe above, we hold that the above decision of Hon'ble Bombay HighCourt would be squarely applicable to the case of the assessee and hasrightly been followed by the learned CIT(A). … We also find that Hon'ble Jurisdictional High Court in the case ofCIT Vs. Rita Mechanical Works – [2012] 344 ITR 544 (P&H) has alsorelied upon the decision of Hon'ble Bombay High Court in the case ofTexspin Engineering and Manufacturing Works (supra) for taking theview that taking over the assets of the firm by a company does notgive rise to profit chargeable to capital gain under Section 45(4) of theIncome-tax Act. Though in the above mentioned case the issue beforethe Hon'ble Jurisdictional High Court was with regard to the capital gainunder Section 45(4) of the Act, but, their Lordships, while consideringthe decision of Hon'ble Bombay High Court in the case of TexspinEngineering and Manufacturing Works (supra) has specifically referredand discussed the applicability of Section 45(1) read with Section247(2) of the Act in paragraph 17 of their order. No contrary decisionis brought to our knowledge. In view of the above, we, respectfullyfollowing the above decision of Hon'ble Bombay High Court in the caseof Texspin Engineering and Manufacturing Works (supra), uphold theorder of learned CIT(A) and dismiss the appeal filed by the Revenue.… In the result, both the appeals of the Revenue are dismissed.**[Paras 22, 23, 24]**

17. Mr. Vinod Kumar Yadav v. ITO (ITA No.2640/D/18) (Dated 27/05/2019)

SECTION 56 – FORFEITURE OF AMOUNT RECEIVED IN ADVANCE FOR SALE OF PROPERTY, TAXABLE AS INCOME FROM OTHER SOURCES OR TO BE REDUCED FROM COST OF ASSET – CLAUSE (IX) INSERTED IN SECTION 56(2) WITH EFFECT FROM 1.4.2015 TREATING FORFEITURE OF AMOUNT RECEIVED IN RELATION TO TRANSFER OF CAPITAL GAINS AS INCOME FROM OTHER SOURCES IS PROSPECTIVE IN NATURE AND NOT APPLICABLE TO AY 2013-14 – IF THE DEVELOPMENT AGREEMENT ENTERED BETWEEN ASSESSEE AND DEVELOPER DID NOT CONCLUDE AND TERMINATED IN BETWEEN, NO INCOME ACCRUED UNDER THE HEAD CAPITAL GAINS AS PER SECTION 45 READ WITH SECTION 48 – DECISION OF SUPREME COURT IN CIT VS. BALBIR SINGH MAINI FOLLOWED.

Held, After considering the rival submissions and on perusal of therelevant findings given in the impugned order, we find that it is anundisputed fact that assessee has received a sum of Rs. 2,12,81,250/-from M/s. Gopal Hightech Infra Developers Pvt. Ltd. as a nonrefundabledeposit as per clause 9 of the 'Collaboration agreement'dated 11.10.2012. Further, as per clause 6 of the collaborationagreement, the possession was to be handed over after getting the LOIby the above developer and during the year under consideration theLOI could not be obtained due to various reasons beyond the controlof both the parties. Ld. AO has held that the said amount is notcovered under the head 'capital gain' since capital asset has not beentransferred and also concluded that amount received by the assesseecannot be treated as part of the sale consideration. Before the Ld.CIT(A), assessee has also brought on record that it has entered into anagreement dated 16.3.2016 with the developer wherein both partiesagreed that in order to make further efforts in getting the LOI andlicence from town and country planning department, Haryana toextend the tenure of collaboration agreement to further period of 18months. Under the collaboration agreement assessee was entitled toreceive 1300 sq. yard per acre out of the residential plots and 50% ofthe developed area of sites for schools, clubs, hospital etc. and 36%out of built up commercial area. The parties have also agreed in termsof clause 13 that the developer on receiving the LOI will develop andhand over the possession within 36 months with a grace period of 2months. The developer has also applied for LOI and licence from theconcerned authorities at various times, which has been pointed out bythe Ld. Counsel before us as per the documents containing in thepaper book. It is also a fact that during the relevant assessment year developer was not able to obtain the LOI from Govt. of Haryana forgetting permission for development of land within the time specified.Finally, the developer obtained the license from the town and countryplanning department LC-V (9 of 2018) dated 29.1.2018, valid upto28.1.2023, a copy of the same has been filed in the paper book from132 to 133. Thus, it is quite clear that transfer has not taken placeduring the year under consideration and if at all it can be said that any sale or transfer has taken place and income has accrued, it is inthe financial year 2017-18 and this fact that the transfer has nottaken place has been accepted by both AO and Ld. CIT(A). Hence, theamount cannot be held to be chargeable as Capital Gain in the currentassessment year. Although the assessee in the year underconsideration has offered the amount received as capital gain…. The Ld. AO has held that in view of section 51 of the Act, if anyamount is received which falls within the purview of section 51 wouldbe taxable as income from other sources u/s 56 of the Act. Beforeinsertion of provision of Finance Act 2015 w.e.f.

1.4.2015, section readas under :"Where any capital asset was on any previous occasion thesubject of negotiations for its transfer, any advance or othermoney received and retained by the assessee in respect of suchnegotiations shall be deducted from the cost for which the assetwas acquired or the written down value or the fair market value,as the case may be, in computing the cost of acquisition." Later on w.e.f. 1.4.2015 proviso was added which read asunder:-"Provided that where any sum of money, received as an advanceor otherwise in the course of negotiations for transfer of a capital asset, has been included in the total income of the assessee forany previous year in accordance with the provisions of clause (ix)of sub-section (2) of section 56. then. such sum shall not bededucted from the cost for which the asset was acquired or thewritten down value or the fair market value. As the case may be.in computing the cost of acquisition." … Clause ix of sub section 2 to section 56 has been brought in thestatute w.e.f. 1.4.2015, which provides that;"any sum of money received as an advance or otherwise in thecourse of negotiations for transfer of a capital asset, if-(a) Such sum is forfeited; and(b) The negotiations do not result in transfer of such capital asset. .. Ergo, for treating the amount received as advance in the courseof negotiation over the transfer of capital asset has been deemed to beincome from other sources only w.e.f. 1.4.2015. Hence, the amendedprovision will not be applicable to the assessee as same will not have aretrospective effect for the year under consideration, that is, for theassessment Year 2013-14. Thus, said amount cannot be held to bechargeable to tax in the current year, neither u/s 45 because there isno transfer u/s 2(47)(v); nor u/s 56(2). This position has been clarifiedby ITAT Mumbai Bench in the case of ITO vs. Fiesta Properties (P) Ltd.(2016) 73 taxmann.com (Mumbai).

Further the Hon'ble Supreme Court in the case of CIT vs. BalbirSingh Maini (2017) 398 ITR 531, have held that where for want ofpermissions, entire transaction of development of land envisages injoint development agreement fell through, there would be no profit orgain which arose from the transfer of capital asset which could bebrought to tax u/s 45 read with section 48.**[Paras 7, 8, 8.1, 9, 10]**

18. ITO vs. Mannat Motors (ITA No. 3159/D/2016) (Dated: 24.06.2019)

SECTION 68 – THAT ORDER OF CIT(A) IS CONFIRMED - THE ASSESSEE FILED EVIDENCES TO PROVE CREDITORS ARE PAID THROUGH BANKING CHANNEL. DEBTS ARE RECOVERED THROUGH BANKING CHANNEL AND CASH WHICH ARE RECORDED IN BOOKS OF ACCOUNT - SAME ENTRIES ARE SUPPORTED BY CONFIRMATION OF PARTIES - THE LD. CIT(A) ON THE BASIS OF ALL THE DOCUMENTARY EVIDENCES FILED ON RECORD FOUND THAT ASSESSEE HAS RECOVERED THE AMOUNT FROM THE DEBTORS AND PAYMENTS HAVE BEEN MADE THROUGH CHEQUES AND FURTHER MADE PAYMENTS TO THE CREDITORS OF RS.82,30,000/- DETAILS HAVE BEEN SUBSTANTIATED BY THE ASSESSEE THROUGH EVIDENCES ON RECORD.

10. We have considered the rival submissions. The A.O. noted in the assessment order that there are balances of sundry creditors in preceding assessment year as well as in assessment year under appeal. It is also noted that assessee has paid substantial amount to the sundry creditors in assessment year under appeal. The A.O. also noted that assessee has sundry debtors in earlier

year. It is also noted in the assessment order that assessee recovered the amounts from the sundry debtors in assessment year under appeal which was paid to the sundry creditors. Learned Counsel for the Assessee pointed-out that in earlier years sundry debtors and creditors have not been disputed by the Revenue Department, therefore, genuineness of the transaction of earlier year cannot be disputed. There is no explanation to that effect by the Ld. D.R. Whatever transactions were conducted in earlier year could not be subject matter of dispute in assessment year under appeal. Since there were debtors in earlier years, who paid the amount to assessee in assessment year under appeal, there could not be any reason to disbelieve the explanation of assessee. The A.O. instead of considering the addition on account of payment to the sundry creditors, made the addition on account of amount received from sundry debtors. The Ld. CIT(A) in appellate proceedings forwarded the written submissions of the assessee which is supported by facts and evidences. The written submissions of the assessee is reproduced above which clearly satisfy that part of the payments have been made to the sundry creditors through account payee cheques and in other cases also no cash transactions have been conducted. The detailed explanation of assessee was referred to the A.O. for his comments, on which, no adverse comments have been offered by the A.O. in the remand report. The assessee filed evidences to prove creditors are paid through banking channel. Debts are recovered through banking channel and cash which are recorded in books of account. Same entries are supported by confirmation of parties. Since the assessee filed complete details at assessment stage as per remand report of the A.O. as well as filed details along with evidences at appellate proceedings to explain that assessee recovered the amounts from sundry debtors and paid off to the sundry creditors, the Ld. CIT(A) in proper perspective based on evidence on record, correctly came to the finding that assessee explained payment to the creditors of Rs.82,30,000/-. The Ld. CIT(A) also gave specific finding that assessee has not been able to substantiate the payment of Rs.15,09,000/- to the creditors. Therefore, we do not find any infirmity in the Order of the Ld. CIT(A) in deleting the substantial addition and confirming part addition against the assessee. The Hon'ble Punjab & Haryana High Court in the case of Kuldeep Industrial Corporation 209 CTR 400 observed that "with reference to Rule-46A of the I.T. Rules, when A.O. was present before Ld. CIT(A) and did not raise any objection, Rule 46-A would not be violated." In the present case, the A.O. filed remand report before Ld. CIT(A) in which he has not raised any objection with regard to admission of additional evidences because according to A.O. assessee has not filed any new evidence even in appellate proceedings. The A.O. merely contended that addition on merit may be confirmed. The Ld. CIT(A), therefore, did not violate Rule 46A of I.T. Rules. Even during the course of arguments, the Ld. D.R. was not able to explain as to how Rule 46A have been violated in the present case. The Ld. CIT(A) on the basis of all the documentary evidences filed on record found that assessee has recovered the amount from the debtors and payments have been made through cheques and further made payments to the creditors of Rs.82,30,000/- have been substantiated by the assessee through evidences on record. The finding of fact recorded by the Ld. CIT(A) have not been rebutted through any evidence or material on record. The Ld. CIT(A) was, therefore, justified in deleting the addition of Rs.82,30,000/- in the matter. However, assessee failed to substantiate the payment of Rs.15,09,000/- to the creditors, therefore, addition to that extent is correctly made by the Ld. CIT(A). Since no evidence of payment of Rs.15,09,000/- to the creditors have been produced before us also, therefore, there is no question of accepting the contention of assessee that Section 69A of the I.T. Act, 1961 would not apply in the case of the assessee. Considering the totality of the facts and circumstances of the case in the light of finding of fact recorded by the Ld. CIT(A), we do not find any infirmity in the Order of

the Ld. CIT(A) in deleting the part addition and confirming the addition of Rs.15,09,000/-. We, confirm the Order of the Ld. CIT(A). Resultantly, the Departmental Appeal and Cross Objections of the Assessee are dismissed.

19. ACIT vs. Sanvik Engineers India Pvt. Ltd. (ITA No. 3201/D/2015) (Dated: 30.05.2019)

S. 68 - EVEN IF THE PURCHASES ARE HELD AS BOGUS - THE ENTIRE PURCHASE AMOUNT CANNOT BE ADDED WHEN THE DEPARTMENT HAS NOT DISPUTED THE ASSESSEE'S SALES - THE ASSESSING OFFICER HAS NOT REJECTED THE BOOKS OF ACCOUNTS AND HAS NOT GRANTED OPPORTUNITIES OF CROSS EXAMINATION - IN SUCH CASE ONLY GROSS PROFIT ELEMENT EMBEDDED IN SUCH BOGUS PURCHASES CAN BE ADDED.

16. Since in the instant case the Assessing Officer has not disturbed the sales and has not rejected the books of accounts, therefore, the entire amount of bogus purchases as alleged cannot be added to the total income of the assessee and the addition has to be restricted to the extent of the G. P. Rate on purchases at the same rate of other genuine purchases. The assessee in the paper book page 54 has given the calculations of such GP rate at 9.96%. We, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to restrict the addition to the extent the G. P. rate on purchases at the same rate of other genuine purchases. The Assessing Officer is accordingly directed to restrict the addition to 9.96% of alleged bogus purchases as against Rs. 1,58,47,973 added by him subject to verification of the GP so computed by the assessee in the paper book. The appeal filed by the revenue is accordingly partly allowed.

20. Sunita Gupta vs. ITO (ITA NO. 701/D/2018) (Dated: 29.05.2019)

Section 68 r/w 41(1) - THAT ALL THE LETTERS ISSUED U/S 133(6) WERE RETURNED BACK IS INCORRECT - SINCE IN THE INSTANT CASE THE PURCHASES ARE NOT DOUBTED - THE ASSESSEE HAS MADE PAYMENTS TO THE CREDITORS IN THE SUBSEQUENT YEARS THROUGH BANKING CHANNELS - PURCHASES MADE FROM SOME OF THE ABOVE PARTIES IN THE SUBSEQUENT YEARS WERE NOT DOUBTED - THEREFORE, ADDITION IN OUR OPINION ON ACCOUNT OF DIFFERENCE IN THE OPENING AND CLOSING BALANCE OF SUNDRY CREDITORS IN ABSENCE OF NON PRODUCTION OF THE CREDITORS IS NOT JUSTIFIED.

32. Since in the instant case it is not understood as to whether the addition has been made u/s. 41(1) or 68 of the IT Act , 1961 and since the Assessing Officer has accepted purchases as genuine and the amount outstanding in the name of sundry creditors have been paid through banking channels in subsequent years and purchases made from the said parties in subsequent years has been accepted by the revenue without any doubt and since the notices issued to the three parties were never returned back as per the letter addressed by the Assessing Officer to the

assessee, therefore, merely because the said creditors were not produced before the Assessing Officer for his examination, in our opinion, cannot be a ground for making the disallowance. We, therefore, set aside the order of the CIT(A) on this issue and direct the Assessing Officer to delete the addition.

21. Jai Bhikshu Credit & Holding vs. DCIT (ITA No. 2911/D/2016) (Dated: 28.05.2019)

S. 73 - PROVISIONS OF SECTION 73 DOES NOT APPLY TO THE ASSESSEE FALLING INTO THE EXCEPTION i.e THAT WHOSE GROSS TOTAL INCOME CONSISTS MAINLY OF INCOME WHICH IS CHARGEABLE UNDER THE HEAD INTEREST ON SECURITIES, INCOME FROM HOUSE PROPERTY, CAPITAL GAINS AND INCOME FROM OTHER SOURCES – AND THE PRINCIPAL BUSINESS OF WHICH IS THE BUSINESS OF TRADING IN SHARES OR BANKING OR GRANTING OF LOANS AND ADVANCES

9. On looking at the computation of total income filed by the assessee before the learned assessing officer it has business income of loss of INR 2 445/–, long-term capital gain exempt u/s 10(38) of Rs. 11446874/– and exempt dividend income of INR 1252106/–. The long-term capital gain which is exempt under section 10 (38) as well as the exempt dividend income which is also exempt under section 10 (34) of the income tax act does not enter into the computation of the total income but is an exempt income. Therefore the only income which is chargeable is under the business income of INR 2 445/–. Therefore it is apparent that no part of the business of the assessee company consists of purchase and sale of the shares. Merely indulging in purchase and sale of shares for investment is not business activity in sale and purchase of shares of other companies for the purpose of this section. Such is the mandate of honourable Calcutta High Court 350 ITR 251 in case of Standipack P Ltd V CIT [Cal]. In view of this we reverse the orders of the lower authorities and hold that explanation to section 73 does not apply to the assessee company. Accordingly ground number 2, 3 and 4 of the appeal of the assessee are allowed.

22. Jindal Steel and Power Ltd. v. ACIT (ITA No. 893/D/14)(29.04.19)(ITAT, Del)

I. SECTION 80IA – ADJUSTMENT IN DEDUCTION UNDER SUB-SECTION 8 TO SECTION 80IA – MARKET VALUE OF ELECTRICITY SOLD TO CAPTIVE UNITS – IN CONTROLLED MARKET SITUATION WHERE STATUTORY AUTHORITIES HAVE IMPOSED CONDITIONS AND REGULATIONS ON USAGE AND SALE OF POWER – THE RATE OFFERED BY STATE ELECTRICITY BOARD CAN SAFELY BE TAKEN AS MARKET RATE FOR PURPOSE OF SALE TO CAPTIVE UNITS – THE ASSESSING OFFICER WAS NOT JUSTIFIED IN REDUCING THE CLAIM OF DEDUCTION ON THE GROUND THAT RATE ADOPTED BY THE ASSESSEE ON THE BASIS OF RATE OF STATE ELECTRICITY BOARD FOR SUPPLY OF ELECTRICITY TO CAPTIVE UNITS WAS HIGHER AND DOES NOT REPRESENT MARKET RATE – ADJUSTMENT DELETED

Discussion at Page 11 to 21 Para 25 to 28

II. SECTION 80IB – CLAIM OF ADDITIONAL DEDUCTION NOT CLAIMED IN THE OF INCOME – THE ASSESSEE WAS ELIGIBLE TO CLAIM DEDUCTION IN RESPECT OF ONE UNIT WHICH WAS INADVERTENTLY NOT CLAIMED IN THE RETURN ON INCOME – ALL THE CONDITIONS WERE SATISFIED – THE ASSESSING OFFICER DID NOT ALLOW THE CLAIM MERELY ON THE BASIS OF DECISION OF SC IN THE CASE OF GOETZE INDIA LTD. – TRIBUNAL AFTER ADMITTING THE CLAIM DIRECTED THE ASSESSING OFFICER TO ALLOW THE SAME AFTER VERIFICATION OF FACTS.

Held, After considering the rival submissions and perusing the materials on record we find that the assessee before the Assessing Officer had categorically submitted that in the relevant assessment year, the said unit earned profits of Rs.77,81,08,987/- which were eligible for deduction u/s 80IB of the Act. The said deduction was, inadvertently, not claimed by assessee in original/ revised return of income. In the 'Notes to Account No. 7' filed along with the return of income, the eligibility of deduction u/s 80IB was categorically mentioned. Accordingly, the deduction was claimed during assessment proceedings for relevant assessment year, vide letter dated 28.03.2012 along that with Form 10CCB certifying the said claim of deduction. From the assessment order it is seen that the AO allowed a similar deduction u/s 80IB with respect to Ferro Chrome Unit (SAF), which was mentioned in the notes to the account, and not claimed in the Return of Income, was allowed during the course of assessment and to that extent, the facts are identical. It is also seen from record that allowability of the claim on merits is not disputed by the AO and in fact deduction on this unit has been allowed in subsequent year also. However, the only reason why the AO did not allow the deduction is on account of a Supreme Court decision in the case of Goetze India Limited vs CIT (284 ITR 323) (SC). The Hon'ble Supreme Court, made it clear that the decision in Goetze India (supra) was restricted to the power of AO to entertain a claim for deduction otherwise than by a revised return and the same did not impinge on the power of the Tribunal u/s 254 of the Act to permit a new claim. In any case, this order has been subject matter of decision in various other cases, wherein interpreting this issue, it has been held in favour of the Assessee by observing that the power of the Tribunal in deciding appeals is very wide. Hon'ble Punjab and Haryana High Court in the case of CIT v. Ramco International [2011] 332 ITR 306 (P&H), after discussing the decision of Goetze India (supra), upheld the Tribunal's decision which had, inter alia, upheld the decision of CIT(Appeals) allowing the Assessee to claim the benefit of Section 80-IB though Form 10CCB and other documents which were furnished before the AO during the course of assessment proceedings. [Para 48]

In view of the above discussions, we set aside the orders of the Lower Authorities. As AO has not examined the quantum of deduction allowable under section 80IB being profit derived from Rail Universal Beam Mill we direct the AO to allow deduction under section 80IB in respect of income derived from that unit after verification of the eligible amount as per law. Needless to mention that the AO before determining the eligible amount of deduction shall allow reasonable opportunity of hearing to the assessee. [Para 49]

III. SECTION 14A – NO DISALLOWANCE U/S 14A R.W.R 8D WITHOUT RECORDING DISSATISFACTION WITH RESPECT OF SUO MOTO DISALLOWANCE OFFERED BY THE ASSESSEE IN THE RETURN OF INCOME.

Held, We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. In the instant case the assessee company earned dividend income of Rs.90.14 crores which is exempt income and includible in the total income. Against the said income the assessee Suo-moto disallowed expenses to the tune of Rs.2,65,715/- in the return of income under section 14A of the Act. The AO in the impugned order worked out the amount disallowable under section 14A read with rule 8D at Rs.21.54 crores. We find that the condition precedent for invoking provisions of rule 8D is that the AO must record a satisfaction that the amount of disallowance claimed in the return of income is not correct. Without recording such a satisfaction the AO cannot invoke provisions of Rule 8D. Above view finds support from the decision of the Hon'ble Jurisdictional High Court in the case of COMMISSIONER OF INCOME TAX-I vs. ABHISHEK INDUSTRIES LTD. Reported in 360 ITR 652 and COMMISSIONER OF INCOME-TAX vs. KAPSONS ASSOCIATES reported in 381 ITR 204. In the instant case on perusal of the impugned order of assessment we notice that no such satisfaction was arrived at by the AO. In the circumstances disallowance under section 14A of the Act of Rs.21.54 crores in place of Rs.2,65,715/- claimed by the assessee in the Return Income is bad in law and unsustainable. We therefore delete the same and direct the AO to restrict the disallowance under section 14A of the act to Rs.2,65,715/-. [Para 83]

IV. SECTION 32 – CLAIM OF DEPRECIATION IS ALLOWABLE IF THE ASSETS ARE KEPT READY FOR USE – THE CONDITION OF PUT TO USE SHOULD BE INTERPRETED LIBERALLY AND CLAIM OF DEPRECIATION IS ALLOWABLE WHERE BUSINESS ASSETS ARE KEPT ON STANDBY.

Held, we have heard the rival submissions and perused the orders of the lower authorities and materials available on record. The AO disallowed depreciation of Rs42 lacs in respect of 2 generator sets on the ground that those generator sets were not used during the relevant previous year. The assessee explained before the AO that the 2 generator sets were kept standby for use in the business of generation of electricity so that the continuity of the business is not affected. We find that no material has been brought on record to controvert the plausible explanation of the assessee. It is an established position of law that the asset which have been kept ready for use in business but could not be used for any reason the same is treated as used for the purpose of business. Support for the above view is drawn from the decision in the case of CIT vs. Nahar Exports Ltd. 163 Taxman 518 (P&H). We therefore delete the disallowance of depreciation of Rs.42 lacs and allow this ground of appeal of the assessee . [Para 93]

23. Qualcomm India P. Ltd. v. DCIT (ITA No. 1810/D/14)(03.06.19)(ITAT, Del)

SECTION 92C – TRANSFER PRICING ADJUSTMENT – SELECTION OF COMPARABLES- COMPANY WITH GIANT OPERATIONS AND HIGH RISK

ASSUMING CAPACITY CANNOT BE TAKEN AS VALID COMPARABLE TO A COMPANY PROVIDING CAPTIVE SERVICES.

Held, Undisputedly, assessee before us is a captive service provider that provides 100% services to its AEs only, as desired by its AE. Annual Report of Infosys placed before us shows that this company is into providing diversified services like providing end-toend business solutions that leverage technology thereby enabling clients to enhance business performance. The solutions span over entire software life cycle encompassing technical consulting, design, development, reengineering, maintenance, systems integration, package evaluation and implementation, and testing and infrastructure management services. In addition, this company offers software products for banking industry. [Para 8.3.3]

Further assessee is a captive service provider providing services exclusively to its AEs on cost plus basis having minimum risk and absolutely no intangibles. Whereas, this company is found to be having high turnover and huge intangibles as per annual report. It is also observed that this company is expanding in the areas of R&D for developing and creating new functionalities which is to the tune of 1.3% of the total revenue. Furthermore, it is also not in dispute that Infosys owns product "Finacle", which is submitted to be a universal banking solution empowering banking sector across the globe. Perusal of P&L account, available in annual report reveals that this company has income of Rs. 15648 crores from software services and product of which segmental information is not available. This company has been ordered to be excluded by the Hon'ble Delhi High Court in case cited as *CIT* v. *Agnity India Technologies (P.) Ltd.* reported in (2013) 36 Taxmann.com 289. Hon'ble High Court has observed that this Tribunal while examining comparability of this company with Agnity India Technologies which was also a captive service provider operating on minimal risk providing software development service has excluded this company from list of comparables for reason that it is a giant company in area of development of software, assumption of risk leading to high profits etc. Hon'ble High Court upheld view expressed by this Tribunal for excluding Infosys from list of comparables. [Para 9]

We, therefore, direct Ld.TPO/AO to exclude this company from final list of comparables for benchmarking international transactions. [Para 9.1]

24. M/s. Barco Electronics Systems P. Ltd. v. DCIT (ITA No. 1530/D/16)(28.06.19)(ITAT, Delhi)

SECTION 92B/C- TRANSFER PRICING ADJUSTMENT ON ACCOUNT OF DELAYED TRADE RECEIVABLES – WHERE THE MARGIN SHOWN BY THE ASSESSEE WAS MORE THAN THAT OF COMPARABLES AND DELAY IN RECEIVABLE HAVING ALREADY BEEN CONSIDERED IN WORKING CAPITAL ADJUSTMENT – THE ADJUSTMENT OF INTEREST ON DELAYED TRADE RECEIVABLES IS NOT SUSTAINABLE.

Held, we have heard the rival submission and perused the relevant material on record. We have noted that the assessee is not charging interest on overdue debts from the third parties and also the assessee is a debt free company and not paying any interest on funds utilized is business. We

have also noted that the assessee company has a margin of 23.3% on Software Development segment as compared to the margin of 11.42% of the comparable companies. The working capital adjusted margin of the assessee have already factored into account the delay in the receivables and therefore no separate adjustment on this account is required to be made. The credit period of the comparable companies has been found to be 147 days as against the credit period allowed by the assessee of the 30 days. In view of the decision of the Hon'ble Delhi High Court in the case of CIT Vs EKL Appliances Ltd (supra), we are of the opinion that impact of the delayed receivables has already been factored in the working capital adjustment and, therefore, any further adjustment on the outstanding receivables is not required separately in the instant case. [Para 5]

25. A. T. Kearney India Pvt. Ltd. v. ACIT(ITA No.2623/D/15) (Dated 21/06/2019)

SECTION 92(4) READ WITH 10A – ELIGIBILTY OF DEDUCTION UNDER SECITON 10A ON VOLUNTARY TP ADJUSTMENT – PROVISIONS OF FIRST PROVISO TO SECTION 92(4) DISENTITLING CLAIM OF EXEMPTION / DEDUCTION ON TP ADJUSTMENT IS APPLIABLE ONLY WHERE ADJUSTMENT OF ALP IS MADE BY AO/TPO AND NOT TO THE VOLUNTARY ADJUSTMENT MADE BY ASESSEE ITSELF.

Held, We have heard the rival submissions and perused thematerial available on record. The first issue for determinationbefore us is whether the assessee will be eligible for claim ofdeduction u/s 10A of the Act with respect to suo moto transferpricing adjustment made by the assessee. Both the parties haveargued at length on the issue. On one hand, it is the assessee'scontention that provisions of section 92(4) will not be applicablein this case as the transfer pricing adjustment has been madevoluntarily by the assessee and once the income has been offeredto tax, it forms part of the profit of the business and thededuction u/s 10A cannot be denied. The Ld. AR has also cited anumber of judicial precedents in support of his contention. Onthe other hand, Ld. Sr. DR has taken a stand that the Act doesnot empower the assessee to enhance the Arm's Length Price andthat only the Assessing Officer is empowered to makeadjustments u/s 92C(4) of the Act. The facts leading to thiscontroversy are that while filing its income tax return, theassessee had compared its operating margin with the comparablecompanies and since the operating margin earned by theassessee was lower than the operating margin earned by thecomparable companies, the assessee made a voluntary transferpricing adjustment amounting to Rs. 1,96,45,478/-. After thisvoluntary adjustment, operating profit margin of the assesseecame to 25% which was higher than the three years averageoperating profit margin of the comparables. Thereafter, the returnof income was filed which included the voluntary transfer pricingadjustment and the gross taxable income before deduction u/s10A was determined at Rs. 2,23,50,953/-. Thereafter, theassessee proceeded to claim deduction of Rs. 1,69,61,565/- u/s10A which was denied by the Assessing Officer and later onconfirmed by the Ld. DRP. … As per the proviso to section 92C(4), no deduction u/s 10Aor 10B or Chapter VIA is to be allowed in respect of amount ofincome by which the total income of the assessee is enhancedafter computation of income under the sub-section. Thedepartment has disallowed the assessee's claim by relying on thisproviso. An identical case came up for hearing before the ITATBangalore Bench in the case of I-Gate Global Solutions Limitedvs. ACIT (supra) and the

ITAT Bangalore Bench returned afinding that the assessee was entitled to deduction u/s 10A inrespect of income declared in the return of income on the basis ofcomputation of ALP.This order of the ITAT Bangalore Bench was upheld bythe Hon'ble Karnataka High Court in ITA 453/2008 wherein videjudgment dated 17.6.2014, the Hon'ble Karnataka High Courtanswered the substantial question of law no. 4 against therevenue and in favour of the assessee. We further note that ITATAhmedabad Bench in the case of QX KPO Services Pvt. Ltd. vs.ITO (supra) had followed the order of the ITAT Bangalore Tribunalin the case of I-Gate Global Solutions Ltd. Vs ACIT (supra) andhad accordingly allowed the deduction u/s 10A of the Act on thevoluntary TP adjustments made by the assessee. Similarly, theITAT Pune Bench in the case of Approva Systems Pvt. Ltd. vs.DCIT (supra) also followed the decision of ITAT Bangalore Benchin the case of I-Gate Global Solutions Ltd. Vs ACIT (supra) andallowed deduction u/s 10A of the Act on the voluntary transferpricing adjustment made by the assessee by noting that theassessee was entitled to deduction u/s 10A of the Act onadditional income offered on account of suo moto adjustment onaccount of transfer pricing provisions and that the provisions ofsection 92C(4) of the Act were not attracted. Similarly, ITAT Hyderabad Bench in the case of Sumtotal Systems Pvt. Ltd. vs.DCIT reported in 88 Taxmann.com 897 also relied on the order ofthe ITAT Bangalore Bench in the case of I-Gate Global SolutionsLtd. Vs ACIT (supra) and allowed deduction u/s 10A of the Act onvoluntary transfer pricing adjustment made by the assessee.Thus, the ratio of the aforesaid orders of the Tribunal, which weare bound to follow, is that the first proviso to section 92C(4) ofthe Act is evidently applicable only to situations whereadjustment to the ALP is made by the Assessing Officer/TPO/Ld.DRP and not to the voluntary adjustment made by the assesseeitself. If the legislative intent was to treat the adjustments madeby the Assessing Officer at par with the voluntary adjustmentmade by the assessee, the legislative intent would have beenexpressed in different words and section 92C(4) would not havereferred to computation of income made by the Assessing Officerin terms of the ALP determined u/s 92C(3) based 'enhanced'income. We also note that the Ld. Sr. DR has placed reliance onthe ratio laid down in the case of Deloitte Consulting India (P)Ltd.(2012) 22 taxmann.com 107 (Mumbai). However, the samedoes not stand because of the ratio of the judgment of theHon'ble High Court of Karnataka on the same issue. Though the said judgment is of the non-jurisdictional High Court, the same isbinding on this Tribunal in absence of any contrary decision ofthe Jurisdictional High Court. Therefore, respectfully followingthe ratio of the decision of the Coordinate Benches as mentionedin the preceding paragraphs as well as the Hon'ble High Court ofKarnataka, we allow assessee's ground nos. B.1, 1.1, 1.2 and 1.3and we direct the Assessing Officer to delete this disallowanceand grant benefit of deduction u/s 10A on the amount ofvoluntary TP adjustment made by the assessee. **[Paras 5, 5.1, 5.2]**

26. ITO vs. Rajeev Aggarwal (ITA No. 3031/D/2016) (Dated: 22.05.2019)

Section 145 - THE BOOKS OF ACCOUNT ARE AUDITED - CASH BOOK, BANK BOOK, JOURNAL, BANK STOCK AND JOURNAL LEDGER WERE MAINTAINED BY THE ASSESSEE AND NO ANY DISCREPANCIES HAVE BEEN POINTED OUT THEREIN - THE STOCK REGISTERS WERE ALSO PRODUCED WHICH WERE NOT CONSIDERED BY AO - THEREFORE, THE REJECTION OF ACCOUNT BOOKS IS NOT JUSTIFIED – IN CASE OF CASH SALES THERE WAS NO NEED TO MENTION THE NAMES AND ADDRESSES OF THE BUYERS AND SIMPLY

BECAUSE THE NAMES OF THE BUYERS WERE NOT MENTIONED ON THE INVOICES - IT CAN HARDLY BE PRESUMED THAT THE RATES CHARGED IN THE INVOICES ARE NOT ACCEPTABLE - THE SELLING RATE OF BULLION WAS ALSO EASILY ASCERTAINABLE FROM THE NATIONAL MARKET, SARRAFA ASSOCIATIONS OR FROM OTHER COMPARABLE BUSINESS HOUSES - NO DEFECTS ARE POINTED OUT IN THE BOOKS OF ACCOUNT MAINTAINED BY THE ASSESSEE.

7. …… As regards other reason for rejection of accounts of account, we are of the opinion that simply because the names of the buyers were not mentioned in the bills of cash sales, it would not go to disbelieve the books of account as held by Hon'ble Bombay High Court in the case of RB JessaramFatehchand (Sugar Dept.) vs. CIT, 75 ITR 33. We find substance in the contention of the assessee that gold bullion is a precious metal and its day-today rates are easily ascertainable from the rates declared by National Market, Sarrafa Bazars etc. It is not the case of the Revenue that the rate of bullion charged in the invoices was not in consonance with the market rates of gold bullion prevailing at that point of time. No any comparable instance has been given to support the doubt by the Assessing Officer on the rates of bullion sold by the assessee. The assessee has maintained quantitative tally of the stock, on perusal of which we find no incongruity in the purchases, sales and stock shown by the assessee. Besides, the Revenue authorities have not made out a case that the assessee has not adopted consistent method of accounting and in view of aforesaid facts, the profits and gains earned by the assessee can be easily deduced from the books of accounts so maintained by the assessee. Therefore, in our considered opinion, the Assessing Officer was not justified in rejecting the book version of the assessee and to apply the profit rate of 0.54% without any good reason.

27. SGDC India P. Ltd. v. DCIT (ITA No. 403-405/D/19)(28.06.19)(ITAT, Delhi)

SECTION 147 – CHANGE OF OPINION – WHERE AN ISSUE HAS BEEN EXAMINED AND ACCEPTED IN ONE YEAR AND THE ASSESSING OFFICER DRAWS DIFFERENT CONCLUSION IN SOME OTHER YEAR – THE REOPENING OF ASSESSMENT OF PRECEDING YEARS ON THE BASIS OF SUCH DIFFERENT CONCLUSION AMOUNTS TO CHANGE OF OPINION - THE TERM 'RECORD' MEANS ENTIRE RECORD OF PRECEDING AND SUBSEQUENT YEARS - NOTICE U/S 148 QUASHED.

Held, the question that arises for our consideration is as to whether the reassessment proceedings are valid when the original assessment has been completed u/s 143(1) for the impugned assessment year [for assessment year 2010-11 – 143(1) and for assessment year 2011-12 – 143(3)] when the very issue of chargeability of refundable security deposit as revenue receipt or not was examined in 2012-13 and the reassessment proceedings were initiated on the basis of thefindings in assessment year 2013-14. [Para 18]

We find the reasons recorded for reopening of the assessment for the impugned assessment year is based on the findings of the assessment order for assessment year 2013-14 whereas the same issue was decided and accepted in assessment year 2012-13. Thus, we find merit in the submission of the ld. Counsel for the assessee that the reassessment proceedings are based on

change of opinion and re-appraisal of facts already on record and are not based on any tangible material and, therefore, such reassessment proceedings are vitiated. We find the Hon'ble Bombay High Court in the case of NYK Line (India) Ltd. (supra) has held that where the assessee has disclosed all material facts relating to container detention charges at the time of making assessment, mere fact that Assessing Officer had come to a different conclusion in respect of said income in subsequent assessment year would not justify reopening of assessment. It has been held in the said decision that an order of assessment which has been passed for a subsequent assessment year may not be the foundation to reopen an assessment for an earlier assessment year. However, there must be some new facts which come to light in the course of assessment for subsequent assessment year which emerge in the order of assessment. Otherwise, a mere change of opinion on the part of the Assessing Officer in the assessment for a subsequent assessment year would not by itself legitimize the reopening of an assessment for an earlier year. [Para 19]

In the instant case, we find the Assessing Officer has not brought on record any tangible material or information to establish a case of escapement of income. The whole basis of the reopening in the instant case is based on addition made in assessment year 2013-14 which, in our opinion, cannot be termed as tangible material for the purpose of the provisions of section 147 of the IT Act, especially when the Assessing Officer in the assessment year 2012-13 has accepted this very issue after due examination and no addition has been made. In our opinion, for the purpose of section 148, the requirement of tangible material is mandatory irrespective of mode of original assessment as held by the Hon'ble Delhi High Court in the case of Tupperware India P. Ltd. (supra). Further, as held by the Hon'ble Supreme Court in the case of Mahendra Mills Ltd. (supra), the term 'record' includes the entire record of subsequent and preceding years. Since the issue of refundable security deposit was examined in assessment year 2012-13 and the opinion so formed will be equally relevant for assessment year 2009-10 to 2011-12 as well and as such the reassessment proceedings based on a different view adopted in assessment year 2013-14, in our opinion, would be based on change of opinion and reappraisal of facts already on record. Therefore, we agree with the contention of the ld. counsel for the assessee that the reassessment proceedings so initiated are void on the ground that the reasons are not based on any tangible material for recording of such reasons. The various decisions relied on by the ld. DR are distinguishable and not applicable to the facts of the present case. In view of the above discussion, we hold that the reassessment proceedings initiated by the Assessing Officer are not in accordance with the law. [Para 22]

28. DCIT v. Jubilant Organosys Ltd. (ITA No. 6732/D/13)(25.06.19)(ITAT, Delhi)

SECTION 147 – REOPENING OF ASSESSMENT – CHANGE OF OPINION - THE ASSESSING OFFICER RECORDED THE REASONS ON THE BASIS OF RETURN OF INCOME AND ASSESSMENT RECORD ALREADY AVAILABLE ON RECORD IN ABSENCE OF ANY TANGIBLE MATERIAL – THE REOPENING OF ASSESSMENT IS NOT SUSTAINABLE

Held, We have carefully considered the rival contentions and also perused the reasons recorded by the ld AO which are placed at page No. 79 to 82 of the paper book. The ld AO has stated that „on going through the return of income and assessment order" he found that the assessee has claimed excess deduction. Thereafter, he listed those issues on which he proposed the reopening

the assessment proceedings. Hon'ble Supreme Court in case of CIT Vs. Kelvinator of India 320 ITR 561 (SC) that to reopen concluded assessment proceedings there must be a tangible material coming into the possession of the ld AO to reopen the case. In the present case, the ld AO did not have any tangible material but has merely looked at the return of income as well as assessment records and from that he reopened the assessment. During the course of assessment proceedings the ld AO has applied mind to issues on which reopening has been made. The order of the ld CIT(A) has held that impugned case is a fit case wherein, reopening has been made on the basis of mere change of opinion. In view of this, we do not find any infirmity in the order of the ld CIT(A) in quashing the reassessment proceedings. The ld DR also could not show us any reason to deny that reopening has been done in absence of any tangible material and there was of change of opinion. From reasons recorded it is evident that AO has reopened assessment on appraisal of same material which was before him during original assessment proceedings. Hence, we dismiss all the grounds of appeal challenging reopening of assessment. [Para 8]

29. Radhu Developers P. Ltd. v. ITO (ITA No. 2866/D/19)(30.05.19)(ITAT, Del)

SECTION 147 – NOTICE ISSUED IN THE NAME OF NON-EXISTENT COMPANY – THE NOTICE AND REASONS WERE ISSUED IN THE NAME OF AMALGAMATED COMPANY WHICH IS NOT IN EXISTENCE – THE ENTIRE REASSESSMENT PROCEEDINGS ARE HELD TO BE INVALID

Held, Since, the Assessing Officer has recorded the reasons in the name of assessee which was not inexistence and the fact of not being inexistence was in the knowledge of department, the notice issued and reasons recorded are *void ab initio* and therefore, any assessment order passed in consequence thereof is also *null and void.* The case law of Hon'ble Supreme Court in the case of Skylight Hospitality LLP does not apply to the facts and circumstances of the case as in that case in the reason to believe itself the Assessing Officer had mentioned the fact that company had merged with another company. The Hon'ble Supreme Court in para 6 has noted the reasons recorded. I further find that the judgment of Hon'ble Supreme Court has been distinguished by Hon'ble Delhi Bench in the case of Sindhu Trade Links Ltd. vide order dated 25.05.2018. The Hon'ble Tribunal vide para 9 has dismissed the appeal of Revenue under similar facts and circumstances. [Para 10]

In view of these facts and circumstances, I hold that assessment order passed by Assessing Officer is *null and void* as the reasons has been recorded on a non-existent assessee and that too when the fact of amalgamation was in the knowledge of department. [Para 11]

30. Shri Mohd. Yameen Munna vs. ITO (ITA No. 7134/D/2018) (Dated: 02.05.2019)

SECTION 148 - THE ENTIRE AMOUNT OF SALE CONSIDERATION COULD NOT BE SAID TO BE CAPITAL GAINS, THEREFORE, THERE WAS NO REASON TO BELIEVE - THE A.O. HAS MENTIONED IN THE REASONS THAT ASSESSEE SOLD THE PROPERTY AND HIS SHARE COMES TO RS.43,04,000/- - THEREFORE, RECORDED REASONS TO BELIEVE THAT CAPITAL GAINS ON SALE

CONSIDERATION OF RS.43,04,000/- CHARGEABLE TO TAX IS VAGUE AND WITHOUT APPLICATION OF MIND.

4.1. It is well settled Law that validity of reopening of the assessment shall have to be judged with reference to the reasons recorded for reopening of the assessment. In the present case, the A.O. has mentioned in the reasons that assessee sold the property and his share comes to Rs.43,04,000/-. Since, no compliance was made by the assessee, the A.O, therefore, presumed that there is an escapement of income on account of long term capital gains. The A.O, therefore, recorded reasons to believe that capital gains on sale consideration of Rs.43,04,000/- chargeable to tax has escaped assessment. The A.O. did not verify the information and even did not compute as to how much capital gain have been escaped assessment in the facts of the case. The reasons are thus, vague and did not show any application of mind on the part of the A.O. The A.O. in the case of the co-owner of the same property ShriIqbal has accepted the long term capital gains in a sum of Rs.1,47,975/- on the same set of facts. It would show that A.O. did not verify the information as to how much capital gains has escaped assessment. The A.O, therefore, acted only on the basis of suspicion and it could not be said that it was based on belief that income chargeable to tax had escaped assessment. The A.O. had to act on the basis of the reasons to believe and not on reasons to suspect. The issue is, therefore, covered in favour of the assessee by the Order of ITAT, Agra Bench in the case of Rameshwar, Jhansi vs. ITO 6(2), Jhansi (supra). Following the same decision, I set aside the Orders of the authorities below and quash the reopening of the assessment. Resultantly, all additions stand deleted. Appeal of Assessee is allowed.

31. M/s Sawhney Builders v. DCIT, (ITA No.2330/D/15) (Dated 03/06/2019)

SECTION132/153A – ASSESSMENT IN CASE OF SEARCH - LOOSE SHEETS OF PAPER WITHOUT ANY CORROBORATIVE EVIDENCES DONOT HAVE ANY EVIDENTIARY VALUE – PROFITS DISCLOSED IN THE PROFIT AND LOSS ACCOUINT WERE EXPLAINED TO BE IN THE VICINITY OF COMPARABLE COMPANIES – ALLOCATION OF BOGUS EXPENSES ON THE BASIS OF LOOSE SHEETS OF PAPER WAS NOT VALID – ADDITION ON THE BASIS OF LOOSE SHEET OF PAPER DELETED.

Held,We do not find any merit in the observations of the Assessing Officer that the difference has been adjusted against the wages of different months to arrive at the amount of Rs. 6.13 crores debited in the profit and loss account. We, therefore, do not find any force in the observations of the CIT(A) that the trade norms alone cannot be the basis of ignoring hard evidence in a particular case. There is no dispute that even section 44AD of the Act itself accepts 8% as net profit in respect of civil contractors. As mentioned elsewhere, the assessee's profit is in the vicinity of 11%. This fact cannot be brushed aside lightly. Assuming that there were discrepancies in the books of account of the assessee which prompted the partners to surrender Rs. 1.50 crores, but then, even this will take care of thealleged discrepancies in the books of account of the assessee. In our considered opinion, making an addition only on the basis of entries found in the loose sheets cannot be sustained. Considering the facts of the case in totality, we are of the considered opinion that an addition of Rs. 20 lakhs on this account should meet the

ends of justice. We, accordingly, direct the Assessing Officer to restrict the addition to Rs. 20 lakhs.**[Para17]**

32. Champ Info Software vs. PCIT (ITA No. 2799/D/2018) (Dated: 21.06.2019)

S. 263 - IN THE INSTANT CASE, THE LD. PCIT HAS ESSENTIALLY EXERCISED REVISIONARY POWER U/S 263 OF THE ACT TO EXAMINE THE SOURCE OF SOURCE OF PARTNER WHICH IS NOT PERMISSIBLE IN THE EYES OF LAW.

5.6 Moreover, acceptance of capital introduction from the partner on the evidence placed on record by the Assessing Officer is a possible view and, not an unsustainable view and, therefore, even otherwise invocation of section 263 is not in accordance with law. In CIT vs. DLF Ltd. reported in 350 ITR 555 the Hon'ble Delhi High Court applying the mandate of the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. vs. CIT reported in 243ITR 83 and CIT vs. Max India Ltd. reported in 295 ITR 282 has held that it is not mere prejudicial to revenue or a mere erroneous view which can be revised but there must be an element of unsustainability which clothes the Commissioner with the jurisdiction u/s 263 of the Act. Also in the case of ITO vs. D.G. Housing Project Ltd reported in 343 ITR 329 it was held by the Hon'ble Delhi High Court that in case of inadequate enquiry it is incumbent for the Commissioner to conduct enquiry and notmerely remit the matter to the Assessing Officer without conducting any verification/enquiry. In the case of PCIT vs. Delhi Airport Metro Express (P) Ltd. reported in 398 ITR 8 (Del)

33. Smt. Preeti Lamba Vs. DCIT (ITA No.4444/Del/2016) (Dated: 29/05/2019).

SECTION 271AAA - PENALTY U/S. 271AAA CANNOT BE LEVIED SINCE THE ASSESSEE HAS PAID THE TAXES DUE ON THE SURRENDERED INCOME MUCH PRIOR TO THE FILING OF THE RETURN OF THE INCOME.

11. So far as the observation of the CIT(A) that assessee has not paid the taxes in respect of undisclosed income in due time is concerned, we find from the copy of Form No. 26 AS that the assessee has deposited the tax due there on amounting to Rs.7,72,500/- on 04.01.2010. The Ld. DR also fairly conceded that the amount has been paid on 04.01.2010 which is much prior to the filing of the return of income as per the entry in Form No.26AS. We, therefore, find merit in the submission of the Ld. Counsel for the assessee that penalty u/s. 271 AAA cannot be levied in the instant case since the assessee has paid the taxes due on the surrendered income much prior to the filing of the return of the income. We, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty so levied u/s 271 AAA of the IT Act, 1961.

34. ACIT vs. International Cars and Motors Ltd. (ITA No.5149-5150/D/2016) (Dated: 30.04.2019)

S.271(1)(c) - IN ABSENCE OF ANY PRIMA FACIE SATISFACTION RECORDED BY THE ASSESSING OFFICER FOR INITIATION OF THE PENALTY IN THE ASSESSMENT ORDER, THE PENALTY LEVIED BY THE ASSESSING OFFICER IS WITHOUT JURISDICTION AND VOID-AB-INITIO – RELIANCE PLACED ON SHAMBOO DYAL VS ACIT ITA no. 3391/Del/2013 (Del- Trib.), MADHUSHREE GUPTA VS. UNION OF INDIA (2009), 317 ITR 107 (Del.) - (Para 7)

S. 271(1)(C) - MERELY REJECTION OF THE CLAIM MAY NOT INVITE THE ASSESSEE TO PENALTY UNDER SECTION 271(1)(C) OF THE ACT.

15. The Ld. CIT(A) has noted that out of the seven additions, five additions are related to the claim of depreciation or additional appreciation. The remaining two claims relate to disallowance of interest on capital work in progress and disallowance of research and development expenses. The Ld. CIT(A) pointed out that regarding the depreciation the assessee has fully disclosed all the particulars of claim not only in the statement of income but in the audited balance sheet and 3CD reports also. In respect of the capital work-in-progress and research and development expenses also all details have been filed by the assessee in notes to account annexed to balance sheet. We concur with the observation of the Ld. CIT(A) that merely rejection of the claim may not invite the assessee to penalty under section 271(1)(c) of the Act. The Ld. DR could not controvert the observation of the Ld. CIT(A). In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any infirmity in the same and accordingly, we uphold the same. Accordingly, the ground of the appeal is dismissed.

35. Puran Associates Pvt. Ltd. vs. ACIT (ITA No. 2789/D/2016) (Dated: 30.04.2019)

S. 271(1)(c) - MERELY BECAUSE A CLAIM MADE BY THE ASSESSEE IS NOT ACCEPTED BY THE ASSESSING OFFICER WILL NOT AMOUNT TO FURNISHING THE INACCURATE PARTICULARS OF INCOME BY THE ASSESSEE SO AS TO MAKE HIM LIABLE FOR PENALTY U/s 271(1)(C).

9….. The Hon'ble Apex Court in the case of Reliance Petroproduct Pvt. Ltd., has examined the term "inaccurate particulars of income" and stated "whether no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars". In this case, admittedly no information given in the return of income is found to be incorrect or inaccurate. It is a case where the claim of the assessee that the sum of Rs. 14.40 Crore retained in the escrow account should be excluded from sale consideration for the year under consideration and should be taxed in the years in which it is received, was not accepted by the Assessing Officer. The Hon'ble Apex Court has clearly stated in the above mentioned case "a mere making of a claim which is not sustainable in law by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee." In the case under appeal before us, the assessee made a claim which is not accepted by the Assessing Officer however, merely because a claim made by the assessee is not accepted by the Assessing Officer will not amount to furnishing the inaccurate particulars of income by the assessee so as to make him liable for

penalty under section 271(1)(c) . Therefore on the facts of the assessee's case, the decision of reliance Petroproduct Ltd., is squarely applicable. We may also mention that the stand of the assessee is bonafide as well as consistent because in the return of income for subsequent years i.e. Assessment Years 2010-11 and 2011-12 when the installment of amount retained in escrow account is received, the assessee has voluntarily offered such receipt for the purpose of capital gain tax.

36. Sh. B.R.Sharma Vs. ITO(Dated: 29/05/2019)(ITA Nos. 5474/ 5475, 5476/Del/2012).

271(1)(c) – PENALTY HAS BEEN INITIATED ON THE CHARGE OF FURNISHING INACCURATE PARTICULARS - BUT LEVIED PENALTY ON COUNT OF CONCEALMENT OF INCOME - THIS ITSELF CALLS FOR QUASHING OF PENALTY ORDER PASSED BY LD.A.O

7. In the present case, penalty has been initiated on the charge of furnishing inaccurate particulars, but Ld.AO levied penalty on concealment of income. It is observed that assessee was asked to explain penalty on one count whereas levy has been on other count. This itself calls for quashing of penalty order passed by Ld.A.O. for all years under consideration. We, therefore, quash and set aside the penalty order so passed for all years under consideration. Accordingly we allow the claim of assessee on the ground of legality and validity of Penalty order for all the years under consideration.

37. Gragerious Project Pvt. Ltd. vs. ACIT (ITA No. 112/D/2019) (Dated: 29.05.2019)

S. 271(1)(c) - THAT THERE IS NO FINDING BY THE ASSESSING OFFICER OF FURNISHING OF ANY INACCURATE PARTICULARS OR CONCEALMENT OF INCOME BY THE ASSESSEE – NO RECORDING OF SATISFACTION FOR INITIATION OF PENALTY PROCEEDINGS EITHER IN THE ASSESSMENT ORDER - IN THE NOTICE ALSO THERE IS NO SPECIFIC CHARGE - LEVY OF PENALTY UNDER SECTION 271(1)(c) OF THE ACT NOT VALID - HON'BLE KARNATAKA HIGH COURT IN THE CASE OF MANJUNATHA COTTON AND GINNING FACTORY.

9. In the above paragraph, the Assessing Officer has not pointed out any furnishing of inaccurate particulars by the assessee. He simply arrived at the conclusion that the advance written off cannot be allowed as expense in the profit & loss account. Thus, in the whole body of the order, no satisfaction has been recorded for initiating penalty proceedings. Only at the end of the computation of income, the Assessing Officer has recorded "Keeping in view the facts of the case, I am satisfied that it warrants the initiation of penalty proceedings u/s 271(1)(c) of the I.T. Act". Thus, no specific charge is specified either in the assessment order or in the penalty notices. On these facts, the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) would be squarely applicable. The above decision has been followed by ITAT, Delhi Benches in the case of Dr. SitaBhagi (supra), TA Steels Pvt.Ltd. (supra), Sanraj Engineering Pvt.Ltd. (supra), OSE Infrastructure Ltd. (supra) and Mindmill Software Limited (supra).

10. In view of the above, respectfully following the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory and Others (supra) and the above decisions of ITAT, we hold that the levy of penalty under Section 271(1)(c) of the Act in the case of the assessee was not valid.

38. The Mantola Cooperative Thrift & Credit Society vs. ITO (ITA No. 2830/D/2015) (Dated: 12.06.2019)

S. 271(1)(C) - WHETHER PENALTY LEVIED U/S 271(1)(C) OF THE ACT IS NOT SUSTAINABLE WHEN ISSUE IS STILL DEBATABLE BY VIRTUE OF SPECIAL LEAVE PETITION PENDING DISPOSAL IN THE HON'BLE SUPREME COURT IN WHICH LEAVE HAS BEEN GRANTED AS CONTENDED BY THE ASSESSE – HELD NO