ITAT BAR CASE REPORTER - OCTOBER 2019

1. DCIT(Inl Tax) v. Qliktech International AB (ITA No. 391/D/17)(17/10/2019) (ITAT, Delhi)

SECTION 9(1)(VI) – ROYALTY FOR USE OF COPYRIGHT MATERIAL – SALE OF SOFTWARE – CONSIDERATION RECEIVED ON SALE OF SOFTWARE CANNOT BE TERMED AS ROYALTY IN ABSENCE OF TRANSFER OF ANY RIGHT WITH REGARD TO EXPLOITATION OF COPYRIGHT – THE CONSIDERATION IS ONLY LIMITED TO RIGHT TO USE THE COPYRIGHTED MATERIAL AND NOT THE COPYRIGHT – AMENDMENT IN SECTION 9 VIDE FA 2012 CANNOT BE APPLIED UNILATERALLY – CHANGE IN DOMESTIC LAW WILL NOT ALTER THE INTERPRETATION AS PER DTAA – ADDITION DELETED.

Held, Since, the matter stands settled by the order of the Hon'ble High Court, we hereby uphold the ld. CIT (A) observation that the right to use granted through licensing of a software does riot fall within the meaning of "Royalty" as provided for in the domestic law or the DTAA. Any consideration for the same is not taxable as Royally under section 9(1)(vi) or the relevant DTAA. Thus what has been transferred by the appellant is neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in a copyright. The right that is transferred is not a right to use the copyright but is only limited, to the right to use the copyrighted material and the same does not give rise to any royalty income. [Para 9]

10. Regarding the applicability of amendment in Section 9(1)(vi) brought out by Finance Act, 2012, we find that this issue of applicability has been examined in the case of DIT Vs New Skies Satellite BV by the Hon'ble Delhi High Court in ITA 473/2012. The Hon'ble Court observed that the only manner in which change in position of the provisions of the treaty can be relevant only if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. The Hon'ble High Court's observation is relevant to the instant case with regard to the amendment to the Act even though the judgment was given in the case of determination of royalty of payment of transponder fee, it adequately dealt with the issue of Section 9(1)(vi).

2. Janarth v. ITO (ITA No.5963/D/18) (Dated 22/10/2019)

SECTION 11 - WRITE BACK OF PROVISION OF EXPENSES CREATED IN THE EARLIER YEAR AND TDS ON BANK INTEREST, DOES NOT REPRESENT REAL INCOME – CANNOT BE CONSIDERED AS INCOME FOR THE PURPOSE OF

APPLICATION OR ACCUMULATION THEREOF AND CLAIMING EXEMPTION THEREON UNDER SECTION 11 OF THE ACT.

Held, only issue involved in this appeal that assessee hasearned income to the credit of the profit and loss account of Rs. 3136713/-as writing back of excess provision of expenses of earlier year. Such incomewas not at all received by the assessee during the year. According to section11 the specified income of the trust are chargeable to tax which includedincome derived from property held under a trust. The writing back of theexpenses provision could not have been applied for the charitable purposesas the assessee did not receive such income. Infact, the assessee hasclaimed excess application of income in the earlier years. Further,accumulation can only be of real income, as it has only been received by theassessee as held in 159 ITR 280. Further, with respect to the bank interestand tax deduction at source thereon are not received during the year, butremain invested in the specified securities such as bank FDR. Thus, it isapparent that correct income of the assessee has not been computed by theld AO in accordance with the provision of section 11 to 13 of the Act.Further, the provision of explanation 11(2) specifically provide that if thereis any income which is not received during that year then the assessee mayexercise an option that application cannot be made in the year in which theincome is received. Therefore, it is apparent that lower authorities have notcorrectly computed the total income of the assessee. Thus, we set aside thewhole issue back to the file of the ld AO with a direction to assessee tosubstantiate the computation of total income before him. He may assessincome of the assessee on the correct income in accordance with the law… Accordingly, the appeal of the assessee is allowed with above direction. **[Para 8, 9]**

3. DCIT(E) v. Janmalal Bajaj Foundation (ITA No. 3912/D/16)(04/10/2019)(ITAT, Del)

SECTION 11- THE CLAIM OF ACCUMULATION OF FUNDS CANNOT BE DENIED MERELY BECAUSE THERE WAS DELAY IN FILING OF RETURN INCOME PARTICULARLY WHEN THE DELAY IS SUFFICIENTLY EXPLAINED – THE PROVISIONS OF SECTION 139(1) AND 139(4) HAVE TO BE READ CONJOINTLY AND IF THE RETURN IS FILED WITHIN THE EXTENDED TIME, THE BENEFIT OF ACCUMULATION WOULD BE AVAILABLE.

Held, So, following the decision rendered by the coordinate Bench of the Tribunal, we are of the considered view that the AO has merely made disallowance on account of accumulation u/s 11 (1) Explanation (2) on the ground that the assessee has failed to file return of income and intimation/application for accumulation, but when it is undisputed fact that the delay of 17 days in filing the return of income for the year under assessment was neither intentional nor deliberate and in these circumstances, provisions u/s 139(1) and (4) are to be read conjointly, meaning thereby, the return filed within specified period under section 139(4) is to be treated having been filed within prescribed period u/s 139(1) and (2) of the Act. The aforesaid order passed by the Tribunal has been upheld by Hon'ble Delhi High Court in ITA 492/2018 dated 25.04.2018. In view of the matter, we are of the considered view that the ld. CIT (A) has rightly and validly deleted the additions made by the AO on account of disallowance u/s 11(1) Explanation (2) of the Act. [Para 7]

4. K.P. Singh Charitable Foundation v. CIT(E) (ITA No. 3223-24/D/19)(07.10.2019)(ITAT, Del)

SECTION 12AA – REGISTRATION - AT THE TIME OF REGISTRATION, THE CIT(E) IS ONLY REQUIRED TO EXAMINE THE OBJECTS OF THE TRUST – A TRUST CANNOT BE EXPECTED TO START OPERATION SOON AFTER ITS FORMATION – CIT(E) DIRECTED TO GRANT REGISTRATION

Held, In view of what has been discussed above, we are of the considered view that the assessee trust having been constituted to carry out the charitable activities is entitled for registration u/s 12AA of the Act and consequent approval u/s 80G, but the ld. CIT (E) has erred in declining the registration u/s 12AA of the Act and approval u/s 80G of the Act on the basis of conjectures and surmises that the assessee has not supplied the details of charitable activities carried out by losing sight of the fact that within short span of one year, the details of charitable activities cannot be started and as such, the question of supplying the details thereof does not arise, which is not sustainable in the eyes of law. Consequently, appeals filed by the assessee are allowed directing the ld. CIT (E) to provide registration u/s 12AA and also to grant consequent approval u/s 80G of the Act. [Para 10]

5. Vishnu Apartments P. Ltd. v. ACIT (ITA No. 1087 & 5309/D/13)(10.10.2019)(ITAT, Del)

SECTION 37 – DISALLOWANCE OF COST OF CONSTRUCTION ON THE BASIS OF REPORT OF DVO – IT IS NECESSARY TO REJECT BOOKS OF ACCOUNT BEFORE REFERRING THE MATTER TO DVO – THE ASSESSEE IS MAINTAINING PROPER BOOKS OF ACCOUNT AND CLAIM OF EXPENSES WAS SUPPORTED FROM RELEVANT BILLS AND VOUCHERS – THERE WAS NO REASON FOR THE AO TO REFER THE MATTER TO DVO WITHOUT DISPUTING THE CORRECTNESS OF BOOKS OF ACCOUNT – ALSO, NO ADDITION IS WARRANTED WHERE THE DIFFERENCE BETWEEN VALUATION OF THE ASSESSEE AND THAT OF DVO IN INSIGNIFICANT (IN THIS CASE LESS THAN 3%) - DISALLOWANCE DELETED.

Held, Now, coming to the grievance of the assessee, it is an admitted fact that the books of account of the assessee have not been rejected before referring the matter to the DVO for determination of the cost of construction. The **Hon'ble Supreme Court** in the case of **Sargam Cinema (supra)**, has held that an assessing authority cannot refer any matter to the DVO without rejecting the books of account. [Para 12.1]

Since, in the instant case, it is an admitted fact that the books of account of the assessee are not rejected and the assessee has maintained all bills and vouchers which are not found to be false or untrue, therefore, without rejecting the books ofaccount of the assessee, the Assessing Officer could not have referred the matter to the DVO for determination of the cost of construction and thereby making addition on the basis of such difference. [Para 13]

Even otherwise also, it is an admitted fact that the difference between the cost of construction declared by the assessee at Rs.85.22 crores as against the value determined by the DVO of Rs.82.68 crores is only 2.54 crores which is less than 3% of the total cost of construction

declared by the assessee. Thus, the difference being less than 3% is very insignificant. We find the Hon'ble Delhi High Court in the case of **CIT vs. Ambience Developers and Infrastructure (P) Ltd.**, (supra) has held that for insignificant difference between cost of construction as per books of account and that estimated by the DVO, addition on the basis of DVO's report is not justified. [Para 14]

Since, in the instant case, the assessee has maintained the books of account supported by bills and vouchers for the construction of the mall and hotel, which was not rejected by the Assessing Officer before sending the matter to the DVO for determination of the cost of construction and since the difference in the value declared by the assessee and the value determined by the DVO is also very insignificant being less than 3% of the total cost of construction declared by the assessee, therefore, in view of our discussion in the preceding paragraphs, we are of the considered opinion that the CIT(A) was not justified in sustaining the addition of Rs.90,50,894/-. Accordingly, the order of the CIT(A) is set aside and the grounds raised by the assessee are allowed. [Para 15]

6. DCIT vs. Miele India Pvt. Ltd. (ITA No. 7556/D/2017) (Dated: 01.10.2019)

SECTION 37 WHETHER THE AO WAS CORRECT IN DISALLOWING EXPENDITURE CLAIMED UNDER SECTION 37(1) OF THE ACT FOR ADVERTISEMENT OR SALE PROMOTION OF RS.2,06,37,597/- SINCE INCURRED FOR THE FUTURE BENEFITS AND ENDURING IN NATURE AND OF CAPITAL NATURE – HELD NO

3. Learned Counsel for the Assessee, at the outset submitted that the issue is covered by the Order of ITAT, Delhi Bench in the case of same assessee for the A.Y. 2010- 2011 in ITA.No.724/Del./2016 in which vide Order Dated 11.04.2019, the Departmental Appeal for identical grounds have been dismissed. The findings of the Tribunal in paras 15 and 16 are reproduced as under:

"15. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below qua the issue. It would be pertinent to mention here that during the course of assessment proceedings, the case was referred to the TPO and the TPO framed order u/s 92CA(3) of the Act on 09.01.2014 and no adverse inference was drawn in respect of I.T. notification by the assessee during the year under consideration. This shows that the TPO was satisfied with the AMP expenses incurred by the assessee and did not make any adverse comment in so far as the issue of brand building is concerned.

16. In our considered opinion, public memory is very short and, therefore, the companies have to incur advertisement expenditure year after year to keep products fresh in the minds of the public. In our considered opinion, such expenditure cannot partake the character of giving any enduring benefit. In our considered opinion, the Assessing Officer has grossly erred in treating such expenditure as intangible asset and on facts of the case, the findings of the Id. CIT(A) needs no interference. Ground No. 2 stands dismissed."

7. C-1 India P. Ltd. v. ACIT (ITA No. 615 to 618/Del/2013)(22/10/2019)(ITAT, Del)

SECTION 37(1) – LOSS ON FOREIGN EXCHANGE FLUCTUATION ON OUTSTANDING LOAN – AS PER AS-11, LOSS ARISING ON RE-STATEMENT OF LOAN IS REQUIRED TO BE ADJUSTED IN THE PROFIT & LOSS A/C – ALSO, SUCH LOSS IS ALLOWABLE AS PER DECISION OF APEX COURT IN THE CASE OF WOODWARD GOVERNOR.

Held, We have heard the rival contentions and perused the record. The assessee had raised loan in Assessment Year 2003-04, which during the assessment proceedings was held to be non-genuine. However, the Tribunal vide order dated 01.07.2019 has accepted the case of the assessee and held that the loan was raised by the assessee from its holding company in order to meet its working capital requirement. The interest paid on such loan has been allowed by us as revenue expenditure in the paras above for Assessment Years 2007-08 & 2008-09. During the year under consideration, the issue which arises is in respect of the diminution in value of foreign exchange loan. The loss on re-statement of the foreign exchange loan was claimed as deductible in the hands of the assessee. As per the Standard AS-11 of Accounting principles, such restatement of foreign exchange loan is the requirement of accounting principles. On such re-statement, the loss or gain arising there from is to be allowed as a deduction or added as income in the hands of the assessee, as the case may be. The assessee has filed tabulated chart in this regard wherein in Assessment Year 2005-06 loss arises in the hands of the assessee of Rs.17,20,000/-, which has been allowed as a deduction. Further, the gain arising in all the other years has been added in the hands of the assessee. Following the similar principle of accounting, the assessee in the year under consideration had debited expenditure of Rs.2.22 crore, which merits to be allowed as revenue expenditure. Accordingly, we hold so. We also find that the said issue stands covered by the ratio laid down by the decision of Hon'ble Supreme Court in the case of CIT vs Woodward Governor India Pvt.Ltd. (supra). [Para 24]

8. Federal Mogul v. JCIT (ITA No.509/D/17) (Dated 16/10/2019)

SECTION 37(1) – ALLOWABILITY OF WRITE-OFF OF SERVICE TAX PAID IN THE EARLIER YEAR – ASSESSEE HAS AN OPTION TO WRITE OFF THE CLAIM OF SERVICE TAX WHEN IT DECIDES THAT THE BENEFIT OF SUCH SERVICE TAX MAY NOT BE AVAILABLE AS CENVAT CREDIT.

Held, we have heard the rival contentions and perused the record. Thelimited issue arising in the present appeal is against the claim ofdeduction on account of the service tax paid in the earlier years, butdebited during the year. The case of the assessee before us is that theassessee was engaged in the manufacturing of auto parts and on theinputs i.e. raw material service tax was paid by it which in turn could beset off against the service tax receivables. The assessee had not debitedthe said service tax paid in the relevant year, as the assessee thought ofadjustment against the service tax receivable. But, in the year underconsideration the assessee debited the said amount of service tax paid asit was of the view that the same could not be set off against service taxreceivable and hence, the claim of deduction. The said claim of theassessee was not allowed by the authorities below on the ground that itwas pre-mature for the assessee to avail the benefit of Cenvat credit. Asunder the Act, the said benefit on inputs and inputs services could beavailed

later also. The counter claim of the assessee is that since itrealized that the said input could not be set off hence, the claim made inthe books of accounts, merits to be allowed in the hands of the assessee.We are of the view that the assessee is at liberty to make the aforesaidclaim in the year of its choice and the claim made in the year underconsideration, merits to be allowed in the hands of the assessee. We findthat the said issue has been decided by the various benches of Tribunalincluding the decision of Hyderabad Bench of the Tribunal in the case ofM/s. NCS Distilleries P.Ltd. vs ITO (supra). We hold that the write off ofCenvat credit is an allowable expenditure u/s 37(1) of the Act, in the yearit was debited to the books of accounts. Hence, the grounds raised by theassessee in this appeal are allowed.**[Para7]**

9. Eli Lily and Co. Limited vs DCIT (I.T.A. No.7487/Del/2018)(AY 2014-15)(14.10.2019)

SECTION 37 – CAPITAL OR REVENUE – AO HELD THAT EXPENDITURE INCURRED BY WAY OF LICENCE FEE IS CAPITAL IN NATURE IN AS MUCH AS SUCH PAYMENT WAS MADE FOR LIMITED LICENSE TO USE THE TECHNICAL INFORMATION AND REGULATORY APPROVALS- HELD, MERELY BECAUSE THE BENEFIT WAS AVAILABLE TO THE ASSESSEE FOR A NUMBER OF YEARS IS OF NO CONSEQUENCE TO SAY THAT THE EXPENDITURE IS CAPITAL IN NATURE

It is not in dispute that the assessee demonstrated before the Ld. DRP that the products being manufactured by OTL in respect of which the license was obtained for commercialization, was discontinued w.e.f. 09/01/2015 and the contract was terminated. Though, it is submitted by the Ld. DR that inasmuch as the termination letter speaks that it has to come into force w.e.f. 9/10/2015, it has no relevance to the year under consideration, what is relevant to be seen here is whether the assessee held the rights under the agreements in perpetuity or at least further agreed period of 15 years in continuity or such an agreement had met with a premature termination and such a fact strengthens the argument of the assessee that no endurable benefit had accrue to the assessee under such an agreement. (para 21)

On a careful consideration of the material before us, we are of the considered opinion that the technical information and the marketing approvals of a product provided by the licensor only facilitates greater acceptable of the products of the assessee leading to higher profitability in the existing business of distribution and marketing of products carried on by it, without addition to the profit earning apparatus and on this premise we return a finding that the length of advantage in terms of time derived by the assessee has no bearing on the question to decide the nature of expenditure incurred by the assessee by way of licence fee. In a number of decisions cited before us by the Ld. AR, namely, CIT vs. Madras Auto Service (P) Ltd 233 ITR 468 (SC), CIT vs. HMT Ltd., 203 ITR 818 etc this issue was dealt with extensively and it was held that in the absenceof any enduring benefit of capital nature accrue to the assessee as a result of incurring the impugned expenditure, merely because the benefit was available to the assessee for a number of years is of no consequence to say that the expenditure is capital in nature. (para 22)

For the reasons stated in the preceding paragraphs, we are of the considered opinion that no benefit of enduring nature had accrued to the assessee under the agreement dated 30/06/2012 entered into by the assessee with OLL and OTL and the licence fee paid by the assessee under such an agreement is in the nature of Revenue expenditure, which is allowable. With this view of the matter, we allow the appeal of the assessee.(Para 23)

10. S.G. Enterprises Pvt. Ltd. vs. ACIT (ITA No. 275/D/2012) (Dated: 01.10.2019)

S. 40A(3) - WHEN IDENTITY OF THE PARTIES AND GENUINENESS OF THE TRANSACTION WAS DULY PROVED BEFORE LEARNED CIT (A) - THE PROVISIONS CONTAINED U/S 40A(3) ARE NOT ATTRACTED AND RELIED UPON THE CBDT CIRCULAR NO.6-P DATED 06.07.1968 AND CIRCULAR NO.1/2009 DATED 27.03.2009.

11. When we examine the issue in controversy in the light of the CBDT Circular No. 6-P dated 06.07.1968 and Circular No.1/2009 dated 27.03.2009, it is apparently clear that this provision has been incorporated to counter evasion of tax for claim of expenditure shown to have been incurred in cash with a view to frustrate proper investigation by the Department as to the identity of the payee and the reasonableness of the payment. In the instant case, when the identity of the parties who have made the payment have been proved and genuineness of the transaction is also not in dispute, mechanically invoking the provisions contained u/s 40A(3) is not permissible. Moreover, all the payments in question have been duly recorded in the books of account and there is no question of claiming for any expenditure. So, following the decision rendered by the Hon'ble Rajasthan High Court in Smt. HarshilaChordia (supra) and coordinate Bench of the Tribunal in Lord Krishna Dwellers (P) Ltd. (supra), we are of the considered view that ld. CIT (A) has erred in disallowing the purchases to the tune of Rs.19,30,605/- and Rs.16,27,004/- from M/s. Sumit Enterprises and M/s. Paras Enterprises respectively and as such, the disallowance made is not sustainable, hence ordered to be deleted.

11. MadhuGangwani vs. ACIT (ITA No. 2310/D/2019) (Dated: 01.10.2019)

Section 45 read 2(47)(v) - RESGITERED DOCUMENT SHALL OPERATE FROM THE DATE OF EXECUTION AND NOT REGISTRATION.

5…….Learned Counsel for the Assessee has filed copy of the Registered Agreement to Sell Dated 16.01.2009 in support of the aforesaid property whereby the assessee has agreed to sell the property to the purchaser ShriRajnishKarki, subject to part payment and part possession have been handed over to the purchaser. This agreement to sell is registered with the Sub Registrar. Thus, conditions of Section 2(47)(v) of the I.T. Act are satisfied in the sense that there is a transfer of immovable property on execution of the registered agreement to sell whereby part possession is of the property in question have been handed over to the purchaser, subject to part payment. The remaining conditions have been satisfied by handing over the entire possession of the property in question subject to remaining payment on execution of the sale deed dated 31.03.2009. Thus, the transfer of capital asset is completed in previous year relevant to preceding A.Y. 2009-2010. The Revenue has however been relying upon the fact that the sale deed dated

31.03.2009 since registered on 01.04.2009, therefore, the transaction of transfer of capital asset took place in A.Y. 2010-2011 in appeal. We do not agree with the view of the Revenue. Section 47 of the Registration Act, 1908 provides as under:

> "47. Time from which registered document operates.— A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

5.2. Considering the facts of the case in the light of above discussion, it is clear that agreement to sell was executed and registered on 16.01.2009 whereby the part possession of the property in question have been handed over to the purchaser subjected to part payment. Therefore, transfer of capital asset completes in preceding A.Y. 2009- 2010. This fact is further strengthened by the fact that registered sale deed was executed between the parties on 31.03.2009 whereby the entire terms and conditions are satisfied. The full sale consideration have been paid and possession of the property have been handed over to the purchaser. This fact is further strengthened by Section 47 of the Registration Act whereby it is provided that registered document shall operate from the date of its execution. In these circumstances, we hold that transfer of capital asset had taken place in preceding A.Y. 2009-2010. Therefore, capital gain tax would not be chargeable in assessment year under appeal i.e., 2010-2011.

12. Medhavi Professional Service Pvt. Ltd. vs. ACIT (ITA No. 6454/D/2019) (Dated: 30.09.2019).

Section 56(2)(viib) - CBDT vide circular order F. 173/354/2019–ITA-1 dated 9th August 2019 has settled the issue by categorically providing that notwithstanding the date of assessment order, the provisions of section 56(2)(viib) of the Act would not apply to any start up registered with DIPP which had submitted to the authorities the declaration in Form 2 that it fulfils the conditions mentioned in the Notification dated 19.2.2019 - Circular No. 22/2019 dated 30.08.2019, which is a consolidated Circular for assessment of start-ups, provides that where a case pertaining to addition u/s 56(2)(viib) of the Act in case of the 4 start-up is pending before the ITAT then the tax department shall not press the ground relating to addition u/s 56(2)(viib) - Addition made in respect of share premium u/s 56(2viib) of the Act does not survive.

13. Reeshu Goel v. ITO (ITA No. 1691/D/19)(07/10/2019)(ITAT, Delhi)

SECTION 147 – NON DISPOSAL OF OBJECTIONS – THE ASSESSING OFFICER WITHOUT FOLLOWING THE PROCESS OF LAW PASSED THE ASSESSMENT ORDER WITHOUT DISPOSING OFF THE OBJECTIONS TO NOTICE U/S 148 – AO CANNOT BE GIVEN SECOND INNINGS - THE ASSESSMENT IS LIABLE TO BE QUASHED.

SECTION 10(38) R.W.S 68 – PENNY STOCK – SCRIP NAME CCL INTERNATIONAL LTD. –THERE IS NO MATERIAL OR EVIDENCE IN THE ASSESSMENT ORDER TO SHOW THAT ASSESSEE OR ITS BROKERS WERE INDULGED IN

ACCOMMODATION ENTRY – NO ENQUIRY WAS MADE FROM THE BROKER – THERE WAS STEADY INCREASE IN THE PRICE OF THE SHARE AND IT IS NOT THE CASE THAT RISE IN PRICE WAS BEYOND THE CAP SPECIFIED BY SEBI – NO DEFECT HAS BEEN POINTED OUT IN THE DOCUMENTARY EVIDENCES FURNISHED BY ASSESSEE – THE COMPANY HAD REASONABLE FINANCIALS AND SAME CANNOT BE SAID TO BE PAPER ENTITY – GENERAL MODUS OPERANDI AS PER INVESTIGATION WING KOLKATA CANNOT BE APPLICABLE TO ALL THE SHARE HOLDERS – ADDITION DELETED.

Held, Though the Hon'ble Jurisdictional High Court in the writ jurisdiction has set aside the re-assessment order with a direction to the Assessing Officer to again take up the objection and dispose of the objections by passing a reasoned order and also give liberty to the petitioner/assessee to seek appropriate remedies with the objection which has been rejected by the Assessing Officer. Now here in this case, the Assessing Officer had passed the assessment order without adhering to the process of law and not only that, the ground raised before the Ld. CIT(A) on this point has been rejected on the erroneous presumption that such an objection has not been filed which fact is found to be not correct. Thus, here the stage of first appeal has also been crossed and assessee's objection remains indisposed off. If a law mandates the Assessing Officer to act in a specific manner especially in the case of jurisdictional issue relating to Section 147, then he has to adhere to the mandate of the law; and if there is any violation of such law, the consequence is fatal to the entire reassessment proceedings and results into quashing of the assessment itself. The assessee here in this case was denied remedy to challenge the action u/s 147/148, had the objections been disposed off adversely to the assessee. The Hon'ble Jurisdictional High Court in the case of PCIT vs. Tupperware India (supra) as noted above has clearly opined that such a failure to comply the law laid down by the Hon'ble Supreme Court should have resulted in quashing of the reassessment. Accordingly, if the above principle and the ratio laid down by the Hon'ble High Courts cited above and by the Hon'ble Jurisdictional High Court is to be followed, then we are of the opinion that on this ground alone the impugned reassessment order is liable to be quashed and at this stage we are not inclined to set aside this issue to Assessing Officer for deciding this matter when substantial time has lapsed and two stages have been crossed. [Para 7]

18. The entire premise of the Assessing Officer for treating the entire transaction to be a bogus Long Term Capital Gain and making addition u/s. 68 is that, firstly, M/s. CCL International Ltd. did not have much financial worth to justify such a price rise; secondly, the SEBI had suspended the trade of the share for a brief period; thirdly, he has pointed out the history of price rise between 06.02.2010 to 25.11.2014 and then has drawn adverse inference that price of these shares were manipulated and rigged in the stock exchange which was solely to provide accommodation entries to the various parties; and lastly, he has also referred to certain inquiry report of Investigation Wing Kolkata during the course of which certain brokers have admitted that they had provided accommodation entries in the scrip of M/s. CCL International. But nowhere in the entire assessment order, there is any reference to any material or evidence that assessee or assessee's broker have been found to be indulged in any kind of accommodation entry in this scrip. No inquiry whatsoever has been made from the broker of the assessee. Further, during the period in which assessee had purchased the shares and had sold them whether the SEBI had suspended the trading has not been mentioned, in fact, Assessing Officer himself

mentions that there was brief suspension in the year 2010, whereas the assessee has purchased shares in the year 2011 and sold them in the year 2012. Coming to the financials, as culled out from the records, the revenue from the operation of M/s. CCL International Ltd. from March, 2010 to March, 2012 was between Rs. 55.25 crore to Rs. 79 crore. Thus, it cannot be held that it was mere a paper entity. From a bare perusal of the history of listing and trading of shares and the quote of Bombay Stock Exchange as quoted in the assessment order, it clearly reflects that as on 06.02.2010, the closing price was Rs. 50 and there was a steady increase and within the period of 4 years the price had reached up to Rs.609 on 25.11.2014. Nowhere, it has been pointed out that the rise was beyond the cap laid down by the SEBI, because the price of the scrip cannot rise beyond the cap prescribed by the SEBI. If the shares have been purchased and sold from the stock exchange on a quoted price with proper contract number, trade time and after paying STT, then it is very difficult to assume that the sale proceeds received from sale of such shares is bogus, especially when purchase of shares are not in dispute. This inter alia means assessee was in possession of shares which were also dematerialised. To prove that such a transaction was in the nature of bogus or colourable transaction, there has to be some inquiry or material to nail the assessee that she was some kind of a beneficiary in some accommodation entry operation. No defect has been pointed out in the documents submitted by the assessee nor has the broker of the assessee been inquired upon. Simply relying upon the general modus operandi and statement of some brokers recorded by the Kolkata Investigation Wing does not mean that all the transactions undertaken of the scrip M/s. CCL International Ltd. through the country by millions of subscribers are bogus. Thus, in absence of any material or evidence against the assessee, we do not find any reason as to why the claim of Long Term Capital Gain from sale of such share should be denied. Consequently, the addition on account of commission is also deleted. Accordingly, we delete the addition made by the Assessing Officer.

14. M/S SAMBHAV BUILDCON (P) LTD. vs ACIT (ITA NO. 3519/DEL/2005)(AY 2001-02)(15.10.2019)

SECTION 68 - ASSESSE IS A BUILDER ENGAGED IN THE BUSINESS OF CONSTRUCTION – WHETHER CREDIT PURCHASES MADE IN CURRENT YEAR WHOSE PAYMENT WAS MADE IN NEXT ASSESSMENT YEAR CAN BE ADDED AS INCOME U/S 68 – HELD, AO HAD NOT DISALLOWED THE PURCHASES FROM THOSE CREDITORS AND TRADING RESULT WERE ALSO NOT DISTURBED – S. 69C SHOULD BE APPLICABLE IN PLACE OF S. 68 OF THE ACT- UNPAID PURCHASE PRICE COULD NOT BE ADDED TO THE INCOME OF THE ASSESSEE

We have heard both the parties and perused the records, especially the impugned order of the Ld. CIT(A) and the case laws cited before us. We find that assessee is a builder engaged in the business of construction and filed its return on 29-10-2001 declaring the income of Rs. 15,993/- after claiming brought forward losses in respect of A. Y. 1998-99 and 2000-0I amounting to Rs. 4,1901/- , Rs. 8,2901- Rs. 3,513/-. We further note that AO has completed the assessment u/s 144 of the Act vide order dated 19-03-2004. We further note that Assessee is required to explain about the current liabilities totaling to Rs. 21,26,190/- from the 03 companies for which the AO has issued notices to 03 parties mentioned in the facts of the case u/s. 133(6) of the Act and could not find response from those parties and in this manner the AO added the same

amount as unexplained cash credit under the provisions of Section 68 of the I.T. Act. We note that Ld. CIT(A) has also upheld the decision of the AO on the issue in dispute. For substantiating the claim of the assessee, we find considerable cogency in the contention of the Ld. Counsel for the assesee stated that the addition u/s. 68 of the Act could not be invoked to make the disallowance, because the said amount was paid to in the next assessment year and the same could not be paid during the year under consideration since the building was sold in the next assessment year. After receiving the payment of building sold, the payment was made and it was noted that the documentary proof is the books of the assessee which are audited and it shows that all these payments were made and the assessee also filed necessary evidence before the authorities below which was also accepted by the department in the next years for substantiating the claim of the assessee. We further note that the assessee has also filed the affidavit of Sh. Naresh Jain, Director of the assessee company. All these submissions of the assessee were forwarded to the AO for his comment. However, the AO adopted his earlier stand. Hence, the addition in dispute is not permissible u/s. 68 of the I.T. Act which should have been invoked u/s. 69C of the Act. We further note that the applicability of section 69C of the Act in place of section 68 of the Act applied by the AO, enabling the provision of section 292B permits the authority to do so in view of the decision of the Hon'ble Delhi High Court in the case of Yadu Hari Dalmia vs. CIT (1980) 126 ITR 48 (Delhi). The unpaid purchase price could not be added to the income of the assessee as per the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ritu Anurag Aggarwal (2010) 2 taxmann.com 134 (Delhi). We are of the view that when purchases were not doubted by the AO, the addition in dispute u/s. 68 of the Act is not tenable. As per the aforesaid decision, in the present case AO had not disallowed the purchases from those creditors and trading result were also not disturbed. To support our aforesaid view, we draw support from the decision of the Hon'ble Punjab & Haryana High Court in the case of Pr. CIT vs. Kulwinder Singh (2017) 298 CTR 389 (Punjab & Haryana) wherein it has been held that section 68 of the Act could not be invoked for the amount representing purchases made on credit. (para 5)

15. JAS Forwarding Worldwide P. Ltd. v. DCIT (ITA No. 5410/D15)(23.10.2019)(ITAT, Del)

SECTION 92C – TPO CANNOT QUESTION PRUDENCY OR NEED OF THE AN INTERNATIONAL TRANSACTION - THE SCOPE OF TPO IS LIMITED TO VERIFY AND ASCERTAIN THE ARM'S LENGTH PRICE OF A GIVEN TRANSACTION

Held, As mentioned elsewhere, the TPO has taken arm's length price of IGS at NIL and made an adjustment of 35.89 lakhs. The reimbursement received by the assessee has already been exhibited elsewhere. A perusal of the order of the TPO shows that the TPO has constantly hit upon the fact that the assessee has failed to demonstrate the need and benefits derived from such services. [Para 38]

In the light of the aforementioned decisions of the Hon'ble High Court of Delhi, we are of the considered view that the only thing that a TPO can examine is the rendition of services and supporting evidences. We, accordingly, restore this issue to the file of the TPO. The TPO is

directed to examine the rendition of services with supporting evidences and the assessee is directed to file the details for the same. [Para 41]

16. Rajeev Goel v.ACIT(ITA No.1184/D/19) (Dated 26/09/2019)

SECTION 143(2) – VALIDITY OF JURISDICTION OF THE ASSESSING OFFICER ISSUING NOTICE UNDER SECTION 143(2) – ALTHOUGH THERE WAS DIFFERENCE IN THE ADDRESS OF THE ASSESSEE MENTIONED IN PAN AND THAT FILED IN THE RETURN OF INCOME, HOWEVER, NOTICE UNDER SECTION 143(2) SELECTING THE RETURN FOR SCRUTINY WAS ISSUED BY NONE OF THE OFFICERS HAVING JURISDICTION AS PER ADDRESS MENTIONED IN PAN OR RETURN OF INCOME – THUS SINCE NOTICE WAS NOT ISSUED BY THE JURISDICTIONAL ASSESSING OFFICER, THE SAME WAS INVALID – EVEN OTHERWISE NOTICE WAS DELIVERED AT WRONG ADDRESS AND THEREFORE WAS NOT VALIDLY SERVED – ASSESSMENT PROCEEDINGS WERE THUS QUASHED.

Held,We have heard rival parties and have gone through the materialplaced on record. We find that it is correct that the assessee obtainedhis PAN number by stating residential address as B-37, MaharanaPratap Enclave, Pitampura Delhi-110034. Print out of PAN directoryshowing theaddress and PAN number of the assessee is placed inpage-4 of paper book filed by Revenue. Further, it is also correct thatthe assessee filed his return of income by stating therein address as 1705, 3rd Floor, Onkar Bhawan, Bhagirath Place, Delhi-110006,therefore, it is an undisputed fact that there is difference between theaddress mentioned in PAN data base as well as in the return ofincome filed by assessee. As per jurisdiction chart of Income TaxDepartment in Delhi, extracted from the website of Income TaxDepartment, placed at page book page 301 to 327, the jurisdiction ofassessee as per his address in PAN application is with AssessingOfficer Ward 39(1). The jurisdiction of the Assessing Officer, as perthe address mentioned in the return of income is with AssessingOfficer Circle No.47(1) who has passed the assessment order. Thenotice issued u/s 143(2) has been issued by the Assessing OfficerCircle 34(1) who is neither the Assessing Officer of assessee on thebasis of address in PAN application nor is the Assessing Officer ofassessee as per address mentioned in the returns of income…. The jurisdiction chart placed in paper book page 308 reflectsthe area covered under Circle 34(1) which includes Sarai Pepal Thala,Shalimar Bagh(south), Ashok Vihar, Wazir Pur, Sawan Park, NimriColony, Malka Ganj. At none of the places mentioned above, theassessee resides or does his business. Therefore, the notice issued bythe Assessing Officer of Circle 34(1) is held to be illegal as theAssessing Officer of Circle 34(1) had no jurisdiction on the assesseeeither on the basis of his residential address or on the basis of hisbusiness address. The Ld. DR also could not produce any orderpassed u/s 127 of the Act either by the Commissioner of Circle 34(1)or Commissioner of Circle 47(1) of the Act. As regards, the contentionraised by the Ld. DR that the assessee should have approached theAssessing Officer for change of address also does not hold good inview of the decision of the Hon'ble Delhi High Court in the case of Pr.CIT vs Atlanta Capital Pvt. Ltd….Even otherwise, we have observed that the Assessing Officer ofCircle 34(1) did not have jurisdiction over the assessee neither on thebasis of residential address nor on the basis of business address.

Therefore, the notice issued by Assessing Officer of Circle-34(1)cannot be said to be legal as it has been issued by a nonjurisdictional Assessing Officer and that too without any order u/s127 of the Act. The Hon'ble Delhi ITAT in the case of KIEInfrastructures & Projects (P.) Ltd. vs ITO in IT Appeal No.23(Del) of2012 has held as …*"Where in case of assessee, Assessing Officer at ward 4 Agra himselftransferred jurisdiction of case to Assessing Officer at ward 5(3), NewDelhi and there being no transfer order passed by Chief Commissioner orCommissioner, it was a case of violation of provisions of section 127 and,therefore, impugned assessment order passed by Assessing Officer, ward5(3), New Delhi was to be regarded as void ab intio."* … Similarly, Lucknow Bench of the Tribunal in the case of M/sBajrang Bali Industries vs ACIT in ITA No.724/LKW/2017, orderdated 30/11/2018 has held as… *"6. In the present case, the return of income was furnished on 30.09.2013.The financial year in which the return was filed expired on 31.03.2014 andtherefore, last date for issue of notice was 30.09.2014. The statutory periodfor issuance of notice u/s 143(2) expired on 30.09.2014 and by 30.09.2014*
the notice u/s 143(2), which was within the prescribed period of time, wasissued only by DCIT-IV, Kanpur who had no jurisdiction over the case, asthe DCIT-IV himself had transferred the case to DCIT-2, Kanpur vide memodated 20.08.2015, a copy of which is placed at paper book Page 3.Therefore from the above facts and circumstances, it become apparent thatthe first Assessing Officer who issued notice on 30.09.2014 had nojurisdiction to assess the assessee and, therefore, he transferred the case toDCIT-2, Kanpur who though had jurisdiction to assess the assessee butissued notice u/s 143(2) only on 07.09.2015 by which date period forissuance of notice had expired. We further find that no order u/s 127 of theAct was passed by the Assessing Officer to transfer the case from Kanpur-4to Kanpur-2. The Assessing Officer who had jurisdiction to assess theassessee issued notice u/s 143(2) only on 07.09.2015 which was beyond theprescribed time limit for issuance of such notice. Therefore, the noticeissued u/s 143(2) by DCIT, Kanpur-2 beyond the statutory period of time iswithout jurisdiction and therefore, any order passed in consequence of suchnotice is also liable to be quashed. Therefore, we are in agreement with theargument of Ld. AR. Accordingly, additional grounds of appeal 5 to 8 areallowed. Since we have decided the legal issues, in favour of assessee thegrounds on merits of the case have become infructuous and have not beenadjudicated."..In view of the above facts and circumstances & judicial precedentsthe arguments of the Ld. AR is accepted & notice issued by AssessingOfficer of Circle-34(1) is held to be *void-ab-intio*..... Moreover, if for a moment, we presume that the notice issued byCircle 34(1) Assessing Officer was valid then its service was notproper as the address mentioned on the notice placed in paper bookpage 253 is B-37, Maharana Pratap Enclave, Pitampura Delhi-110034, whereas as per India Post tracking report, the notice hasbeen delivered at Delhi address to one Ranjeev Goel with Pin Code110006. There is difference between the address mentioned in thenotice which is Pin Code 110034 and tracking report which is 110006and also there is difference in the name mentioned in the noticewhich is Rajeev Goel and that mentioned in the tracking report whichis Ranjeev Goel. The copy of tracking report is placed at paper bookpage 254. Therefore, in view of these facts, the notice, even ifpresumed to be by jurisdictional Assessing Officer has not beenserved properly….Therefore, on this ground also the assessee succeeds as in thiscase also the service of notice was not proper.**[Paras 10, 11, 12, 13, 14]**

17. Huron Builders Pvt. Ltd. vs. ITO (ITA No. 6251/D/2019) (dated 03.10.2019)

SECTION 147 - NON-FILING OF RETURN AND NON APPEARANCE OF SHARE APPLICANTS IN PERSON CANNOT JUSTIFY THE INVOKING OF SECTION 147 AS CONDITION PRECEDENT AS GIVEN IN THE SECTION - DECISION OF THE AO TO EXAMINE THE SHARE CAPITAL DOES NOT AND CANNOT CONSTITUTE TANGIBLE MATERIAL SO AS TO JUSTIFY INITIATION OF PROCEEDINGS UNDER SECTION 147 - ESPECIALLY WHEN SAME SHARE CAPITAL WHEN IT WAS FORFEITED STANDS ACCEPTED BY THE SAME AO.

22. Here on facts of the present case, non-filing of return under section 139 and non-appearance of such share applicants, in person, could not justify initiation of proceedings under section 147 against the appellant, firstly, the share application money forfeited in the subsequent year has been accepted to be capital receipts by the AO in order passed u/s 143(3); and secondly, identities, genuineness of the transactions and the creditworthiness of the persons stood fully proved by the information made available by them to the assessee.

25. To sum up, our conclusion is that initiation of proceedings under section 147 are hit by complete lack of requisite 'reason to believe' on based on tangible material/evidence. In the reason recorded, there is not even whisper that the share application money (alongwith premium) was bogus in nature. The authorities below have simply justified the initiation of proceedings under section 147 on the grounds that there was non-filing of return under section 139, owing to which the introduction of share capital could not be examined and for such an examination only action under section 147 was necessary. In our considered opinion, the reasons recorded were not based on correct and legal premise and such 'reasons recorded' suffer from complete lack of jurisdiction. Even at the cost of repetition, we hold that, although sufficiency of reasons cannot be gone into, but very existence of requisite reason to believe can be examined and that too lawfully in the appellate proceedings. On such an examination, we find that there did not exist any material, much less tangible material for holding validity of 'reason to believe'. Accordingly, very initiation of proceedings under section 147 is held invalid and accordingly the assessment order dated 29.12.2017 passed under section 147 is liable to be quashed and we hold so.

18. **Smt. Phulvati vs The ITO (ITA No.4572/Del/2018)(AY 2009-10)(14.10.2019)**

SECTION 148 - AO ISSUED NOTICE U/S.148 DATED 17.03.2016 THROUGH SPEED POST WHICH WAS RETURNED BACK UNDELIVERED BY THE POSTAL AUTHORITIES- THEREAFTER NOTICE AFFIXED ON ADDRESS OF THE ASSESSE ON 06.06.2016- HOWEVER, THE PERIOD OF SIX YEARS FOR ISSUE OF NOTICE U/S. 148 IN THE INSTANT CASE EXPIRES ON 31.03.2016 – HELD, SINCE, NOTICE U/S 148 NOT SERVED WITHIN LIMITATION PERIOD, HENCE THE NOTICE NOT VALID- IN FAVOUR OF ASSESSE

I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I have also gone through the paper book filed on behalf of the assessee. I find the AO in the instant case issued notice u/s.148 dated 17.03.2016 through speed post which was

returned back undelivered by the postal authorities. Thereafter as per the AO the same was served by ITI through affixture. A perusal of the copy of the report of the Inspector placed at page 17 of the paper book shows that the Inspector has given his report to the AO on 06.06.2016 wherein he has mentioned that the notice was affixed on the address of the assessee on 06.06.2016. However, the period of six years for issue of notice u/s. 148 in the instant case expires on 31.03.2016. Therefore, the notice has not been properly served on the assessee before the due date. Further a perusal of the assessment order shows that the order has been passed on 03.10.2016 which the AO has mentioned in the body of the order.(Para 9)

I have considered the rival arguments made by both the sides and perused the orders of the authorities below. I have also gone through the paper book filed on behalf of the assessee. I find the AO in the instant case issued notice u/s.148 dated 17.03.2016 through speed post which was returned back undelivered by the postal authorities. Thereafter as per the AO the same was served by ITI through affixture. A perusal of the copy of the report of the Inspector placed at page 17 of the paper book shows that the Inspector has given his report to the AO on 06.06.2016 wherein he has mentioned that the notice was affixed on the address of the assessee on 06.06.2016. However, the period of six years for issue of notice u/s. 148 in the instant case expires on 31.03.2016. Therefore, the notice has not been properly served on the assessee before the due date. Further a perusal of the assessment order shows that the order has been passed on 03.10.2016 which the AO has mentioned in the body of the order.(para 11)

19. Mukesh Chand Garg v. ITO (ITA No. 794/D/19)(07/10/2019)(ITAT, Del)

SECTION 151 – MERELY WRITING "SATISFIED" OR "YES IT IS FIT CASE TO ISSUE NOTICE U/S 148 OF THE ACT" IS NOT SUFFICIENT – THE NOTICE U/S 148 WAS HELD TO BE WITHOUT PROPER APPROVAL.

SECTION 68 – CLIENT CODE MODIFICATION – ADDITION DELETED ON THE BASIS OF DECISION OF BOMBAY HIGH COURT IN THE CASE OF PR.CIT V. PAT COMMODITY SERVICES

Held, 9. A perusal of the proforma for approval to issue of notice u/s. 148, copy of which is placed at page 12 of the paper book shows that as per clause 12 of the proforma, the PCIT while giving approval has simply mentioned "satisfied". Similarly as per clause 11, the Addl. CIT has simply mentioned "Yes", it is a fit case to issue notice u/s. 148 of the IT Act, 1961.

9.1 The Hon'ble Delhi High Court in the case of PCIT Vs. N. C. Cables Ltd. (supra) has held as under:..

9.2 The Hon'ble M. P. High court in the case of CIT Vs. S. Goyanka Lime & Chemicals Ltd. (supra) has held as under :….

9.3 Since in the instant case also both the approving authorities have given the approval in a mechanical manner, therefore, in the light of the ratio laid down by the decisions cited (supra) and the other decisions filed in the case law compilation, the reassessment proceedings in my

opinion are not in accordance with law. Therefore, the same is liable to be quashed. I, therefore, quash the reassessment proceedings.

10. **Even otherwise on merit** also, so far as the addition on account of client code modification is concerned I find the Hon'ble Bombay High Court in the case of PAT Commodity Services (supra) has observed as under :-

> "3.The respondent assessee is a private limited company engaged in the Business of providing Commodity services to its clients. In the return of income filed by the assessee for the Assessment Year 200607, the Assessing Officer noticed that there were instances of client code modifications. The Assessing Officer believed that the same was done to indulge in circular trading to pass on profits or losses to the clients of the assessee company as per requirements. After hearing the assessee, the Assessing Officer made additions in the income of the assessee on such basis. The issue eventually reached to the Tribunal. The Tribunal did accept the Revenue's theory of misuse of clients code modification facility. However, the Tribunal accepted — the assessee's explanation and discarded the Revenue's theory that profit of the assessee's company were passed on to the clients. It was also noticed that the Revenue has not contended that the client code modification facility is often misused by the assessee to pass on losses to the investors, who may have sizable profit arising out of commodity trading against which such losses can be set off. The Revenue normally points out number of such instances of client code modifications as well as nature of errors in filling of the client code. At any rate, what can be taxed in the hands of the present assessee is the income escaping assessment. Even if the Revenue's theory of the assessee having enabled the clients to claim contrived losses, the Revenue had to bring on record some evidence of the income earned by the assessee in the process, be it in the nature of commission or otherwise. In the present case, the Assessing Officer has added the entire amount of doubtful transactions by way of assessee's additional income, which is wholly impermissible. We do not know the fate of the individual investors in whose cases, the Revenue could have questioned the artificial losses. Be that as it may, we do not think entertaining these appeals would serve any useful purpose.
>
> 4.In the result, both the appeals are dismissed."

11.Respectfully following the decision of Hon'ble Bombay High Court cited (supra). I hold that the addition made by the Assessing Officer and sustained by the CIT(A) on account of client codes modification is not justified. The grounds raised by the assessee are accordingly allowed.

20. Jagjit Singh v. ACIT (ITA No. 1095-98/D/15)(01/10/2019)(ITAT, Del)

SECTION 153C – SATISFACTION NOTE – THE AO OF THE OTHER PERSON IS REQUIRED TO APPLY HIS MIND TO THE DOCUMENTS AND RECORD SPECIFIC SATISFACTION AS TO HOW THE SUCH DOCUMENTS BELONGS TO THE ASSESSEE - THE SATISFACTION NOTE RECORDED BY THE AO OF OTHER PERSON IS SAME AS THAT OF AO OF THE SEARCHED PERSON – NO FINDING

AS THAT DOCUMENTS SEIZED BELONG TO THE ASSESSEE – NOTICE U/S 153C IS LIABLE TO BE QUASHED

SECTION 153C- THE MATERIAL FOUND MUST BE QUA SIX ASSESSMENT YEAR FOR THE PURPOSE OF VALID ACTION U/S 153C

ASSESSMENT FOR YEAR OF SEARCH HAS TO BE FRAMED U/S 153C AND NOT 143(3) - ASSESSMENT FRAMED U/S 143(3) IS BAD IN LAW

Held, When we examine the facts of the present case in the light of the ratio laid down by Hon'ble High Court in cases of CIT vs. RRJ Securities Ltd. and Pepsico India Holdings Private Ltd. vs. ACIT (supra), it leads to the irresistible conclusion that firstly, AO of the searched person, namely, M/s. ABW Infrastructure (P) Ltd. must arrive at a categoric satisfaction that a document seized from him does not belong to him (searched person) but to some other person and second requirement is after such satisfaction is arrived at that the document is handed over to the person to whom the said document belongs. [Para 18]

19. In the instant case, both the aforesaid conditions have not been satisfied by the AO of the searched person and then AO of the other person, the assessee in this case, has mechanically proceeded to initiate the proceedings u/s 153C and 153A by merely recording the word satisfaction that the seized documents belong to assessee. In other words, it is difficult to make out from the satisfaction note recorded in case of searched person and in case of other person, the requisite satisfaction as required u/s 153C of the Act. We are constrained to record that both the satisfaction note dated 20.01.2014 and 23.01.2014 recorded in case of searched person and in case of such other person are identical and are not in consonance with the provisions contained u/s 153C of the Act. Furthermore, the AO has also failed to conclude as to how the alleged documents were incriminating in nature in order to assess the income of the assessee u/s 153C of the Act. So, in the absence of existence of any incriminating material, power u/s 153C cannot be invoked.

24. At the same time, SMS mentioned by the AO at page 2 of the assessment order found on the mobile phone of Atul Bansal, searched person, are relevant only for AY 2012-13 and not AY 2011-12 as the date of search on the basis of which assessment u/s 153C was initiated on 09.11.2011. Moreover, CIT (A) in para 5.2 of AY 2011-12 failed to clarify if any incriminating material was seized for this year.

25. In view of what has been discussed above, we are of the considered view that assessment framed by the assessee u/s 153A r/w section 153C for AYs 2009-10, 2010-11 and 2011-12 is bad in law for want of jurisdictional error with the AO. At the same time, assessment framed u/s 143 (3) for AY 2012-13 is also bad in law because date of handing over the seized document is 20.01.2014 and the assessment in this case was required to be framed u/s 153C of the Act.

21. Geopetrol International Inc v. ADIT (ITA No. 1874/D/15)(11.10.2019)(ITAT, Del)

SECTION 234B – INTEREST FOR DEFAULT IN PAYMENT OF ADVANCE TAX – NON RESIDENT HAVING NO PE IN INDIA – FAILURE ON THE PART OF THE

PAYER TO DEDUCT TDS – ASSESSEE SHALL NOT BE LIABLE TO PAY INTEREST U/S 234B

Held, We have heard both the parties and perused all there relevant material available on record. In the present case, it is an undisputed fact that the assessee is a foreign company and the entire revenue/income of the assessee came from Indian Oil Corporation (AOD, Digboi). The Hon'ble Delhi High Court in case of GE Packaged Power Inc. (supra) has considered the case law that of Alcatel Lucent USA Inc. [2014] 2 ITR-OL 276 (Del.) which was referred by the CIT(A) in his order. The question arises here is whether interest should be levied on the assessee under Section 234B on the ground of non-payment of advance tax. The Revenue is relying upon the decision of Alcatel Lucent USA Inc. (supra). As per the scheme of Section 234B, firstly, the obligation imposed upon a payer of a sum to foreign company, requiring a deduction of tax at source under Section 195 and secondly, an obligation is directly imposed upon the assessee, by requiring it to compute its advance tax liability as stipulated under Section 209 of the Act. However, a foreign company assessee that receives remittances that are attributable as business profits to a PE in India, is permitted a tax credit while computing its advance tax liability under Section 209, since a tax is deductible at source under Section 195. As per the provisions of the Act, the assessee was entitled to, in its computation of its advance tax liability, take a tax credit of that amount which was deductible or collectible, regardless of whether amount was actually deducted or collected. The actual deduction takes place at a later point in time i.e. at the point at which the payment is actually made to the assessee.

Thus, in the present case, the ratio applies as the Assessment Year involved is 2011-12 which is prior to the amendment. Therefore, no interest is leviable on the assessee under Section 234B, despite filing the returns declaring Nil income. Hence, the CIT (A) as well as the Assessing Officer were not right in levying the interest under Section 234B. The appeal of the assessee is allowed. [Para 7]

22. Punj Lloyd Limited v. ACIT (ITA No.5889, 5890, 5891/D/14) (Dated 25/09/2019)

SECTION 254 – VALIDITY OF APPEAL BEFORE THE TRIBUNAL IN CASE OF COMPANY UNDER INSOLVENCY AS PER IBC – WHERE A COMPANY IS UNDERGOING INSOLVENCY PROCEEDINGS UNDER IBC AND THE MORATORIUM PERIOD IS IN OPERATION, THE APPEAL FILED BY THE ERSTWHILE MANAGEMENT OF THE COMPANY NEEDS TO BE SUBSTITUTED BY IRP – FURTHER TRIBUNAL IS BARRED TO PASS ANY ORDER DURING THE MORATORIUM PERIOD UNDER SECTION 14 OF IBC, 2016 – IN VIEW OF ABOVE THE PENDING APPEAL OF THE COMPANY IS DISMISSED WITH LIBERTY TO FILE THE APPEAL AFRESH ON COMPLETION OF RESOLUTION PROCESS, IF DEEMED FIT.

Held,Hon'ble Supreme Court in case of Alchemist Asset Reconstruction Vs M/S.Hotel Gaudavan Pvt. Ltd. in 145 SCL 428(SC) wherein, it has been observedthat even arbitration process started after imposition of the moratorium isnot valid. Even the present appeals are also filed by the assessee companyand not the IRP as appointed by the committee of creditors. If the committeeof creditors decided to file the appeal, then such appeal is required to befiled and substituted duly

signed by the IRP. Further, any order passed byus also cannot have any effect till moratorium period in view of section 14 ofIBC, 2016. In view of the specific request of the assessee, provisions of IBC2016 and decision of the Hon'ble Supreme Court we dismiss all these appealwith a liberty to file them afresh, on completion of resolution process, ifdeem fit. Accordingly, all these appeals are disposed off as dismissedOrder pronounced in the open court on 25/09/2019.[**Para 5**]

23. Rekha Gupta v.Pr. CIT (ITA No.1007/D/19) (Dated 25/09/2019)

SECTION 263 – SCOPE OF EXPLANATION 2 TO SECTION 263 INSERTED BY FINANCE ACT, 2015 PROVIDING THAT AN ORDER IS ERRONEOUS IF THE SAME IS PASSED WITHOUT MAKING ENQUIRY OR CLARIFICATION WHICH SHOULD HAVE BEEN MADE IN THE OPINION OF CIT – WHERE AN ENQUIRY IS CONDUCTED BY THE ASSESSING OFFICER AND THERE IS NO FURTHER MATERIAL TO DOUBT THE TRANSACTION AND CONDUCT FURTHER ENQUIRY, THE OPINION OF CIT IN VACUUM THAT THE ASSESSING OFFICER SHOULD HAVE CONDUCTED FURTHER ENQUIRY IS NOT VALID AND OUTSIDE THE SCOPE OF AMENDED PROVISIONS OF SECTION 263 – WHENEVER EXPLANATION 2 IS INVOKED, IT IS MANDATORY FOR THE CIT TO FIRST SHOW ERROR ON THE PART OF AO IN NOT CONDUCTING THE RELEVANT ENQUIRY ON THE BASIS OF RECORD – IN ABSENCE OF SUCH FINDING, THE ORDER PASSED BY CIT IS NOT JUSTIFIED UNDER THE AMENDED PROVISIONS OF SECTION 263.

Held,we have carefully considered the rival contentions and also perused theorders of the ld AO and Pr. CIT. According to the provisions of section 263 ofthe Act, after examination of records, the ld CIT finds that the order iserroneous and prejudicial to the interest of the revenue, then, he has powerto revise such orders. Explanation 2 to that section has been inserted w.e.f01.06.2015 of Finance Act 2015, wherein, in clause (a) it is provided that ifan order is passed without making enquiry or verification which shouldbeen made, the order passed by the ld AO shall be deemed to be erroneousinsofar as it is prejudicial to the interest of the revenue. In the present casethe assessee is engaged in trading in gold bars under the name & Style of"M/s. Swaran Traders" as a proprietary concern. The case of the assesseewas selected under CASS for scrutiny with a reason of "Low net profit orloss shown from large gross receipt. Therefore, the mandate given to the ld AO was to examine the low net profit. The ld CIT holds that order iserroneous for the reason that AO has not examined the loan received by theassessee from one Mr. Jagjit Singh and the difference between the purchaseand sales shown in the profit and loss account with the purchase and salesshown in party wise details. On the issue of unsecured loan, the assesseehas discharged its initial onus by furnishing income tax return,confirmation, source of funds available with the lender etc. Therefore, it iscorrect that the assessee has discharged its onus cast upon him. Thereafterif material gives any indication than the ld AO should have made furtherenquiry. No such material has been shown by the ld CIT from theassessment records. Thus on this issue, it cannot be said that AO shouldhave been made any further enquiry. Thus, n the issue of verification ofunsecured loan, we do not find that there is lack of due inquiry….With respect to purchase and sales assessee has explained before the ldCIT, that tax component which

is debited or credited to the parties accountalong with net sales value and only net sales is shown in the profit and lossaccount. The difference as pointed out by the CIT in show cause noticecannot be said to be difference but the correct accounting method. Naturallyat the time of sale the assessee credits net off tax in profit and loss accountand debit the whole amount including tax in the account of the debtors.Similarly, purchases are made by debiting the trading account by net offpurchase and crediting whole amount including taxes to the account of thecreditors. These details were already enquired by the ld AO. The ld Pr. CITin his order has not mentioned what further enquiry AO might have made.Whenever an explanation 2(a) is invoked, it is mandatory for the CIT, toshow what are the enquiries on the basis of information available on recordshould have been made by the ld AO and also that those enquiries have notbeen made. In absence of such a specific finding it cannot be said that theorder passed by the AO is erroneous and prejudicial to the interest ofrevenue. In the order passed by the ld Pr. CIT we do not have suchcategorical finding of lack of inquiry on both these issues. Further, it wasalso not the mandate given to the ld AO to enquire on this aspects as thecase was selected for limited verification of low profit. In view of this, we donot find that the order passed by the ld Pr CIT u/s 263 is sustainable.Accordingly, we quash it and allow appeal of the assessee..**[Paras 8, 9]**

24. Jagjit Singh v. Pr. CIT (ITA.No.2777/Del./2018)(10/10/2019)(ITAT, Delhi)

SECTION 263 - WHERE THE REASSESSMENT ORDER PASSED U/S 147 ITSELF IS BAD IN LAW, THE SAME CANNOT BE REVISED UNDER SECTION 263 OF THE ACT

PROCEEDINGS U/S 263 INITIATED ON THE BASIS OF AUDIT OBJECTION ARE BAD IN LAW.

Held, It may also be noted here that the property sold was joint property of assessee and his wife. Therefore, there were no illegality in the action of the assessee in making investment in the name of one of the seller out of the same funds which have been received on account of sale of the property. The investment have been made out of the same funds. The assessee further explained that later on wife of assessee has expired, therefore, he being the legal-heir of his wife, become the absolute owner of the property in question and as such it would be deemed to be the investment made in the name of assessee. It may also be noted here that thereafter notice under section 148 of the I.T. Act, have been issued on 13th March, 2015. On this date also, the Judgment of the Hon'ble jurisdictional Punjab and Haryana High Court in the case of CIT vs., Gurnam Singh (supra), Dated 1st April, 2008 was in force in favour of assessee. Therefore, on the date of initiation of reassessment proceedings also, the issue was covered in favour of the assessee by Judgment of the Hon'ble jurisdictional Punjab and Haryana High Court in the case of Gurnam Singh (supra). Therefore, initiation of reassessment proceedings itself was illegal and bad in law on the same reason that assessee made investment in the name of his wife for availing exemption under section 54B of the Income Tax Act. Thus, the reassessment order itself was invalid and bad in Law. The ITAT, Delhi Bench in the group of cases of Supersonic Technologies Pvt., Ltd., etc., vs., Pr. CIT [2019] 69 (Trib.) 585 (Del.) held that "when

reassessment order was invalid, invalid reassessment order cannot be revised by the Commissioner. Revisional Order bad in law and liable to be quashed." [Para 6.4]

6.6. It may also be noted here that in this case after passing of the reassessment order Dated 2nd March, 2016 an audit objection was raised on Dated 17th August, 2016 [PB-27] with regard to irregular exemption under capital gains on the same issue. The audit party has directed that exemption under section 54B is not allowable to the assessee because assessee has not made investment in his own name. The Ld. Pr. CIT on the basis of the audit objection has initiated the revisional proceedings under section 263 of the Income Tax Act. However, such a course was not found approved by Hon'ble Punjab and Haryana High Court in the case of CIT vs., Sohana Woollen Mills [2008] 296 ITR 238 [P&H]

6.7. Since in this case revisional proceedings have been initiated on mere audit objection and that a different view have been taken by the Ld. Pr. CIT as against the Judgment of the Hon'ble jurisdictional Punjab and Haryana High Court in the case of Gurnam Singh (supra), therefore, it would not be enough to say that the reassessment order was erroneous or prejudicial to the interests of the revenue. The contention of the Ld. D.R. is, therefore, have no merit that the assessing officer has not examined this case and that the Order was erroneous insofar as prejudicial to the interests of revenue.

25. Smt. Shumana Sen vs DCIT (ITA No. 3281/DEL/2015) [A.Y 2005-06] ITA No. 3282/DEL/2015 [A.Y 2006-07] ITA No. 3283/DEL/2015 [A.Y 2007-08] ITA No. 3284/DEL/2015 [A.Y 2008-09](11.10.19)

SECTION 263:JURISDICTION ASSUMED BY PCIT ON THE GROUND THAT NO PROPER ENQUIRIES WERE CONDUCTED BY THE ASSESSING OFFICER DURING THE COURSE OF ASSESSMENT PROCEEDINGS – HELD,POWERS U/S 263 OF THE ACT CAN BE EXERCISED BY THE COMMISSIONER ON SATISFACTION OF TWIN CONDITIONS, I.E., THE ASSESSMENT ORDER SHOULD BE ERRONEOUS AND PREJUDICIAL TO THE INTEREST OF THE REVENUE-THUS, WHERE THERE ARE TWO POSSIBLE VIEWS AND THE ASSESSING OFFICER HAS TAKEN ONE OF THE POSSIBLE VIEWS, NO ACTION TO EXERCISE POWERS OF REVISION CAN ARISE - DETAILED INVESTIGATION/ ENQUIRES BY ASSESSING OFFICER DURING ASSESSMENT PROCEEDINGS- JURISDICTION U/S 263 NOT VALID AND PREJUDICIAL TO ASSESSE AND REVENUE

Adverting to the facts of the case, we find that it is a settledposition of law that powers u/s 263 of the Act can be exercised by theCommissioner on satisfaction of twin conditions, i.e., the assessmentorder should be erroneous and prejudicial to the interest of theRevenue. By 'erroneous' it is meant contrary to law. Thus, this powercannot be exercised unless the Commissioner is able to establish thatthe order of the Assessing Officer is erroneous and prejudicial to theinterest of the Revenue. Thus, where there are two possible views andthe Assessing Officer has taken one of the possible views, no action toexercise powers of revision can arise, nor can revisional power beexercised for directing a fuller enquiry to find out if the

view taken iserroneous. This power of revision can be exercised only where noenquiry, as required under the law, is done. It is not open to enquire incase of inadequate inquiry. (para 29)

Considering the facts of the case in hand, in totality, in the lightof judicial decisions discussed hereinabove, supported by a vortex ofevidences, examined and analysed by the Assessing Officer during thecourse of assessment proceedings, further supported by thoroughinvestigations/enquiries made by the Assessing Officer during theassessment proceedings, we are of the considered view that thereremains nothing for the PCIT to assume jurisdiction u/s 263 of the Actto say that the assessment order is not only erroneous but prejudicialto the interest of the revenue. We are of the considered view that thePCIT has wrongly assumed jurisdiction u/s 263 of the Act, hence hiscombined order for all the A.Ys deserves to be set aside. We,accordingly, set aside the order of the PCIT and restore that of theAssessing Officer. We order accordingly.(para 39)

Before parting with the present order, we are constrained tobring on record, to be looked into by the Central Board of Direct Taxes(CBDT) that proceedings u/s 263 of the Act have been initiated in thiscase apparently on the basis of false, frivolous and baseless allegationswith malafide intention of the quarter concerned which were alsoexamined and found not sustainable by the Vigilance Directorate ofIncome-tax Department. No doubt, proceedings u/s 263 of the Acthaving been initiated and completed on the allegations leveled by aSenior Officer of the Income-tax Department is an order passed by aquasi-judicial authority but it sans judicious approach required to beexercised by the quasi-judicial authority. Quasi-judicial proceedingsinitiated apparently on the basis of false, frivolous and baselessallegations have not only prejudiced appellant rather it has alsowasted the valuable time of the Tribunal. **Facts and circumstances ofthe case, available on record as discussed in the preceding parasprove, that the Senior Officer of the Revenue Department had not onlygot the proceedings u/s 263 initiated against Appellant on false,frivolous and baseless allegations rather continued to litigate againstthe appellant as well as against the Revenue Department by filingfrivolous applications one after the other before the Hon'ble HighCourt of Delhi as well as the Tribunal.** (para 40)

In these circumstances, we direct the CBDT to initiate a discreetenquiry in this case to find out, as to how and under whatcircumstances on the basis of false, frivolous and baseless allegations,that too with malafide intentions, proceedings u/s 263 of the Act havebeen initiated apparently to victimize the appellant, to proceedagainst the guilty officials under Rules and to further frame theguidelines to deal with such abuse of powers by the senior officers, sothat such incident should not reoccur.(para 41)

In the result, all the four appeals of the assessee in ITA Nos.3281 to 3284/DEL/2015 are allowed. (para 42)

26. Late Harbhajan Singh Makkar vs. ACIT (ITA No. 2451/D/2015) (Dated: 16.10.2019)

THE ADDITION CANNOT BE MADE IN THE HANDS OF THE ASSESSEE, AS DENIAL OF OPPORTUNITY TO THE ASSESSE DENYING CROSS-EXAMINE OF THE WITNESS WHOSE STATEMENTS WERE MADE THE SOLE BASIS OF THE ASSESSMENT IS A SERIOUS FLAW RENDERING THE ORDER AS NULLITY IN AS MUCH AS IT AMOUNTED TO VIOLATION OF THE PRINCIPLES OF THE NATURAL JUSTICE AS HELD BY HONOURABLE SUPREME COURT IN 281 CTR 241.

9. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that assessee has sold the property at 1st floor, BB – 17 greater Kailash part – 2, New Delhi for a consideration of INR 14,000,000 to Mrs. Santhosh Rani Gupta. The sale deed was registered on 26/11/2009 wherein the agreed consideration paid by the assessee was INR 14,000,000 . Sale consideration stated in Para number 6 of the sale deed shows various cheques issued on various dates in the favour of the assessee. The contention of the assessee is that this amount of money has been paid by Mr. Mittal and not Mrs. Gupta. Learned Assessing Officer noted that Mr. Honey Gupta, son of the buyer made a statement on oath on 12/11/2010 before the Assistant Director Of Income Tax (Investigation), New Delhi wherein in response to question No. 3 and Question Number 9 , he submitted that part payment for the purchase of property was made in cash and therefore he voluntarily surrendered the difference on account of payment made in cash to the seller (assessee) of property to the tune of Rs. 1.70 crores as paid by mother of the Mr. Honey Gupta for 1st floor during financial year 2010-11 and Rs. 1.40 crores paid by him for 2nd floor during financial year 2000-11. The statement of the broker Mr. Naveen was also recorded in case of Mr. Mittal on 24/1/2011 by the Additional Director Of Income Tax (Investigation) New Delhi wherein in response to Question No 4 he stated that sale of the property at the 1st floor belonging to the assessee was sold to Mr. Santhosh Rani Gupta for Rs. 31,000,000/-. In response to Question No. 6 he submitted that the above payment was made in cash to the sellers (assessee) in the morning of the date of execution of sale deed. Further the statement of Mr. Honey Gupta was also recorded on 27/12/2012 by the Assistant Commissioner of Income Tax (AO) wherein he denied that he has not made any cash payment. He further stated that he has only made cheque payment for purchase of this property and source of which has already been explained. He further submitted that the original statement given by him is because of his illness and therefore there cannot be relied upon. Therefore, it is apparent that the buyer has not given any statement to the investigation wing or to the Assessing Officer. It is the statement of the son of the buyer which was used against the assessee for making the addition. The son of the buyer has retracted the same statement when called upon by the learned assessing officer. Further, the statement of the broker was also recorded who has not received any brokerage on the transaction from either of the parties. It is further apparent that no opportunity was given to the assessee to cross-examine as Mr. Honey Gupta or Shri Naveen, broker. Further with respect to the amount of cash paid allegedly by the buyer of the property to the assessee there is a contradictory statement with respect to the timing between the buyer and this broker on the period in which the above cash was paid. Furthermore, the learned Authorized Representative produced before us the order passed u/s 143 (3) read with section 148 of the income tax act dated 31/1/2014 wherein the total income of the buyer was assessed at Rs. 492380/– as originally assessed u/s 143 (3) that the returned income and no addition with respect to Rs. 1.40 crores alleged cash paid by her to the assessee was made. Therefore, when the addition has not been made in the hands of the buyer, who is the source of the cash payment to the seller (assessee), no addition can be made in the hands of the assessee. In fact the addition

should have been made in the hands of the buyer on account of cash paid to the seller and in the hands of the seller as unaccounted sale consideration subject to capital gains tax. Even otherwise the assessee has requested for the cross-examination of Sri Honey Gupta as well as the broker during the assessment proceedings however same has been denied. The only evidence available with the Assessing Officer is the statement of Mr. Honey Gupta and the broker which has been used against the assessee for making the addition. When the assessee had specifically asked for the cross-examination and if same was not given to the assessee, the addition cannot be made in the hands of the assessee, as denial of opportunity to the assessee to cross-examine the witness whose statements were made the sole basis of the assessment is a serious flaw rendering the order as nullity in as much as it amounted to violation of the principles of the natural justice as held by Honourable Supreme Court in 281 CTR 241. In view of this we do not have any other alternative but to direct the learned assessing officer to delete the addition of INR 17,000,000 made in the hands of the assessee over and above the declared sales consideration of INR 14,000,000 towards the sale of the property for the computation of the capital gain. Accordingly we reverse the finding of the lower authorities. Accordingly ground number 1 of the appeal of the assessee is allowed.