ITAT BAR CASE REPORTER - SEPTEMBER 2019

1. World Institution Development Programme v. ITO(Exemption)(ITA No. 08/D/19) (Dated 17/09/2019)

SECTION 11/12A - ASSESSEE ENGAGED IN THE ACTIVITY OF HELPING STUDENTS IN ENROLMENT OF VARIOUS UNIVERSITIES - FALL WITHIN THE MEANING OF 'EDUCATION' UNDER SECTION 2(15) OF THE ACT – MERE COLLECTION OF FEES DOES NOT MILITATE CONCEPT OF CHARITY – EXEMPTION UNDER SECTION 11 ALLOWED.

Held,We have carefully considered the rival contentions and perused the orders ofthe lower authorities. Admittedly, the assessee is a charitable trust. It isregistered u/s 12AA of the Act as well as u/s 80G(5) of the Act. Further, inthe earlier years the similar activities of the assessee have been accepted bythe revenue holding that activities of the assessee are covered under head "educational" in nature and benefit u/s 11 and 12 of the Act has beengranted to the assessee. For this year claim of the assessee has beenrejected by the ld AO. Looking to the object of the trust the assessee hasearned course material fees of Rs. 4.11 crores out of which it has spent staffsalary of Rs. 12.14 lakhs, course material charges of Rs. 72.37 lakhs,course material photocopy charges of Rs. 7.19 lakhs, honorarium charges ofRs. 59.21 lakhs. Over and above it has also incurred courier fees of Rs.11.44 lakhs, printing and stationary charges of Rs. 4.79 lakhs. The assesseeis carrying on object of establishing and helping universities, colleges,schools and other institutions for strengthening the cause of education byproviding didactical facilities provide consultancy support in the area ofeducational planning and administration for opening, diversifying anddeveloping the existing or new institutions. It also provides mutual andtechnical cooperation for implementing and supplementing forestablishment of universities. It has entered into an MOU with the GlobalOpen University, Nagaland for helping the university in the areas ofinstructional material and resource development, research design,publications and collaborative programme development. Thus, it wasassigned duty of preparation and publication of study material including itsdistribution to the students from time to time. It was also helping incoordinating the development activities of the universities. The trust hasappointed 200 teachers who guide the students in studying course materialand their queries of study material. It also helps the students in preparationfor examination. Such facts are stated before the ld AO per letter dated 08.06.2016. The assessee also submitted the details of course materialexpenses of Rs. 72.37 lakhs, which was for the course material, it can besaid to be an educational activity or not. Admittedly, in the earlier years theclaim of the assessee is accepted. The issue is discussed by the Hon'bleDelhi High Court in case of DIT Vs. The Delhi Public School Society ITA No.609/2008 dated 03.04.2018, wherein, the issue is examined that when theassessee is carrying out opening and running around 120 schools throughfranchise agreement and

franchise charges received with the assessee forusing the name of Delhi Public School by the satellite schools in and outsideIndia and assessee earned franchisee fees is an educational activity orbusiness activity. The Hon'ble High Court observed that the memorandumof association of DPS society as well as the joint venture agreement enteredby DPS society with the satellite schools is having motive of an educationalpurpose. Further, in para No. 33 of that decision, Hon'ble High Court hasstated it is an educational activity which qualifies as a charitable purposewithin the meaning of section 2(15) of the Act. It further held that theobjected activity were an activity incidental to the dominant educational purposes….. Further, in ITA No. 4329/Del/2012 for Assessment Year 2009-10, the coordinate bench also held that when a trust entered into an agreementwith the assessee society in providing research services is also engaged incharitable purpose even if it incidentally involves the carrying on ofcommercial activity. Further in case of CIT Vs. Spicmacay ITA No. 406/2017dated 16.05.2017 the Hon'ble Delhi High Court held that mere receipt ofsum did not mean that it was involved in trade, business. Applying theabove principles to the facts of the above case, it is apparent that theassessee is a developing, preparing and providing study material to thestudents of Global Open university of Nagaland as per MOU placed beforeus at page 21. For this, it recovers 67% of the fees for publication,preparation of study material. Admittedly, study material has used ascurriculum of the above university. Admittedly, the assessee is alsoreceiving examination fees, conducting such examination, providing help tothe university, and incurring expenses on them. Admittedly, it is not shownby the ld AO that the revenue surplus generated by the assessee is notutilized for the purposes of educational activities. Thus, prima facie assesseeis carrying on the educational activities and not the business as facilitator.Further, the decision stated by the ld AO of 101 ITR 234 of the Hon'bleSupreme Court, does not apply to the facts of the present case as in thatcase as trust was running, printing and publishing newspapers, where as inthe impugned case the assessee is preparing study material which is part ofthe curriculum of the university for the distribution to the students and material purposes in examination of the students. The Hon'ble Delhi HighCourt in 81 Taxmann.com 142 in Delhi Bureau of Textbooks Vs. DirectorIncome Tax held that when a charitable society engaged in the printing,publishing of its books of govt schools which was provided to the students,such activities classifies as an educational activity. The Hon'ble Delhi HighCourt also considered the decision of the Hon'ble Supreme Court in 101 ITR234 and distinguishes the same in para No. 21. Further, in para No. 22 itheld that preparation and distribution of textbooks certainly contributes tothe process of training and development of the mind and character ofstudents. Further in para No. 29 the Hon'ble High Court also referred toprinciple of consistency. These findings are equally applicable to the presentcase. It also dealt with in that decision the observation of the revenue abouthuge earning by that assessee whether that can be said to be a charitableactivity. The court held that it does not hamper the claim of the assesseeu/s 11 and 12 of the Act. As the facts of the present case are identical to thefacts of the case decided by the Hon'ble Delhi High Court in 81Taxmann.com 412 thus following the

decision of the Hon'ble Delhi HighCourt we also hold that the activity of the assessee is an educationalactivity and assessee is eligible for exemption u/s 11 and 12 of the Act.Accordingly, orders of the lower authorities are reversed and appeal of theassessee is allowed.**[Paras 8, 9]**

2 ADIT(E) vs India Trade Promotion Organisation (ITA No.1919/Del./2016) (Dated: 13.09.2019)

S 11/12 - APPLICATION OF INCOME MAY INCLUDE PURCHASE OF A CAPITAL ASSET - THE SAID PURCHASE IS VALID AND TAKEN INTO CONSIDERATION FOR THE PURPOSE OF ENSURING COMPLIANCE, I.E., APPLICATION OF MONEY OR FUNDS AND IS NOT A FACTOR WHICH DETERMINES AND DECIDES THE QUANTUM OF INCOME DERIVED FROM PROPERTY HELD UNDER TRUST - COMPUTATION OF INCOME IS SEPARATE AND DISTINCT AND HAS TO BE MADE ON COMMERCIAL BASIS BY APPLYING PROVISIONS OF THE ACT – DISALLOWANCE ON THE GROUND THAT WHEN DEDUCTION IS ALLOWED IN RESPECT OF CAPITAL EXPENDITURE, NO DEPRECIATION IS ALLOWED ON THE SAME ASSETS AS IT WOULD LEAD TO DOUBLE DEDUCTION – FOLLOWED HON'BLE DELHI HIGH COURT IN ITA NO.7 / 2013 ORDER DATED 27.11.2013 RENDERED IN ASSESSEE'S OWN CASE.

3. ITO vs M/s. Swati Housing & Construction Pvt. Ltd. (ITA No. 1228/Del/2015)(AY 2010-11)(23.08.2019)

SECTION 40(A)(IA) – HELD, THAT IF THE PAYEE HAS ACCOUNTED FOR THE COMMISSION AS HIS INCOME AND HAS SHOWN IT IN HIS RETURN OF INCOME AND ALSO PAID TAX THEREON THEN NO DISALLOWANCE CAN BE MADE- WHETHER AMENDMENT BROUGHT IN STATUE ON ACCOUNT OF 30% DISALLOWANCE CAN BE GIVEN RETROSPECTIVE EFFECT- HELD, IN A VICE VERSA SITUATION IF AMENDED PROVISION INCREASED THE QUANTUM OF DISALLOWANCE, THEN CAN REVENUE RETROSPECTIVELY DISALLOW HIGHER PERCENTAGE OF DISALLOWANCE- ANSWER WOULD BE NO, HENCE, DISALLOWANCE APPLICABLE PROSPECTIVELY

We have heard the rival submissions and also perused the relevant finding given in the impugned orders qua the disallowance u/s 40(a)(ia). Admittedly the Ld. CIT(A) has deleted the disallowance on the ground that the only amount which has been shown as payable in the books of account will entail disallowance u/s 40(a)(ia) and not the amount which has been paid even though TDS has been deducted. Now this issue has

been set at rest by the Hon'ble Supreme Court in the case of Palam Gas Service vs. CIT (supra) that disallowance u/s 40(a)(ia) is applicable not only on the payable amount but also on paid and under both the circumstances TDS should be deducted. Thus, reasoning given by the Ld. CIT (A) is rejected. However, we agree with the other contention of the Ld. Counsel that if the payee has accounted for the commission as his income and has shown it in his return of income and also paid tax thereon then no disallowance can be made in terms of second proviso to section 40(a)(ia) r.w.s first proviso to section 201. The AO is accordingly directed to verify the contention of the assessee that if payee has accounted for the commission payment received by him as his income and has paid taxes thereon, then no disallowance should be made. (Para 9)

In so far as the second contention of the Ld. Counsel is concerned that only 30% should be disallowed in view of amendment brought in the statute w.e.f. 01-04-2015 and should be applied retrospectively and reliance on the decision of Tribunal in the case of Smt. Kanta Yadav vs. ITO (supra), we are unable to subscribe to the contention of the Ld. Counsel, because when a substantive provision has been brought in the statute from a prospective date, it cannot be given retrospective effect. Because, now the statute has quantified the disallowance at a flat rate of 30% instead of 100% and such a reduced percentage of disallowance cannot be imported for all the past assessments. Further, such an amendment cannot be held to be beneficiary provision or clarificatory albeit as this provision now quantifies the disallowance at a certain percentage and such a quantification of disallowance cannot be held to be retrospective. For example, where disallowance has been made hundred percent and assessee does not challenge the quantum, then can he claim that disallowance ought to have been at reduced percentage. In a vice versa situation if amended provision increase the quantum of disallowance, then can revenue retrospectively disallow higher percentage of disallowance. Answer would be no. Whenever there is an amendment with regard to rate of tax or fixation of any quantum of deduction for disallowance or allowance, then such an amendment has to be interpreted prospectively only after the statute has brought the provision with prospective date. It is a trite law that a substantive provision cannot be given retrospective effect unless statute provides for. Its only when any beneficial provision is brought in the statute to undo any hardship and or remove any mischief, then such an amended provision is given retrospective effect. Thus, the contention raised by the assessee is dismissed. (Para 10)

SECTION 68 - ADDITIONS U/S 68 MADE BY THE AO ON ACCOUNT OF SUNDRY CREDITOR-NONE OF THE PARTIES HAD RESPONDED TO NOTICES SENT U/S 133(6)- HELD, PARTIES WERE HAVING REGULAR TRANSACTIONS FROM WHOM ASSESSEE HAS BEEN MAKING PURCHASES AND ALL THE PAYMENTS HAS BEEN MADE THOUGH ACCOUNT PAYEE CHEQUES AGAINST SPECIFIC BILLS AND ALSO MENTIONS VOUCHERS NUMBERS-HENCE, ADDITION DELETED

Held, We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as material referred to before us. The entire basis for the additions made by the AO is that, none of the parties have responded to notices sent u/s 133(6) and beyond that he has neither examined the nature of sundry creditors or ledger account or the bills. First of all, from the perusal of the copy of the ledger account and the balance sheet, it is quite clear that during the year addition on account of sundry creditors are only Rs. 35,36,546/-; and if AO is invoking section 68, ostensibly, the entire addition of Rs. 2,22,59,664/- could not have been made u/s 68, because these are not credits in the books of account for the relevant previous year. Moreover, from the perusal of the ledger account of the sundry creditors it is seen that all these parties were having regular transactions from whom assessee has been making purchases and all the payments has been made though account payee cheques against specific bills and also mentions vouchers numbers. The bills of these parties contain the entire details of purchases made by the assessee. Once from all the parties assessee was having regular business transaction and regular payment has been made from these parties, duly backed by bills and payment vouchers, then where is the question of disallowance. If the purchases made from these parties have been duly accounted for and are part of trading account and neither the debits side nor the credit side of the trading results have been disturbed nor books of accounts have been rejected, then no addition on account of sundry creditors can be made. Accordingly, the addition as confirmed by the Ld. CIT A) is confirmed and additions stands deleted.(para 17)

4. Navnirman Highway Project P. ltd. v. DCIT (ITA No.117/D/2017)(03.09.19)(ITAT, Delhi)

SECTION 40(A)(IA) R.W.S 194H – BANK GUARANTEE COMMISSION – THERE IS NO PRINCIPLE-AGENT RELATIONSHIP BETWEEN BANK AND ASSESSEE-FURTHER THE COMMISSION PARTAKE CHARACTER OF INTEREST U/S 2(28A) AND SAME FALLS OUTSIDE THE PURVIEW OF SECTION 194A AS WELL – DISALLOWANCE DELETED.

Held So, following the decision rendered by the coordinate Bench of the Tribunal, when the bank has issued bank guarantee on behalf of the assessee there is no principal – agent relationship between the bank and the assessee which is a mandatory condition for invoking the provisions contained u/s 194H and in these circumstances, the assessee was not liable to deduct tax at source u/s 194H from payment of bank guarantee commission to the bank. Moreover, bank guarantee commission also partakes the character of interest u/s 2(28A) of the Act and as such, exemption provided u/s 194A(3)(iii) is available to the assessee qua such payment. So, we are of the considered view that the ld. CIT (A) has erred in not following the decision rendered by the coordinate Bench of the Tribunal in Kotak Securities Ltd. (supra) on the ground that the decision of Kotak Securities Ltd. (supra) is not applicable having been pronounced before the issue of Notification No.56/2012 dated 31.12.2012 because ordinarily any

provision of the statute has to be read having prospective effect and not having retrospective effect unless it is specifically provided. So, when there is no principal – agent relationship between the bank and the assessee, deduction of tax at source on commission or brokerage is not required for. Consequently, addition made by the AO and confirmed by the ld.CIT (A) is ordered to be deleted, thus the appeal filed by the assessee is hereby allowed. [Para 7]

5. Shri Govind Kumar Khemkavs ACIT, ITA.No.2963/Del./2019, Date of order: 16.09.2019

SECTION 56(2)(vii)(b) - FAMILY SETTLEMENT WHICH COULD NOT BE TREATED AS 'TRANSFER' - SINCE TRANSFER WAS CONDUCTED THROUGH FAMILY SETTLEMENT DEED BETWEEN THE BROTHERS OF THE ASSESSEE WHO ARE THE RELATIVES OF THE ASSESSEE- IMMOVABLE PROPERTY AS EXPLAINED ABOVE IS RECEIVED FROM THE RELATIVE WHO IS BROTHER OR SISTER OF THE INDIVIDUAL, SUCH PROVISIONS UNDER SECTION 56(2)(VII)(B) WOULD NOT APPLY.

9.3. In this case, since there was a Family Settlement between the assessee and three brothers and they have acted upon Family Settlement Deed and distributed various properties among themselves and necessary rights and title are transferred in favour of each brother would show that parties have entered into genuine transaction. As per the Family Settlement Deed, it was agreed that property in question with superstructure shall be taken by the assessee and that as per the Settlement Deed, the assessee has to contribute a sum of Rs.20 crores from his own resources/ capital or through the borrowed funds as part of the Family Settlement to balance the settlement between brothers. Therefore, no commercial transaction have been entered into between the assessee and his brothers and there is no colourable device. We may also note that admittedly settlement was executed for distribution of different properties between the assessee and his brothers which was having no commercial purpose. It may also be noted here that authorities below rejected the claim of assessee because the transaction was not executed out of natural love and affection. The word 'natural love and affection' have not been specified in Section 56(2)(vii)(b) of the I.T. Act. Therefore, this term has no consequence to the above provisions in which the A.O. made the addition. Since the amount of Rs.12 crores have been taken by assessee as loan from the Bank through the respective agreements referred to above, therefore, it could not be treated as undisclosed income of the assessee. The assessee has explained source of Rs.12 crores through the loan taken from the Bank. Therefore, provisions of Section 69B of the I.T. Act, would not apply to the case of the assessee. Further, it was not the case of the A.O. that provisions of Section 69B are attracted in the case of assessee. Therefore, the Ld. CIT(A), could not have bring to tax the aforesaid amount through new source of income. Considering the above discussion in the light of above decisions, it is clear that provisions of Section 56(2)(vii)(b) and Section 69B of the I.T. Act are not applicable in

this case. In this view of the matter, there was no justification for the authorities below to make the addition of Rs.28.65 crores against the assessee under the above provisions of Law. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. Ground Nos. 3 to 5 of the appeal of Assessee are allowed.

6. ITO vs Rajat Finvest (ITAs No.4731, 4732 & 4733/DEL/2016) (Date of Order: 12.09.2019)

S. 68 – PENNY STOCKS - THE ALLEGATION THAT ASSESSEE HAS GENERATED SOME BOGUS LONG TERM CAPITAL GAIN IN COLLUSION WITH M/S REI AGRO LTD, HOWEVER, NO SUCH EVIDENCE OR MATERIAL HAS BEEN BROUGHT ON RECORD NOR THERE IS ANY REPORT WITH REGARD TO NATURE OF COLLUSION IMPLICATING THE ASSESSEE THAT IT WAS INVOLVED IN ANY OF SUCH COLLUSION WITH M/S. REI AGRO LTD. FOR GENERATING BOGUS LONG TERM CAPITAL GAIN - WHEN ALL THE TRANSACTIONS HAVE BEEN UNDERTAKEN THROUGH ACCREDITED BROKERAGE FIRM THROUGH NATIONAL STOCK EXCHANGE AND ALL THE DETAILS OF CONTRACT NOTES, INVOICES, COPIES OF ACCOUNT OF BROKERAGE FIRM HAVE BEEN SUBMITTED; AND NONE OF THE PURCHASES HAVE BEEN DONE OFF-LINE AS ALL HAVE BEEN DONE THROUGH STOCK EXCHANGE IN THE NORMAL COURSE OF BUSINESS AT A QUOTED PRICE ON THE DATE – THERE IS NO POSSIBILITY OF HAVING ACCOMMODATION ENTRY IN THE GARB OF LONG TERM CAPITAL GAIN.

17. In one of the statement of ShriManoj Singh Jadoun which has been recorded by the investigation wing, as incorporated in the assessment order, it is seen that a specific question was asked vide question no.20 as to why and what was the reason for purchase of share of REI Agro Ltd. on a very higher price and secondly on suffering of losses by a group of companies. Here again, no adverse inference from such a statement can be drawn, as it has been categorically said that thaes Gujarat based companies have made investment in REI Group with an intention to earn profit and same was purely a business decision and on the basis of study of share market and sometime advice is taken from Director of M/s. Tripthi Merchants Pvt. Ltd. regarding investment to be made in the shares and these companies have also dealt and made investment in shares purely out of decision to earn profit. Now to draw adverse inference that the dealing in shares were due to some kind of collusion for generating loss in the books of Gujarat Companies is too farfetched. We are unable to appreciate as to how the Assessing Officer is trying to draw a possible link of any kind of accommodation entry of bogus Long Term Capital Gain on purchase and sale of shares of REI Agro Ltd. As noted by the Ld. CIT (A) and also borne out from the record is that, all the transactions have been undertaken through accredited brokerage firm through national stock exchange and all the details of contract notes, invoices, copies of account of brokerage firm have been submitted; and none of the purchases have been done off-line as all have been done

through stock exchange in the normal course of business at a quoted price on the date. Thus, there is no infirmity in the order and finding of the Ld. CIT (A) and same is confirmed and addition made by the Assessing Officer is thus directed to be deleted.

7. Ram Niwas Gupta vs ACIT (ITA No. 3787/Del/2019)(AY 2015-16)(11.09.2019)

SECTION 68 –ADDITION MADE BY AO ON ACCOUNT OF FOUR SUNDRY CREDITORS ON THE GROUND THAT THE ACCOUNTS SUBMITTED BY THEM ARE NOT TALLYING WITH THE BOOKS OF ACCOUNT OF THE ASSESSEE AND THERE WERE CERTAIN DIFFERENCES IN THE BALANCES BETWEEN THE ACCOUNTS OF THE PARTIES AND THE ASSESSEE - CONFIRMATION WAS NOT RECEIVED FROM THE PURCHASE CREDITORS IN RESPONSE TO NOTICE U/S 133(6), WHICH WERESUBSEQUENTLY PROVIDED TO CIT (A) AS ADDITIONALEVIDENCE WHICH WERE ACCEPTED BY HIM- HELD, NOWHERE THE AO HAS REJECTED THE TRADING RESULT OR THE BOOKS OF ACCOUNT- IF PURCHASES ARE BOGUS,THAT MEANS ASSESSEE MUST HAVE MADE INVESTMENT OUTSIDE THE BOOKS OF ACCOUNT AND IN THAT SITUATION, SECTION 68 CANNOT BE INVOKED

One very important fact that here in this case is that, during the course of appellate proceedings and in remand proceedings, inquiry was conducted by the Assessing Officer directly from these parties, who have not only confirmed the transaction but have also filed their copy of ledger accounts along with details and bank statements. After verifying these details, the Assessing Officer has categorically accepted in his remand report that the confirmations have been received from the parties and they are matching with the credit balance of the assessee and both the accounts are tallying. Despite such a categorical finding, Ld. CIT (A) has still proceeded to confirm the addition on a very lame reason. On one hand, Ld. CIT (A) accepts that the confirmation of credit balances of the creditor have been received directly from the inquiry made by the Assessing Officer and ledger account as appearing in the books of account of the creditors matches with the account of the assessee and also matches with the confirmation account submitted by the creditor, but still proceeds to draw adverse inference. The premise of the addition made by the Assessing Officer was that certain balances do not match with the accounts of the creditors. Now when the difference has been reconciled and balance has been explained and accounts got tallied, then where is the question of drawing any adverse inference. Even if in the first instance the balance was nottallying with the accounts of the creditors, then also, how the authenticity and credibility of third party accounts is given more precedence to the assessee's account when assessee has shown purchase bill wise details and corresponding sale and stock, matching with the bank accounts and entire transaction is through cheque. If the books accounts alongwith purchase and sales have not been doubted then account of sundry creditors cannot be doubted when there is running account and all the purchase have been settledeither in this year or in subsequent year.(Para 15)

8. Hitachi High Technologies Singapore Pte Ltd. v.The Dy. C.I.T. (ITA No.2683-2688/D/156) (Dated 17/09/2019)

SECTION 143(3) READ WITH 254 IN THE SET ASIDE PROCEEDINGS, PURSUANT TO ORDER OF ITAT IN ASSESSEE'S APPEAL, AN ASSESSEE CANNOT BE WORSE OFF THAN THE INCOME ASSESSEED IN THE ORIGINAL ASSESSMENT.

Held,We understand that the powers of the Tribunal in disposing of anappeal are set in very wide terms, but, at the same time, we alsounderstand that in the absence of a cross appeal or cross objection bythe department, the Tribunal cannot enhance an assessment of anappeal by the assessee. Accordingly, we are of the considered viewthat the Tribunal is not competent to give a finding which is adverse tothe assessee and make the latter's position worse than before. It isnot open to the Tribunal to give a finding adverse to the assessee,which does not arise from any question raised in the appeal nor is itopen to it to raise any ground which would work adversely to theappellant and pass an order which makes his position worse than it wasunder the order appealed against. … The Hon'ble Supreme Court in the case of State of Kerala Vs.Vijaya Stores 116 ITR 15 has held that in the case of assessee's appealand in the absence of cross objection or cross appeal from theRevenue, an assessee cannot be worse off as a result of his havingcarried the matter in appeal before the Tribunal…..The ld. DR has objected to the aforementioned decisions reliedupon by the ld. counsel for the assessee. The ld. DR pointed out thatin the case of Vijaya Stores [supra] the judgment was given under theKerala General Sales Tax Act which was premised on the principleespoused in the CPC that the party which has not filed an appeal in alitigation must be deemed to be satisfied with the decision of thelower authority, and he will not be entitled to seek relief against therival party….The ld. DR pointed out that when the assessee approached theTribunal for the first time, the Assessing Officer could not haveappealed against his own order and, therefore, the ratio laid down inthe case of Vijaya Stores [supra] should not be applied. In support ofhis contention, the ld. DR strongly relied upon the decision of theHon'ble Bombay High Court in the case of Ahmadabad Electricity Co.Ltd 199 ITR 351 and pointed out that the full bench decision of theHon'ble Bombay High Court has considered the judgment of the Hon'bleSupreme Court in the case of Hukumchand Mills Ltd 63 ITR 232. It isthe say of the ld. DR that there is no enhancement of income andincome has increased merely on following the directions of theTribunal…. We are of the considered view that firstly, the decision in thecase of Ahmadabad Electricity Co. Ltd [supra] does not apply to thecase in hand because that case involves the admission of additionalground. Secondly, it is incorrect to say that the Assessing Officer couldnot have appealed against his own order. Even if it was not open forthe Revenue to prefer appeal before the ITAT against the order of theDRP, the ratio laid down by the Hon'ble Supreme Court still apply onthe facts of the case in hand…Though we agree with the ld. DR that there was no enhancementof income by

the DRP, but, at the same time, the assessed income ofthe year under consideration, having been exhibited elsewhere, clearlyputs the assessee in a worse off situation that it was before filing theappeal. If the assessee had not filed any appeal against the totalassessed income of all the assessment years under consideration, theincome would have been Rs. 7.21 crores only. However, after filingappeal and after readjudication, the total assessed income of all theyears under consideration is Rs. 123.16 crores. In all fairness, theentire proceedings should now be restricted to adjudication upon theassessed income of all the years under consideration to the extent ofRs. 7.21 crores.**[Para26, 27, 29, 30, 31, 32]**

9. Shri. Gautam Bhalla v. ACIT (ITA No. 1471 & 1472/Del/2019) (03.09.2019)(ITAT, Del)

SECTION 147 – REASSESSMENT IN RESPECT OF ISSUE WHICH IS SUBJECT MATTER OF APPEAL – WHERE THE QUASHING OF ASSESSMENT U/S 153A IS CHALLENGED BY REVENUE BEFORE ITAT – THE INITIATION OF REASSESSMENT PROCEEDINGS IN RESPECT OF SAME ISSUE IS VOID AS PER 3RD PROVISO TO SECTION 147 – NOTICE U/S 148 QUASHED

Held, In background of the facts of the case reproduced by us above, we find that that the addition of Rs.4,95,00,000/- which is in dispute before us has been deleted by the Ld. First Appellate Authority in his order dated 07/03/2017 relying on the decision of the Hon'ble High Court in the case of Kabul Chawala (supra) and the Revenue challenged that order of the Ld. CIT(A) before the Tribunal. Thus, it is an admitted fact that very sum in respect of which the Assessing Officer reopened the proceeding, were the subject matter of the appeal before the Tribunal. We find that the third proviso mandates that no proceeding can be initiated to tax such income, which is subject matter of the appeal. [Para 4.4]

In view of the clear provisions, we are of the considered opinion that Assessing Officer was not justified in reopening the assessment for assessing the income which was subject matter of the appeal before the Tribunal. Accordingly, we hold the reassessment in the instant case as void-ab-initio thus, the reassessment proceeding are accordingly quashed. [Para 4.5]

10. Shri Saurabh Saini v. ITO (ITA No.6003/Del./2018)(05.09.2019)(ITAT, Del)(SMC)

SECTION 147 – INCORRECT FACTS IN THE REASONS – INFORMATION REGARDING CASH DEPOSIT IN THE BANK ACCOUNT PER SE IS NOT

SUFFICIENT TO FORM OPINION REGARDING ESCAPEMENT OF INCOME - REASONS BEING FACTUALLY INCORRECT AS HELD TO BE BASED ON NON APPLICATION – NOTICE U/S 148 QUASHED.

Held, Considering the facts of the case in the light of Order of the Tribunal in the case of Shri Abrar Ahmad Qasimi, Delhi vs. ITO, Ward-46(5), New Delhi (supra), I am of the view that the issue is covered in favour of the assessee by the aforesaid decision of the Tribunal. The assessing officer in the reasons recorded incorrect facts that assessee made cash deposit of Rs.9 lakhs, despite assessing officer has accepted that assessee made cash deposit of Rs.7,50,000/- only. The assessing officer while recording the reasons has not applied mind to the material on record. Further, source of purchase of shares have been accepted by the assessing officer, which was also found factually incorrect. Further the deposit in the bank account per se cannot be income of the assessee. It is mere suspicion of the assessing officer based on incorrect facts that income chargeable to tax has escaped assessment. Following the reasons for the decision in the case of Shri Abrar Ahmad Qasimi, Delhi vs. ITO, Ward-46(5), New Delhi (supra), I set aside the orders of the authorities below and quash the reopening of the assessment in the matter. [Para 7]

11. Magan Bihari Lal vs. DCIT (ITA No. 4558/D/2019) (Dated: 16.09.2019)

S. 148 - ASSESSMENT HAS BEEN REOPENED SOLELY ON THE BASIS OF INFORMATION RECEIVED FROM PR. DIT(INV.), AHMEDABAD - HON'BLE HIGH COURT OF BOMBAY IN THE CASE OF CORONATION AGRO INDUSTRIES LTD. VS DCIT [390 ITR 464](BOM.) FOLLOWED.

7. I have given a thoughtful consideration to the orders of the authorities below qua the issue. The reasons for reopening of assessment have been exhibited elsewhere. It can be seen from the reasons that the assessment has been reopened solely on the basis of information received from Pr. DIT(Inv.), Ahmedabad. It seems that the AO has been carried away by the report of the investigation wing without making any independent verification to justify the reopening. The Hon'ble High Court of Bombay in the case of Coronation Agro Industries Ltd. vs DCIT [390 ITR 464](Bom.) had an occasion to consider an identical issue with identical set of facts has held that notice u/s 148 of the Act is without jurisdiction.

12. M/s Barnala Steel Industries Ltd. vs ACIT (ITA Nos.3201/Del/201 And ITA No. 6783/DEL/2013)(AY 2006-07)(05.09.2019)

SECTION 153 A – WHETHER A CONSOLIDATED NOTICE CAN BE ISSUED FOR DIFFERENT ASSESSMENT YEARS FOR ASSESSMENT U/S 153A- HELD NO- SEPARATE NOTICE REQUIRED FOR EACH ASSESSMENT YEAR

Held, We have heard both the parties and perused all the relevant material on record. From the perusal of the notice issued u/s 153A r.w.s. 153C/143(2) of the Act, it is a clear cut case of overlooking the procedure and provisions set out in the Income Tax Act, 1961. Under these sections, the Assessing Officer cannot issue consolidated notices for different Assessment Years. It is statutory requirement for each assessment year to issue statutory notice separately. The Assessing Officer failed to comply with the statute under which the prescribed procedure is mandatory for the Revenue to be followed. The reliance of the Ld. AR in case of Y Narayana Chetty vs. ITO (35 ITR 388)(SC) is relevant in present case, therefore, the notice itself is bad in law and void ab-initio. Thus, the assessment order does not survive.

13. M/s. K.S. Chawla and Sons HUF and ors v. JCIT (ITA No. 5614 /D/19) (28.08.19) (ITAT, Delhi)

SECTION 271D – PENALTY FOR CONTRAVENTION OF SECTION 269SS – WHERE ASSESSING OFFICER MADE ADDITION IN THE HANDS OF ASSESSEE ON THE GROUND THAT COMPANY IN WHICH ASSESSEE IS DIRECTOR HAS INCURRED PERSONAL EXPENSES ON BEHALF OF ASSESSEE – THE SAME AMOUNT CANNOT BE PRESUMED AS LOAN FOR THE PURPOSE OF IMPOSING PENALTY U/S 271D – PENALTY CANCELLED.

Held, The Assessing Officer, at first, treated the said transaction as income of the assessee which is evident from the appellate proceedings in respect of the quantum additions. This also clearly shows that the Assessing Officer was not sure whether Spaze Towers has given any cash loan to the promoters/directors. Since Spaze Towers incurred expenditure towards the personal needs of the directors/promoters, the same was acknowledged as liability by the directors/promoters but the same cannot be construed as loan or deposit within the framework of section 269SS of the Act. [Para 29]

Considering the facts in totality, in our considered opinion the transaction is devoid of any lender – borrower relationship. In other words, the amount which is the subject matter of consideration in the present cases is out of tax paid from income/disclosed sources of Spaze Towers. [Para 30]

In the present cases, there is no dispute about the sources of money wherefrom the expenditure had been incurred which has already suffered taxation in the hands of the company Spaze Towers and the very same money cannot be considered as representing undisclosed income of the appellants for which false explanation is being given as loan to attract the provisions of section 269SS r.w.s 271D of the Act. [Para 33]

14. V3S Infratech Ltd vs DCIT (ITA Nos. 6514 & 6515/Del/2016) (Dated: 13.09.2019)

S. 292B - PENALTY ORDER PASSED IN THE NAME OF NON-EXISTENT ENTITY IS A SUBSTANTIVE ILLEGALITY AND NOT A PROCEDURAL VIOLATION OF THE NATURE ADVERTED TO IN SECTION 292B - ASSESSEE PARTICIPATION IN THE PROCEEDINGS CANNOT OPERATE AS AN ESTOPPEL AGAINST LAW.

7. Accordingly, following the aforesaid ratio and principle laid down by the Hon'ble Supreme Court, we hold that impugned penalty order passed by the AO in the name of "M/s. Padampat Gopal Krishna Ramapanti Organization Ltd. (Merged with Gohoi Buildwell Ltd. Now known as V3S Infratech Ltd.)" is a substantive illegality and not a procedural violation of the nature adverted to in Section 292B; and hence order passed on amalgamated entity which ceases to exist is a nullity. Such an illegality cannot be cured on the ground that assessee participation in the proceedings as there cannot operate as an estoppel against law. Accordingly, impugned penalty order is quashed.

15. M/s. Basics IT Solutions Pvt. Ltd. vs ACIT (ITA No.5764/Del/2019) (Dated : 13.09.2019)

SECTION 28 - BUSINESS INCOME V. HOUSE PROPERTY - ISSUE TO BE DECIDED WAS THAT WHETHER THE INCOME FROM RENTING OUT OF PROPERTY IS TO BE ASSESSED UNDER THE HEAD 'INCOME FROM BUSINESS' OR INCOME FROM HOUSE PROPERTY' - WHEN THE MEMORANDUM OF ASSOCIATION OF THE COMPANY IN THE MAIN OBJECT READ WITH OTHER OBJECTS CLEARLY SHOWS THAT THE BUSINESS OF THE ASSESSEE WAS TO LET OUT AND LEASE THE PROPERTY IN SUCH CASE RENTAL INCOME TO BE TREATED AS BUSINESS INCOME - HON'BLE SUPREME COURT IN THE CASE OF CHENNAI PROPERTIES AND INVESTMENTS LTD. 373 ITR 673 FOLLOWED.

16. Vital Construction Pvt. Ltd Vs. DCIT (ITA No. 4536/Del/2016) (Dated: 13.09.2019)

SECTION 201(1A) - THE SHORT ISSUE OF THE CASE IS THAT THE ASSESSEE HAS DEPOSITED THE TDS FOR THE MONTH OF SEPTEMBER 2010 ON 07.10.2010 - THAT SINCE THE AMOUNT HAS REFLECTED ON DEPARTMENTAL ONLINE TAX ACCOUNTING SYSTEM (OLTAS) ON 08.10.2010 - THE ASSESSEE IS LIABLE TO LEVY OF INTEREST- HELD THAT THE LAG TIME OF THE OLTAS OF THE DEPARTMENT CANNOT BE ATTRIBUTED AS THE FAULT OF THE ASSESSE- APPEAL OF ASSESSE ALLOWED.

17. Nokia Corporation v. ADIT (ITA No. 1006/D/10)(02.09.2019)(ITAT, Delhi)

PERMANENT ESTABLISHMENT – THE ASSESSING OFFICER HELD THAT ASSESSEE COMPANY HAD PE IN INDIA AS IT WAS GETTING R&D WORK DONE FROM NOKIA INDIA – ON THE BASIS OF DECISION OF DELHI HIGH COURT IN THE CASE OF ADOBE SYSTEM INC 69 TAXAMNN.COM 229 IT WAS HELD THAT AN AGREEMENT FOR R&D SERVICES WOULD NOT RESULT IN ESTABLISHMENT OF PE IN INDIA – IT WAS HELD THAT ASSESSEE DID NOT HAVE PE IN INDIA

Held, The background of the issue is that Nokia India, the Indian subsidiary of the assessee has carried out R&D activities for the assessee during the AYs 2004-05 to 2006-07 in terms of the "Research and Development Subcontracting Agreement". AO in the assessment orders for these years has held that Nokia India constitutes 'fixed places PE' and 'Dependent Agent PE' of the assessee in respect of these R&D activities. [Para 21]

At this juncture, we find that the facts of Adobe Systems Incorporated are similar to the assessee and the issue in question before us. The ld. CIT (A) held that there is fixed PE in terms of Article 5 of DTAA. The premises have been used for carrying R&D activities of the assessee and the assessee has paid for all the costs and facilities. The assessee had control and authority to decide the R&D projects undertaken by Nokia India. The premises have been in control of the assessee. These issues have been clearly dealt by the Hon'ble High Court in their order. Further, the Hon'ble High Court has also taken queue from the order of E-Funds IT Solutions regarding the fixed place PE. [Para 25]

Since, the matter is squarely applicable to the instance case, we hereby hold that fixed place PE do not exist as the right to use test or the disposal test is not satisfied. The appeal of the assessee on this ground is allowed. [Para 27]