# ITAT Case reporter for the month of July 2019

**1. Graduate school of business administration society vs. JCIT (ITA No. 5466/Del./2015)(03.06.2019) (ITAT, Del)**

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**ITO vs Graduate school of business administration society(ITA no. 3666/Del/2015)(03.06.2019) (ITAT, Del)**

**Section 11(1)(a)-Whether Depreciation u/s 32 of IT Act is permissible where Income is exempt u/s 11- Depreciation permissible- Section 11(6) brought in Finance Act, 2014- Not Applicable on AY 2010-11-**.

Held, After considering the rival submissions, we are of the view that issue is covered in favour of the assessee by the Judgment of the Hon'ble Supreme Court in the case of CIT vs. Rajasthan and Gujarat Charitable Foundation (supra), in which it was held that "the assessee is entitled to depreciation under section 32 of the I.T. Act on assets whose cost has been allowed as application to charitable purposes under section 11(1)(a) of the I.T. Act". We may also note that the Amendment in Section 11(6) of the I.T. Act has been brought by Finance Act, 2014, which becomes effective from A.Y. 2015-2016. Therefore, it is not applicable to assessment year under appeal i.e., 2010-2011. In view of the above, we set aside the Orders of the authorities below and delete the addition on account of depreciation. These grounds of appeals of the assessee are allowed.(para 7)

**Section 11(4A)- Whether Surplus on account of Hostel receipt will be considered as business Income under 11(4A)-Hostel facility incidental to charitable purpose of education and hence no business income**

Held, that since assessee exist for educational purpose only and hostel facility provided by the assessee society is incidental to the main objectives of the assessee society for education only, therefore, the authorities below were not justified in considering it to be activity of business in nature. Thus, the surplus out of hostel facility shall have to be considered asfor educational purpose only which have to be applied for educational purposes only. Therefore, the addition made by the authorities below cannot be sustained. (para 10)

**2. M/s. Corbus (India) Pvt. Ltd. vs. DCIT (ITA No.5723 /Del./2016) (Dated: 17.07.2019)**

**S.14A - THAT NO INVESTMENT HAS BEEN MADE DURING THE YEAR UNDER INVESTMENT AND ONLY DIVIDEND HAS BEEN EARNED ON THE REINVESTMENT OF DIVIDEND EARNED IN THE EARLIER YEARS AND THERE WAS NO INTERVENTION OF HUMAN LABOUR AND MIND, SECTION 14A IS NOT ATTRACTED**

9. No doubt, at the time of making initial investment, assessee must have incurred expenses but when it is undisputed fact that no investment has been made during the year under investment and only dividend has been earned on the reinvestment of dividend earned in the earlier years and there was no intervention of human labour and mind, section 14A is not attracted. So, we are of the considered view that AO without bringing on record any evidence as to how and under what circumstances the expenses have been incurred in the given circumstances applied Rule 8D mechanically which is not sustainable in the eyes of law. The ld. CIT (A) has also erred in confirming the addition made u/s 14A of the Act. So, disallowance made u/s 14A is ordered to be deleted. Consequently, ground no.2 is determined in favour of the assessee.

**3. Mahashakti Engineering Co. v. DCIT (ITA No.1940/Del/2016)(22.07.19)(ITAT, Del)**

**SECTION 28 – ADDITION ON ACCOUNT OF UNDERVALUATION OF CLOSING STOCK – THE ASSESSING OFFICER ENHANCED THE VALUE OF CLOSING STOCK WITHOUT DISPUTING THE CORRECTNESS OF TRADING RESULT – THE BOOKS OF ACCOUNT WERE NOT REJECTED AND THE VALUE OF CLOSING STOCK STOOD ACCEPTED BY VAT AND EXCISE AUTHORITIES – THE GROSS PROFIT DECLARED DURING THE YEAR WAS ALSO BETTER THAN PRECEEDING 4 YEARS – THE ADDITION WAS HELD TO BE BAD IN LAW.**

Held, We find some force in the above arguments of the ld. counsel for the assessee. Admittedly, no defect has been pointed out by the Assessing Officer in the books of account except doubting the valuation of closing stock. We find the VAT authorities have scrutinized the records and have accepted the purchase, sales and closing stock without any mistake. The rate of net profit declared by the assessee at 2.43% for the impugned assessment year is higher than the rate of net profit declared in the immediately preceding four years. Further, the ld. counsel for the assessee during the course of hearing had demonstrated before us that the goods were received through challans earlier whereas the invoices were raised later and were entered in the books of account. Since the Assessing Officer in the instant case has not made any adjustment to the opening stock of the subsequent year and for assessment year 2012-13, no addition has been made in the order passed u/s 143(3) and the books of account were never rejected, therefore, we are of the considered opinion that the impugned addition should not have been made on account of valuation of closing stock. We further find merit in

the argument of the ld. counsel that when the profit of the subsequent year is higher than the profit of the current year, there was no point on the part of the assessee to suppress its valuation of closing stock which would have become opening stock of the subsequent year.

The Hon'ble Gujarat High Court in the case of CIT vs. Shakti Industries (supra) has held that where the books of accounts were not rejected, addition of amounts shown in the audited accounts is not sustainable. The Hon'ble Madras High Court in the case of CIT vs. Smt. Sakuntala Devi Khetan (supra) has held that unless and until the competent authority under Sales Tax Act differs or varies with closing stock of assessee, return accepted by said authority is binding on income-tax authorities and the Assessing Officer, in such a case, has no power to scrutinize return submitted by the assessee. [Para 11.1 & 11.2]

We also find merit in the argument of the ld. counsel that considering the size of business of the assessee it is not possible to receive 20% of the material in five days as against 80% of material in the whole year. In view of the above discussion, we are of the considered opinion that the ld.CIT(A) is not justified in sustaining the addition of Rs.69,01,453/- on account of undervaluation of closing stock. [Para 12]

**4. Ashok Kumar Bansal v. ACIT (ITA No. 6618/D/18)(08.07.19)(ITAT, Delhi)**

**SECTION 32 – DEPRECIATION – ONCE THE ASSET ENTERS BLOCK OF ASSET THERE IS NO REQUIREMENT TO SHOW INDIVIDUAL USAGE OF ASSET – CLAIM OF DEPRECIATION WAS ALLOWED.**

Held, after hearing both the sides, I find the Assessing Officer disallowed the depreciation on vehicle and telephone instruments amounting to Rs.2,58,369/- on the ground that the assessee has not used these assets during the year. The ld.CIT(A), thus, sustained the addition. It is the submission of the ld. counsel for the assessee that when the assets have already been entered into the block of assets, therefore, use of individual asset is not necessary and, therefore, the Assessing Officer or the CIT(A) are not justified in disallowing the depreciation. I find merit in the above argument of the ld. counsel for the assessee. It has been held by the Hon'ble Delhi High Court in *CIT vs. Bharat Aluminium Co. Ltd. [2010] 187 taxman 111 (Delhi)* as relied on by the ld. counsel for the assessee that though as per section 32(1), in order to be entitled to claim depreciation, asset is to be owned by assessee and it is also to be used for purpose of business or profession, but expression 'used for the purpose of business', when applied to block of assets, would mean use of block of assets and not any specific building, machinery, plant or furniture in said block of assets as individual assets lose their identity after becoming inseparable part of block of assets. The various other decisions relied on by the ld. counsel for the assessee and placed in the paper book also support his case. Since there is no dispute to the fact of the instance case that the vehicle and telephone instruments are already into the block of assets, therefore, the expression 'used for the

purpose of business' would mean use of block of assets and not any specific asset of the block during the year as individual assets lose their identity after becoming inseparable part of block of assets. I, therefore, set aside the order of the CIT(A) and direct the Assessing Officer to delete the disallowance of depreciation made. **[Para 13]**

**5. AT & T Global Network Services (India) Pvt. Ltd. vs. ACIT (ITA No. 7001/D/2018) (Dated : 18.07.2019).**

**S. 37(1) - NOTIONAL FOREIGN EXCHANGE LOSS CLAIMED IN RETURN OF INCOME AS A TAX DEDUCTIBLE EXPENSE - THE LOSS IS ON ACCOUNT OF EXCHANGE FLUCTUATION IN DEBTORS, CREDITORS, AND OTHER ITEMS WHICH ARE REVENUE IN NATURE - THEREFORE SUCH LOSS IS ALLOWABLE EXPENDITURE U/S 37(1) OF THE ACT.**

In the present year, the assessee company has given break up of foreign exchange loss of Rs. 1.29 crores which is claimed in return of income as a tax deductible expense. The loss is on account of exchange fluctuation in debtors, creditors, and other items which are revenue in nature. Therefore, such loss is allowable expenditure u/s 37(1) of the Act. But the Assessing officer has not taken into account the submissions and the evidences provided by the Assessee during the assessment proceedings. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Needless to say, the assesseebe given opportunity of hearing. Ground No. 8 is allowed.

6. **Biotrobnik Medical Devices India Pvt. Ltd. vs. DCIT (ITA No. 185/D/2018) (Dated: 18.07.2019)**

**S. 37(1) - MERELY BECAUSE THE EXPENDITURE ARE ON THE HIGHER SIDE THIS YEAR COMPARED TO THE EARLIER YEARS - WHEN THERE IS NO DEFECT POINTED OUT IN THE DETAILS SUBMITTED BY THE ASSESSEE AND FURTHER THE EXPLANATION GIVEN BY THE ASSESSEE WAS NOT FOUND TO BE FALSE - THERE IS NO PROVISION IN THE INCOME TAX ACT WHICH AUTHORIZES THE LOWER AUTHORITIES TO DISALLOW THE EXPENDITURE BY APPLYING A FIXED PERCENTAGE WITHOUT FINDING THAT ANY OF THE EXPENDITURE HAS BEEN INCURRED FOR NON-BUSINESS PURPOSES.**

22. We have carefully considered the rival contention and perused the orders of the lower authorities. The learned assessing officer has merely compared the gross profit and net profit ratios of earlier years with the current year and found that there is a sharp decrease in the profitability of the assessee company, which is one of the reason for the same, is the increase in expenditure. However, the learned assessing officer has not pointed out single instance of the expenditure, which is not incurred for the purposes of the business. As per the letter dated 24/08/2015, the assessee has produced

the books of accounts, sales, and purchase bills, vouchers of all the expenditure incurred by the assessee before the lower authorities. It also produced a chart showing the turnover and gross profit and net profit of the assessee. With respect to the each of the expenditure, the assessee has given a reason why there is an increase in the nature of the expenditure and the amount of such expenditure were also mentioned. The rent increase expenditure has been explained by the assessee because of opening of the several branches. He further explained before the assessing officer that there is an increase in the legal and professional fees paid to the lawyers for ongoing litigation with the ex distributors in High Court and in lower courts. It was further stated that there is an increase in the number of the employees by more than 30% and therefore there is an increase in the expenditure. The assessee also substantiated all sale and purchase vouchers with the relevant evidences. For each of the expenditure the assessee has also given in explanation with the tabulation with respect to the earlier years. In view of this, it is apparent that assessee has tried to justify the increase in the expenditure, which resulted into the lower gross profit and net profit in the hands of the assessee compared to the earlier years. Merely because the expenditure are on the higher side this year compared to the earlier years, when there is no defect pointed out in the details submitted by the assessee and further the explanation given by the assessee was not found to be false, there is no provision in the income tax act which authorizes the lower authorities to disallow the expenditure by applying a fixed percentage without finding that any of the expenditure has been incurred for non-business purposes. The learned CIT – A has also held that the genuineness of the expenditure has to be established. However, he did not find any instances that any of the expenditure incurred by the assessee is not genuine. Merely making an assertion that tremendous increase under almost each had a fixed expenditure leads to establish non-genuineness only. Such a sweeping finding of the learned CIT – A is not sustainable in view of absence of any finding by the lower authorities that assessee has incurred nongenuine expenditure of any instance. Further the explanation given by the assessee has not at all been examined by the learned CIT – A to give such a categorical finding about the genuineness of these expenditure. In view of this we reverse the finding of the lower authorities and direct the learned assessing officer to delete the disallowance of INR 5 5305206/– out of various direct and indirect expenditure incurred by the assessee. In view of this ground number 2 (4) of the appeal is allowed.

**7. DCIT v. Ammonia Supply Co. (ITA No. 5088/D/15)(22.07.19)(ITAT, Del)**

**SECTION 37(1) – KEYMAN INSURANCE POLICY FOR PARTNER – INSURANCE POLICY FOR PARTNER WAS TO SAFEGUARD THE INTEREST OF FIRM WHICH IN TURN IS BENEFICIAL TO THE INTEREST OF THE EMPLOYEES – THE EXPENDITURE WAS HELD TO BE ALLOWABLE.**

Held, So, following the decision of B.N. Exports (supra) the ld. CIT (A) has rightly arrived at the decision that keyman insurance policy obtained for the partners was just to safeguard the partnership firm so as to avoid loss to the business due to untimely death of the partner which would further cause the loss to the employees of the firm in general by way of loss of employment etc.. So, we find no illegality or perversity in the deletion of addition of Rs.7,73,347/- under keyman insurance policy, hence ground no.2 is determined against the Revenue. [Para 13]

**8. M/s. Neemrana Hotels P. Ltd. v. DCIT (ITA No. 98/D/17)(10.07.19)(ITAT, Del)**

**SECTION 40(a)(ia)-DISALLOWANCE FOR NON-DEDUCTION OF TDS – NO DISALLOWANCE U/S 40(A)(IA) WARRANTED WHERE ASSESSEE HAS MADE SHORT DEDUCTION OF TDS – DISALLOWANCE DELETED**

Held, the Hon'ble Tribunal decided the issue relying upon its earlier decision wherein similar disallowance was deleted on the basis of decision of Hon'ble Calcutta High Court in the case of CIT v. SK Tekriwal. **[Refer Para 6]**

**9. Neokraft Global Pvt. Ltd. vs. DCIT (ITA No. 6343/D/2016) (Dated: 04.07.2019)**

**S. 40(a)(ia) - AO OPINED THAT SINCE THE TDS HAS BEEN DEPOSITED AFTER THE DUE DATE, THEREFORE, THE TESTING CHARGES OF RS. 1,64,120/- IS NOT ALLOWABLE U/S 40(A)(IA) OF THE ACT AND FURTHER THAT AMENDMENT TO S. 40(A)(IA) IS W.E.F. 01.04.2015 AND THEREFORE, NOT APPLICABLE TO THE SUBJECT ASSESSMENT YEAR – HELD NO**.

7. This issue is no more res integra as the same has been settled in favour of the assessee and against the revenue by the decision of the Hon'ble Supreme Court in the case of M/s Calcutta Export Company in Civil Appeal Nos 4339-4340 of 2018 with other civil appeals.

**10. DCIT vs. Flora & Fauna Housing & Developers Pvt. Ltd (ITA No. 4191/D/2012) (Dated : 22.07.2019)**

**S. 43(5) clause (c) & (d) - TRADING IN DERIVATIVES THROUGH A RECOGNISED STOCK EXCHANGE W.E.F. 01.04.2006 SHALL NOT BE DEEMED TO BE SPECULATIVE TRADING - NATIONAL STOCK EXCHANGE WAS RECOGNISED AS STOCK EXCHANGE BY VIRTUE OF THE CBDT CIRCULAR NO.2/2006 DATED 25.01.2006.**

14. Aforesaid decisions have been duly discussed by the ld. CIT (A) in impugned order which are applicable to the facts and circumstances of the case. The only difference between the order passed by the AO and the impugned order passed by the ld. CIT (A) is, AO has ignored the amendment vide which clause (d) has been inserted in section 43 (5) of the Act by the Finance Act, 2005 w.e.f. 01.04.2006 and relied upon the decisions rendered prior to 01.04.2006 and which are applicable to the transactions done by the assessee after 01.04.2006.

15. So, we are of the considered view that when undisputedly assessee has entered into transaction of derivatives after 01.04.2006 in a recognised stock exchange as per Circular No.2/2006 dated 25.01.2006, loss arising in F&O transaction has to be treated as business loss and not loss in speculative business.

16. The ld. CIT (A) has rightly directed the AO to treat the derivative trading loss as business loss as per provisions contained u/s 43(5) clause (c) & (d) and the same has to be allowed to be set off against the other business income received by the assessee from the trading of Alcoholic Liquor. So, we are of the considered view that the contention raised by the ld. DR that section 73 Explanation 1 is a deeming provision applicable to the facts and circumstances of the case is not tenable as it does not talk of F&O transactions.

**11. DCIT v. Delhi Transport Corporation (ITA No.6658/D/15) (Dated 16/07/2019)**

**SECTION 43 READ WITH SECTION 32 – LIQUIDATED DAMAGES RECEIVED FOR DELAY IN DELIVERY BY THE VENDOR, WHETHER LIABLE TO BE REDUCED FROM COST OF ASSETS – LIQUIDATED DAMAGES RECEIVED IS TO COMPENSATE LOSS OF SOURCE OF INCOME AND NOT TO MEET THE COST OF ASSETS –SUCH LIQUIDATED DAMAGES ARE NOT TO BE REDUCED FROM THE COST OF ASSETS – DECISION OF GUJARAT HIGH COURT IN THE CASE OF DIGVIJAY CEMENT CO. LTD. VS CIT: 138 ITR 45 FOLLOWED.**

Held, In respect of second ground, the assessee for purchase of busesplaced order worth Rs.654,62,81,543/- with the condition that for delayin delivery, the supplier would be liable for penalty/liquidated damagesand on that account the assessee received a sum of Rs.120,11,78,279/-from M/s Ashok Leyland ltd. According to the assessee, this amount hasto be reduced from the purchase of the business to calculate thedepreciation. On this premise, ld. AO held that the value of the bus wasonly Rs.534,51,03,270/- and the assessee is entitled for depreciation onthis amount only and, therefore, disallowed the balance of depreciationto the tune of Rs.18,01,76,741/- and added it to the income of theassessee.Ld. CIT(A) considered the case of the assessee in the light of thedecision of the Hon'ble Gujarat High Court in the light of the decision ofthe Hon'ble Gujarat High Court in the case of Digvijay Cement Co. Ltd.vs CIT (1982) 138 ITR 45 (Guj) wherein it was held by the Hon'bleHigh Court that having regard to

the nature of the business of theassessee in the light of the terms of contract in respect of the provision for compensation for a delay in delivery, the sum received throughcompensation was not made with the intention of reducing the cost ofmachinery but to compensate the loss of profits which the assesseewould suffer on account of delay in delivery of the machinery.Admittedly, the assessee in the case in hand is the transportcorporation earning income by plying the buses. In case of delay indelivery the assessee would suffer loss on profits and that is the reasonthere was a stipulation in the agreement for purchase of buses to theeffect that delay in delivery shall result in levy of penalty/liquidateddamages. On this account, assessee received a sum ofRs.120,11,78,279/- and having regard to the business of the assessee, wehave no doubt in our mind that this compensation received is not toreduce the cost of the buses but to compensate the loss of income/profitsthe assessee would have earned had the buses been supplied in time.We, therefore, are of the considered opinion that the decision of theGujarat High Court in the case of Digvijay Cement Co. Ltd. (supra) isapplicable to the facts of this case on all fours and the ld. CIT(A) hadrightly deleted the addition by following the binding precedent. We,therefore, decline to interfere with the impugned order.In the result, appeal of the revenue is dismissed.**[Paras 5, 6, 7, 8]**

**12. DCIT v. Manisha Juneja Sawhney (ITA No. 3444/D/17)(10.07.19)(ITAT, Del)**

**SECTION 54 – THE ASSESSING OFFICER DENIED CLAIM OF EXEMPTION ON THE GROUND THAT UNDER COLLABORATION AGREEMENT THERE IS NO SALE OF RESIDENTIAL HOUSE – THE ASSESSEE HAVING LOST ITS RIGHT OVER PART OF THE PROPERTY TANTAMOUNT TO SALE OF RESIDENTIAL HOUSE – THE CLAIM OF EXEMPTION U/S 54 IS ALLOWABLE.**

Held, From the records it can be seen that it is an undisputed fact that the subject property was being used as residential house by the assessee from the period of its purchase on 09.08.2007 to the date of handing over its vacant possession to the builder for **re**-development and construction vide collaboration agreement dated 18.04.2012. From the Clause of collaboration agreement, it can be seen that what was transferred / handed over to the builder was the existing structure of the residential property. The builder demolished and redeveloped the old residential property into new residential building consisting of ground floor, 1st floor, second and third floor. Thus, the assessee lost all rights upon the entire existing structure which comprises residential house. The reliance upon the decision of Hon'ble Karnataka High Court in case of Ved Prakash Rakhra (supra) as well as Gita Duggal (supra) and CIT vs. Smt. K.G. Rukminiamma (supra) are apt in present case. By virtue of collaboration agreement, the assessee permanently lost the share beyond the 1st floor in the old residential property i.e. from 2nd floor onwards and in fact received the share up to the 1st floor in the newly constructed residential building. So the assessee permanently dis-possessed of 2nd floor onwards in old and new residential property. Thus, the assessee has rightly claimed

exemption u/s 54. As per the provisions of Section 54, the assessee purchased residential property. The said property was held by the assessee for more than three years from the date of acquisition and it is a case of long term capital gain on transfer of residential property. The said residential property was subject matter of Collaboration Agreement dated 18.04.2012 under which the possession was transferred to the developer and the rights of the purchased property were lost. The consideration received by the assessee under Collaboration Agreement was Rs. 5.50 cores and also the cost of construction of the area of building coming to the share of the assessee which was comprising of area in basement, ground floor and first floor and the said amount was to be treated as sale consideration on account of transfer of the property by the assessee to the builder under Collaboration Agreement. The gain arising on the said transfer was utilized for purchase of residential property at Greater Kailash-III, New Delhi as per the sale registration dated 09.07.2013. Thus the new residential property was acquired within two years from the date of transfer of the said property i.e. date of collaboration on 18.04.2012. Thus, there is no need to interfere with the findings of the CIT(A). The details have been given by the assessee during the Assessment Proceedings. Thus, the Assessing Officer was not correct in disallowing the claim u/s 54 of the Income Tax Act, 1961. **[Para 7]**

**13. Manish Traders vs. ITO (ITA No. 4481/D/2016) (Dated 22.07.2019)**

**S. 55(2)- ASSESSEE'S LEASEHOLD RIGHT FOR A PERIOD OF 90 YEARS IN QUESTION IS A CAPITAL ASSET - NOT TENANCY RIGHTS TO WHICH PROVISIONS CONTAINED U/S 50C ARE APPLICABLE - ASSESSEE IS ENTITLED FOR BENEFIT OF FAIR MARKET VALUE AS ON 01.04.1981 IN ORDER TO COMPUTE THE CAPITAL GAIN**.

17. When it is established that the property in question was acquired by the assessee firm on 02.07.1977 as per registered lease deed for the period of 90 years i.e. prior to 01.04.1981 assessee is entitled for benefit of valuing the property in question on the basis of fair market value as on 01.04.1981 and the cost of acquisition is not to be taken into account for computing the capital gain particularly when the assessee has opted for use the fair market value. So, the second question framed is also answered in affirmative in favour of the assessee.

18. In view of what has been discussed above, we are of the considered view that in view of the findings returned in the preceding paras, assessee's leasehold right for a period of 90 years in question is a capital asset and not tenancy rights to which provisions contained u/s 50C are applicable and assessee is entitled for benefit of fair market value as on 01.04.1981 in order to compute the capital gain. So, the findings returned by the ld. CIT (A) are hereby reversed and the AO is directed to compute the capital gain accordingly. Grounds No.2, 3 & 4 are determined in favour of the assessee.

14. **Sadhvi Securities P. Ltd vs. ACIT (ITA No.1047/Del/2019) (Dated : 16.07.2019)**

**S. 56(2)(viib) - THAT AS PER CLAUSE (b) AND CLAUSE (j) OF RULE 11UA FOR COMPUTING FAIR MARKET VALUE OF THE SHARES THE VALUE OF THE ASSETS AND LIABILITIES AS STATED IN THE AUDITED BALANCE SHEET IMMEDIATELY PRIOR TO THE RECEIPT OF CONSIDERATION SHOULD BE ADOPTED.**

12. We do not find any merit in the argument of the ld. counsel for the assessee. A perusal of the Rule 11U(b) as reproduced by CIT(A) at para 5.6 of his order makes it clear that the balance sheet means the balance sheet as drawn up on the balance sheet date which has been audited by the auditor of the company and where the balance sheet on the valuation date has not been drawn up the balance sheet drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the AGM of the shareholders of the company. We find in the instant case, on the date of receipt of the consideration the balance sheet of the assessee company was not drawn up as the same was drawn up only on 31st July, 2014 which is evident from the audited balance sheet filed. Clause (b) and clause (j) of Rule 11UA makes it clear that for computing fair market value of the shares the value of the assets and liabilities as stated in the audited balance sheet immediately prior to the receipt of consideration should be adopted. If, on the date of receipt of the consideration, the balance sheet was not drawn up, then, the balance sheet drawn up as on a date immediately preceding the valuation date should be adopted i.e., the balance sheet of the immediately preceding year should be adopted. We find, in the instant case, on the valuation date i.e., on 31.03.2004, the balance sheet was not drawn up by the auditor as audited financials were drawn up only on 31st July, 2014 and, therefore, we concur with the observation of the ld.CIT(A) that the valuation of assets and liabilities in the balance sheet of the immediately preceding year i.e., 31.03.2013 should have been adopted. Since the valuation done by the assessee was not in accordance with the Rule framed for valuation of unquoted shares i.e., the assessee has not taken the value of assets before introduction of share capital received through fresh allotment and since the Assessing Officer has correctly determined the valuation of the unquoted equity shares which has been upheld by the CIT(A), therefore, we do not find any infirmity in the order of the CIT(A). Accordingly, the same is upheld and the grounds raised by the assesseeare dismissed.

**15. DCIT v. Smt. Mamta Bhandari (ITA No. 3681/D/16)(10.07.19)(ITAT,Del)**

**SECTION 56(2)(vii)(c) – RECEIPT OF BONUS SHARES – THE PROVISIONS OF SECTION 56(2)(vii)(c) ARE NOT APPLICABLE TO BONUS SHARES AS THERE IS NEITHER ANY INCREASE OR DECREASE IN WEALTH OF THE SHARE HOLDER ON ISSUANCE OF BONUS SHARES – ADDITION DELETED.**

Held, We have considered the rival submissions and do not find any justification to interfere with the Orders of the Ld. CIT(A) in deleting the addition. The Ld. CIT(A) deleted the addition following the relevant provisions of Law in the light of Order of ITAT, Mumbai Bench in the case of Sudhir Menon (HUF) vs. ACIT (supra), in which it was held that provisions of Section 56(2)(vii)(c) of the I.T. Act, would not apply to bonus shares. The ITAT, Delhi Bench in the case of Meenu Satija, New Delhi vs. Pr. CIT (Central), Gurgaon (supra), on identical facts quashed the proceedings under section 263 of the I.T. Act. Therefore, ratio of the decision of the Tribunal in the case of Meenu Satija, New Delhi vs. Pr. CIT (Central), Gurgaon (supra), squarely apply to the facts and circumstances of the case. Whether this order have been passed under section 263 or merit would not make any difference. The principle of law have been clearly decided in favour of the assessee on the identical facts. The Tribunal has also relied upon the decision of Mumbai Bench in the case of Sudhir Menon (HUF) vs. ACIT (supra), which is relied upon by the Ld. CIT(A) as well. No infirmity have been pointed out in the Order of Ld. CIT(A). The issue is, therefore, covered by the Order of ITAT, Delhi Bench in the case of Meenu Satija, New Delhi vs. Pr. CIT (Central), Gurgaon (supra). The Departmental Appeal has no merit and the same is accordingly dismissed. **[Para 5]**

**16. Sheetal Infoservices Pvt. Ltd. v. ITO (ITA No. 4604/Del/2019)(22.07.19)(ITAT, Del)**

**SECTION 68 – UNSECURED LOAN – THE LENDING COMPANIES HAVE POSITIVE ITR AND HAVE BEEN ASSESSED U/S 143(3) – THE AO HAS NOT BROUGHT ON RECORD SINGLE EVIDENCE TO SHOW THAT LOAN WAS BOGUS – THE LENDING COMPANIES HAVE RESPONDED TO NOTICE U/S 133(6) - NON COMPLIANCE OF SUMMON U/S 131 CANNOT BE ATTRIBUTABLE TO THE ASSESSEE - THE ADDITION WAS ORDERED TO BE DELETED AFTER CONSIDERING SC DECISION IN THE CASE OF NRA IRON AND STEELS P. LTD..**

Held, These allegations of the Revenue have been examined against the evidences on record. The assessee has filed the assessment order u/s 143(3) of the Act in the case of M/s Kumar Buildtech Pvt. Ltd. passed by the DCIT-14(2) for the assessment year 2012-13 and by ITO, Ward-14(4) for the assessment year 2013-14. For the assessment year 2012-13, the return income was Rs.58,49,990/- and the assessee has paid taxes of Rs.17,98,408/-. For the assessment year 2013-14, the return income was Rs.1,74,720/-. These two year have been scrutinized u/s 143(3) of the Act. Keeping in view, the tax payment made by the lender company of Rs.17,98,408/- it cannot be said prima facie that the lender company is a paper entity or a conduit to pass the amounts. The observation of the Revenue authorities that the lending company is a typical entry operator cannot be accepted as no entry operator would pay tax to the tune of Rs.17

lakhs plus. For the assessment year 2015-16, the lender company has total income of Rs.19,28,270/- and tax paid of Rs.7,06,459/-. The long term advance given by the lender company was to the tune of Rs.27.24 crores which is quite substantial when compared to the amount given to the assessee. Further, we also find that the against the query of the Assessing Officer regarding the source to M/s Kumar Buildtech Pvt. Ltd., the assessee has filed relevant bank statements showing the receipt of the monies from M/s Rishikesh Hire Purchase and Leasing Company Pvt. Ltd. (RHPLC). The fact that the entity RHPLC is a registered NBFC was also filed before the Assessing Officer and the certificate of registration by the RBI has been duly filed which was not considered by the Revenue. Further, the NBFC has filed return with a total income of Rs.141,35,773/- and taxes paid of Rs.47,42,280/-. The total Long Term loans given by the NBFC is Rs.56.69 crores. Hence, the observation of the Revenue that the loans have been received from paper entities or a typical entry operator cannot be accepted as the source of the source has also been proved by the assessee before the Revenue authorities. [Para 10]

Regarding the allegation that there was no response to the summons issued u/s 131 of the Act, Inspector's report, non-production of Directors of the lending company, we find that the lending company has filed the details asked for u/s 133(6) of the Act vide letter dated 22.11.2017 before the Assessing Officer which was mentioned in the assessment order (page no. 2 last para) itself. Hence, the allegation that there was no response from the lending company to the notices cannot be ccepted. Further, the Assessing Officer observation that the assessee could not produce the Directors of the company for recording of their statement onwards and prove the genuineness of the transaction and that the lending company is not just paper company (page 10/AO) cannot be accepted as the compliance/ non-compliance to notice u/s 131 of the Act cannot be attributable to the assessee. The field enquiries of the Inspector have reported in negative even about the existence of the assessee company at the given address which has been attending before the Revenue authorities on regular basis. [Para 11]

From the facts on record, we find that the assessee has discharged the requirements to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the lending company. The lending company had taxable income of Rs.19.28 lakhs. The source of the source which is M/s Rishikesh Hire Purchase and Leasing Company Pvt. Ltd. had a taxable income of Rs.1.41 crores, thus, proving the financial capability of lending entity has also been examined. Both this company has been scrutinized u/s 143(3) of the Act for the assessment years 2012- 13, 2013-14 and in the case of RHPLC for the assessment year 2014-15. There is no evidence collected by the Revenue even to prima facie prove that the loan was bogus. Hence, it cannot be treated as a fictitious loan. Reliance is also placed on the judgment of Hon'ble High Court of Gujarat in the case of Apex Therm Packaging Pvt. Ltd. 222 Taxmann 125 wherein it was held that Section 68 of the Income-tax Act, 1961 - Cash credit (Unsecured loan) - Whether when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and

when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, Assessing Officer was not justified in making addition - Held, yes [Para 6].Further, in the case of Vaibhav Cotton Pvt. Ltd. 217 Taxmann 140, the Hon'ble Court of Madhya Pradesh held that where the Tribunal on its independent analysis of the matter had reached the factual conclusion about genuineness of unsecured loan transaction and in this process Tribunal has taken note of fact that detailed account of concerned party were filed by the assessed and entries in account were through account payee cheques, source of deposit in the bank was not in dispute and identity of the parties was established and also creditworthiness of the creditors was established, it was right to hold that the loans taken cannot be assessed u/s 68 of the Act. Hence, keeping in view entire gamut of facts before us, and on going through the judgments of the Hon'ble Courts filed by both the parties, we hereby delete the addition made on account of loan received by the assessee. [Para 12]

**17. M/s. Tara Mercantile P. ltd. v. DCIT (ITA No. 1572/D/2017)(12/07/19)(ITAT, Del)**

**SECTION 68 AND SECTION 56(2)(viia) AND 56(2)(viib) – SHARES ISSUED AT PREMIUM – THE ASSESSING OFFICER CALCULATED NAV OF THE SHARES WHICH WAS LESS THAN ISSUE PRICE AND MADE ADDITION IN RESPECT OF EXCESS PREMIUM U/S 68 R.W.S 56(2)(viia) & 56(2)(viib) – THE PROVISIONS OF SECTION 56(2)(viib) ARE APPLICABLE FROM AY 2013-14 ONWARDS AND SAME ARE NOT APPLICABLE TO AY 2011-12 - THE ADDITION U/S 68 IS NOT SUSTAINABLE PARTICULARLY WHEN THE AO HAS ACCEPTED PART SHARE PREMIUM.**

Held, We have heard both the parties and perused the records especially the Written Submissions and the case laws cited therein submitted by both the parties. We note that the main issue involved in this appeal is relating to addition of Rs. 1,21,17,750/- made u/s. 68 of the Act and during this year assessee raised share application money of Rs. 1,25,00,000/- which is evident from page 7-9 of the Paper Book from four shares holders and the shares were allotted on 31.3.2012 which is evident from annual return at page no. 90-94 of the Paper Book. The aforesaid allotment was made by issuing shares at Rs. 10/- per share and share premium at Rs. 990/- per share. The AO had made the addition of Rs. 1,21,17,750/- and has accepted the share capital and part share premium and while arriving to the said conclusion he held that the net asset value as per equity share of assessee was Rs. 30.58 per share and, therefore, balance sum was brought as income u/s. 68 of the Act. We further note that AO had invoked provision to section 68 and section 56(2)(viia) and (viib) of the Act. But none of the provisions are applicable to the instant assessment year i.e. 2011-12 and infact they are applicable only for the assessment year 2013-14. We further find that on exactly identical situation, the ITAT,

Mumbai in the case of ACIT vs. Goldmohur Design & Apparel Park Ltd. Reported in 96 taxmann.com 375 has deleted the similar addition. [Para 5]

**18. SMG Estates (P) Ltd. v. ACIT (ITA No. 1537/D/19)(12.07.19)(ITAT, Del)**

**SECTION 68 – UNSECURED LOANS – THE ASSESSEE HAS FILED ALL THE RELEVANT DOCUMENTS TO PROVE IDENTITY AND GENUINENESS OF THE PARTIES FROM WHOM UNSECURED LOANS WERE RECEIVED – THE ONUS U/S 68 STOOD DISCHARGED BY THE ASSESSEE – THE ASSESSING OFFICER MADE THE ADDITION WITHOUT MAKING ANY ENQUIRIES - THE ADDITION WAS ORDERED TO BE DELETED.**

**SECTION 115BBE – THE SECTION IS APPLICABLE W.E.F. 01.04.2017 AND SAME HAS NOT RETROSPECTIVE APPLICATION.**

Held, We find that the case laws relied by the Revenue grossly pertains to the situations wherein the share application given by various parties was not proved conclusively as to their identity, genuineness and creditworthiness of the transactions. The facts of the instant case are different and are distinguishable. The assessee has discharged the onus of proving the creditors and the Revenue did not make required enquiries. The balance sheet and the business affairs clearly prove the financial capability of the lenders. Reliance is also placed on the judgment of Hon'ble High Court of Gujarat in the case of Apex Therm Packaging Pvt. Ltd. 222 Taxmann 125 wherein it was held that Section 68 of the Incometax Act, 1961 - Cash credit (Unsecured loan) - Whether when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, Assessing Officer was not justified in making addition - Held, yes [Para 6].Further, in the case of Vaibhav Cotton Pvt. Ltd. 217 Taxmann 140, the Hon'ble Court of Madhya Pradesh held that where the Tribunal on its independent analysis of the matter had reached the factual conclusion about genuineness of unsecured loan transaction and in this process Tribunal has taken note of fact that detailed account of concerned party were filed by the assessee and entries in account were through account payee cheques, source of deposit in the bank was not in dispute and identity of the parties was established and also creditworthiness of the creditors was established, it was right to hold that the loans taken cannot be assessed u/s 68 of the Act. Hence, keeping in view entire gamut of facts before us, and on going through the judgments of the Hon'ble Courts filed by both the parties, we hereby delete the addition made on account of loans received by the assessee. [Para 9]

Regarding the ground no. 2 wherein it was pleaded that the Revenue as invoked the provisions of Section 115BBE of the Act, we find that the section has been amended

w.e.f. 01.04.2017 which is prospective and hence not applicable to the year in question before us. Since, the additions have been deleted the applicability of the section to the case would be superfluous. [Para 10]

**19. ITO vs M/S Nirja publishers & printers Pvt. Ltd. (ITA no 1843/Del/2016)(08.07.2019) (ITAT, Del)**

**Deduction u/s 80IC- Deduction u/s 80IC(3) for any undertaking in a notified area- Once deduction under 80IC allowed in initial assessment year then deduction cannot be disallowed in subsequent years on grounds of non-fulfillment of conditions u/s 80IC**

Held, The claim of the assessee in respect of carrying out publishing activity from the eligible undertaking was found genuine on the basis of relevant evidences placed on record and not refuted by the AO in the remand report and thus, assessee is eligible to deduction u/s 80IC of the Act. Once the deduction u/s 80IC of the Act is allowed in the 'initial assessment year' i.e. in the AY 2010-11 after due verification of the prescribed conditions and there is no change in the facts, then the deduction cannot be disallowed in subsequent years on the ground of non-fulfillment of conditions laid down in section 80-IC of the Act. We further note that AO has not disallowed the deduction u/s. 80IC on the ground of violation of prescribed conditions but on the basis of finding that the assessee did not actually carry out any operation at the premise of the eligible undertaking. AS the issue has been independently examined on merit and the assessee's claim of deduction u/s. 80IC in respect of publishing activity carried out from the premise of the eligible undertaking is found to be genuine, based on facts substantiated by relevant evidences, which have not been refuted by the AO in the remand report, hence, the assessee's claim for deduction u/s 80IC was rightly held as fully allowable and accordingly the assessee get full relief on this ground, which does not need any interference on our part, therefore, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Revenue.(Para 6)

**Addition u/s 40(a)(ia) on account of trade discount allowed by assesse to be treated as commission-No TDS deducted u/s 194h- Benefit given by assesse in nature of trade discount and not commission- Assesse not required to deduct TDS u/s 194h- No disallowance**

Held, the benefit given by the assessee to M/s S. Chand Co. Ltd. was in the nature of 'trade discount' and not 'commission',therefore, the assessee was not required to deduct income tax at source u/s. 194H of the Act, thus, no disallowance can be made u/s. 40(a)(ia) of the Act. Therefore, the action of making disallowance u/s. 40(a)(ia) was not called for, as the assessee is not required to deduct TDS u/s. 194H on such discount, which was not in lieu of any services for effecting sales, but was a trade discount. In

view of above, Ld. CIT(A) has rightly allowed this ground in favour of the assessee, which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Revenue. (Para 6.1)

**20. ITO vs. Shri Vijay Gupta, (ITA No. 4080/Del/2018), (Dated: 18.07.2019)**

**80IC - THAT WHETHER THE ASSESSEE IS ELIGIBLE TO CLAIM FURTHER DEDUCTION @ 100% U/S 80IC OF THE ACT BY MAKING SUBSTANTIAL EXPANSION EVEN AFTER THE ASSESSEE HAS ALREADY AVAILED 100% DEDUCTION U/S 80IC OF THE ACT FOR THE INITIAL FIVE YEARS AFTER THE COMMENCEMENT OF MANUFACTURING OR PRODUCTION OF THE INDUSTRIAL UNDERTAKING – HELD YES - HON'BLE SUPREME COURT IN THE CASE OF PR. CIT VS M/S. AARHAM SOFTRONICS VIDE ORDER DATED 20.02.2019 IN CIVIL APPEAL NO.1784 OF 2019 FOLLOWED.**

4.1. Ld. Counsel for the assessee submitted that the issue in dispute is further covered in favour of the assessee by order of Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics vide order dated 20.02.2019 in Civil Appeal No.1784 of 2019. In the rejoinder, the Ld. DR contended that law laid down by Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics (supra) does not lay down correct law, and placed reliance on the order of Hon'ble Supreme Court in the case of CIT vs Classic Binding Industries (supra).

4.1.1. We have heard both sides. We have perused material on record carefully. We find that the order of Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics (supra) dated 20.02.2109 has been passed after the order passed by Hon'ble Supreme Court in the case of CIT vs Classic Binding Industries (supra). We further find that the order of Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics (supra) is passed by a Larger Bench of three Hon'ble judges of the Hon'ble Supreme Court whereas the order of Hon'ble Supreme Court in the case of CIT vs Classic Binding Industries (supra) was passed by two Hon'ble judges of Hon'ble Supreme Court. We further find that the Hon'ble Supreme Court in aforesaid order in the case of Pr. CIT vs M/s. AarhamSoftronics (supra) has already considered the decision of the CIT vs Classic Binding Industries (supra) and has over-ruled the decision in the case of CIT vs Classic Binding Industries (supra) in the following word:

22. "It would be pertinent to point out that in Para 20 of the judgment in Classic Binding Industries, this Court observed that if deduction @ 100% for the entire period of 10 years, it would be doing violence to the language of sub-section (6) of Section 80-IC. However, this observation came without noticing the definition of 'initial assessment year' contained in the same very provision.

23. Having examined the matter in the aforesaid perspective, judgment in the case of Mahabir Industries v. Principal Commissioner of Income Tax would, in fact, help the assessee. The fine distinction pointed out in Classic Binding Industries elopes thereby. To recapitulate, in Mahabir Industries, it was held that if an assessee get 100% exemption under Section 80-IB of the Act for five years and thereafter carries out the substantial expansion because of which said assessee becomes entitled to exemption under the new provision i.e. Section 80-IC of the Act, the assessee would be entitled to deduction @ 100% even after five years. This ruling was predicated on the ground that there can be two initial assessment years, one for the purpose of Section 80-IB and other for the purposes of Section 80-IC of the Act. Once we find that there can be two initial assessment years, even as per the definition thereof in Section 80-IC itself, the legal position comes at par with the one which was discussed in Mahabir Industries.

24.The aforesaid discussion leads us to the following conclusions:

(a) Judgment dated 20th August, 2018 in Classic Binding Industries case omitted to take note of the definition 'initial assessment year' contained in Section 80-IC itself and instead based its conclusion on the definition contained in Section 80-IB, which does not apply in these cases. The definitions of 'initial assessment year' in the two sections, viz. Sections 80-IB and 80-IC are materially different. The definition of 'initial assessment year' under Section 80-IC has made all the difference. Therefore, we are of the opinion that the aforesaid judgment does not lay down the correct law.
(b) An undertaking or an enterprise which had set up a new unit between 7th January, 2003 and 1st April, 2012 in State of Himachal Pradesh of the nature mentioned in clause (ii) of subsection (2) of Section 80-IC, would be entitled to deduction at the rate of 100% of the profits and gains for five assessment years commencing with the 'initial assessment year'. For the next five years, the admissible deduction would be 25% (or 30% where the assessee is a company) of the profits and gains.
(c) However, in case substantial expansion is carried out as defined in clause (ix) of sub-section (8) of Section 80-IC by such an undertaking or enterprise, within the aforesaid period of 10 years, the said previous year in which the substantial expansion is undertaken would become 'initial assessment year', and from that assessment year the assessee shall been entitled to 100% deductions of the profits and gains.
(d) Such deduction, however, would be for a total period of 10 years, as provided in sub-section (6). For example, if the expansion is carried out immediately, on the completion of first five years, the assessee would be entitled to 100% deduction again for the next five years. On the other hand, if substantial expansion is undertaken, say, in 8th year by an assessee such an assessee would be entitled to 100% deduction for the first five years, deduction @ 25% of the profits and gains for the next two years and @ 100% again from 8$^{th}$year as this year becomes 'initial assessment year' once again. However, this 100% deduction would be for remaining three years, i.e. 8th, 9th and 10th assessment years."

4.2. In view of the foregoing, we find that the order of Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics (supra) being passed by a Larger Bench of the Hon'ble Supreme Court has stronger force as a precedent as compared to decision of Hon'ble Supreme Court in the case of CIT vs Classic Binding Industries (supra). Moreover, Hon'ble Supreme Court has, in order in the case Pr. CIT vs M/s. AarhamSoftronics (supra) already considered order in the case of CIT vs Classic Binding Industries (supra) and has over-ruled the order in the case of CIT vs Classic Binding Industriessupra). Therefore, respectfully following the order of Hon'ble Supreme Court in the case of Pr. CIT vs M/s. AarhamSoftronics (supra), we dismiss the grounds of appeal; and decide the issues in dispute in the present appeal before us in favour of the assessee.

**21. Transcend India Pvt Ltd ITA No. 2122/Del/2015 order dated 03rd July 2019**

**Section 92C - Transfer Pricing - ALP - Medical Transcription Services –Exclusion of Comparable (M/s Accentia Technologies Ltd.) with extra ordinary events –Held extraordinary events of merger & acquisitions leading to higher profits and non-availability of segmental data, merits exclusion of such entity for purposes of comparison**

**Held,** it is seen that the comparable in question has completed acquisition of a company, namely, Oak Technologies, USA and increased the customer base from US. The company Oak Technologies, was also found to be offering medical coding and billing services having global network across US, India and Philippines. Further, the company Accentia Technologies Ltd. has consolidated the operations of a company, namely, Denmat Inc. which was involved in medical transcription technology. Regarding the financials, the comparable in question had total turnover of Rs.236 crores out of which the medical transcription amounts to Rs.143 crores, billing & collection Rs.56.74 crores and coding Rs.32.15 crores whereas the turnover of the assessee company is 28 crores only. Regarding the business model, while the assessee company is in HMT model, the comparable in question depends mostly on outsourcing of business processes. The audit report clearly mentions that no segmental data has been prepared and company has only one segment of activity which is HRCM segment. Hence, keeping in view the factors viz. dissimilar business model, non-comparable turnover, extraordinary events of merger and acquisitions leading to higher profits and non-availability of the segmental data, this Tribunal holds that CIT(A) has rightly excluded the company "Accentia Technologies Ltd." from the final list of comparables. (Para 8)

**22. GL Litmus Events Pvt. Ltd.v. ACIT (ITA No.2502/D/15) (Dated 01/07/2019)**

**SECTION 145 – TENABILITY OF DECLARING TAXABLE INCOME ON CASH BASIS VIS-À-VIS BOOKS OF ACCOUNTS MAINTAINED ON MERCANTILE BASIS FOR THE PURPOSE OF COMPANIES ACT – DECLARATION OF TAXABLE INCOME ON CASH BASIS IS PERMISSIBLE UNDER SECTION 145(1), PROVIDED SUCH SYSTEM IS REGULARLY FOLLOWED BY THE ASSESSEE – FOLLOWING CASH SYSTEM IN THE SUCCEEDING YEAR VINDICATES THE REQUIREMENT OF CONSISTENCY UNDER SECTION 145(1). ACCRUAL SYSTEM OF ACCOUNTING FOLLOWED IN THE BOOKS OF ACCOUNTS FOR COMPANIES ACT DOES NOT MILITATE CASH SYSTEM OF ACCOUNTING FOR TAXABLE INCOME UNDER SECTION 145 OF THE ACT.**

Held, We have carefully considered the rival contention and perused theorders of the lower authorities. The only dispute with respect to theabove ground of appeal is whether the assessee has maintained itsbooks of accounts on cash basis of accounting from which thecorrect profit can be deduced or not. It is also not in dispute thatthe assessee has followed the cash basis of accounting for thepurpose of income tax return and maintained its books of accountson accrual basis to comply with the provisions of section 209 of TheCompanies Act 1956. According to the provisions of section 145 ofthe income tax act, to compute the income chargeable under thehead profits and gains of business or profession or income fromother sources, assessee can either follow cash or Mercantile systemof accounting, which is regularly employed by him. This is subjectto the provisions of subsection (2) of section 145 of the income taxact. Further, provisions of section 145 (3) also provides that wherethe assessing officer is not satisfied about the correctness orcompleteness of accounts of the assessee or where the method ofaccounting provided in subsection (1) has not been regularlyfollowed by the assessee , has not been computed in accordancewith this standards notified under subsection (2), the assessingofficer has to make an assessment in the manner provided undersection 144 of the income tax act. On plain reading of the abovesection, it is clear that section 145 provides for computation ofincome u/s 28-29 based on the books of account and method ofaccounting regularly followed by the assessee. However, theassessing officer, if he is not satisfied with the correctness orcompleteness of the books, he may reject them and estimate theincome to the best of his judgment in accordance with the provisionsof section 144 of the income tax act. It is also if it is the option ofthe assessee to follow cash method of accounting or mercantilemethod of accounting and income tax authority had no option orjurisdiction to either direct assessee to maintain its accounts in aparticular manner or adopt different method. Therefore, assesseehas an option or liberty to adopt any recognized method ofaccounting for its business and the income should be computed inaccordance with such regularly maintained accounting system.However, it has a rider that where the assessing officer is notsatisfied about the correctness or completeness of the accounts ofthe assessee, or where the method of accounting provided undersection 145 (1) has not been regularly followed by the assessee,then the assessing officer may make an assessment in the mannerprovided under section 144 of the income tax act. We will deal withthe each of the proposition

with respect to the above issue raised byboth the parties…. The first question that arises is whether the assessee is free tochoose proper method of accounting or not. The provisions ofsection 145 (1) of the act clearly shows that profits and gains of thebusiness of profession be computed in accordance with either cashor mercantile system of accounting regularly employed by theassessee. Therefore, on reading of the above provision it is amplyclear that the choice of method of accounting lies with the assessee.The honourable Supreme Court in case of United commercial Bankvs. Commissioner of income tax (1999) 240 ITR 355 (SC) at page no366 has held that…. Therefore accordingly, principle emerges that the method ofaccounting adopted by the taxpayer consistently in regularly cannotbe discarded by the revenue on the view that he should haveadopted a different method of keeping accounts but the concept ofreal income is certainly applicable in judging whether there has beenan income or not and such principle must be applied with care andwithin their recognized limits. It is further held that the income hasreally accrued or arisen to the assessee must be judged in the lightof the reality of the situation and if the method of accountingemployed by the assessee, real income of the assessee cannot beproperly deduced there from, the income tax officer may determinethe income as per his wisdom. Further, the honourable SupremeCourt in case of CIT vs. Macmillan & Co (1958) 33 ITR 182 has heldthat the choice of the method of accounting lies with the assessee.The only precondition is that assessee must show that he hasfollowed the method regularly for his own purposes. The second issue that arises is whether the assessee is following thismethod regularly or not. Admittedly, this is the 1st year of theassessee. In this year, the assessee has prepared books of accountfor tax purposes following cash method of accounting. Before us,the assessee has submitted the annual accounts prepared for theassessment year in the impugned appeal for assessment year 2011 –12, which are placed at page number 50 – 51 and 91 – 110 of thepaper book. The assessee subsequently has also prepared theaccounts on cash basis for assessment year 2012 – 13, 2013 – 14and 2014 – 15, which are also submitted in the paper bookspreferred before us. This fact has not at all been disputed by thelearned assessing officer, DRP or the learned departmentalrepresentative before us. Therefore, from the above it is clear thatthe appellant company employing the cash basis of accounting,right from the commencement of its commercial operation andthereafter is preparing the same on cash basis. Such issue arosebefore the honourable mother High Court in Sundram and Co Ltdvs. Commissioner Of Income Tax, Madras (1959) 36 ITR 162 (Mad)wherein it has been held 8 page number 167 – 168 as under Further, in 149 ITR 738 and at page number 79 in CIT vs. Sikkahonourable Delhi High Court also held so. In view of this, we do nothave any hesitation in holding that the assessee is maintaining itsbooks of accounts on cash method of accounting and the samemethod of accounting is regularly employed by the assessee duringthis year as well as in subsequent years. Therefore it can be saidthat assessee is following this method of accounting regularly hence it is "regularly employed" by the assessee. … It is also apparent that assessee is a company and therefore theprovisions of the Companies act apply to it. Thus, to comply withthe provisions of section 209 of the companies act 1956, where it isprovided that the

assessee company must maintain its books ofaccounts to be presented before the shareholders as well as beforethe Ministry of corporate affairs, it should comply the accrualmethod of accounting. Such mandate of the company law isdefinitely required to be complied by the assessee and therefore itmaintains its books of account for such purposes employing accrualmethod of accounting. The honourable Supreme Court in 240 ITR355 in case of United commercial Bank vs. Commissioner of incometax ( supra) at page number 365 has held that for determining thereal income, the entries in the balance-sheet required to bemaintained in the statutory form, may not be decisive or conclusive.At page number, 366 of the decision the honourable Supreme Courtfurther held that preparation of the balance sheet in accordancewith the statutory provisions would not disentitle the assessee insubmitting the income tax return on the real taxable income inaccordance with the method of accounting adopted by the assesseeconsistently and regularly. That cannot be discarded by thedepartmental authorities on the ground that the assessee was maintaining the balance sheet in the statutory form based on thecost of investments. Thus it is apparent that the cash systemfollowed by the assessee cannot be discarded merely for the reason thatassessee is also maintaining its books of account on accrualbasis to comply with the provisions of section 209 of the companiesact 1956.However, the cardinal principle that emerges is that the method ofaccounting employed by the assessee must be that with which real profits can be determined. It is also a principle that assessee isregular method of accounting cannot be disturbed merely becausethe AO thinks that another method is preferable. Therefore, theimportant question that needs to be answered is whether themethod of accounting followed by the assessee of cash method, fromwhich the real profits can be determined, or not.The learned assessing officer has held that owing to the jointventurenature of the business of the appellant, the appellantcompany followed the cash system of accounting for income taxpurposes, which is not proper. According to him as the consortiumconsisting of GL litmus events private limited was found with thespecific and exclusive purpose of executing the overlays contract forCWG 2010. Other than the overlays contracts and contract withDDA it has not undertaken any other project either in respect ofCommonwealth games or otherwise. Therefore, according to theassessing officer, activities of the assessee are not carried forwardfrom one accounting period to the next. Therefore, according to him,the books of the assessee should therefore be in the nature ofventure account only and the correct profitability can be arrived at by following the accrual method of accounting only. Therefore, thebooks of accounts maintained by the assessee on Cash basis wererejected. The claim of the assessee is that assessee is engaged inthe business of performing the contract for services, and is in the1st year of its operations with the limited vision of completing thesaid venture, therefore the cash method of accounting employed bythe assessee was the most suitable and easiest method whereinincome was recorded only when it is received and expenses wererecorded only when it is paid. On careful perusal of the provisionsof section 145 (1) of the act, we do not find any distinction with thenature of the business for method of accounting to be employedregularly. Further, the assessee stated that as assessee is in acontract business there are always possibility of disputes

andnegotiation giving rise to the element of uncertainty inacknowledgement of and receipt of the invoices, that is subject tocertain deductions or adjustment is always, it would be futile torecord an income, which has not accrued to the assessee. Thelearned AR further stressed upon the facts of the case and statedthat in assessee"s case this has happened as the bill is raised inthose years have not realized till date and are facing the protractedlitigation for indefinite period. The learned AO is canvassing theaccrual method of accounting only for the reason that the activities of the assessee are not carried forward from one accounting periodto the next. We do not find any justification in the argument of thelearned AO that the assessee should have maintained its books ofaccount on accrual basis for these reasons. The only criteria arethat the income of the assessee must be properly deduced from themethod of accounting regularly employed by the assessee. Suchdistinction cannot be based on the nature of business carried on bythe assessee. The learned AO also did not support the argumentwith a logical reason that whether in such nature of businesses onlyaccrual method of accounting is acceptable, mandatorily orotherwise based on certain accounting standards. There is noneproduced before us. Therefore we reject this argument of the learnedAO that assessee should have maintained its books of accounts onaccrual basis. Even looking at the facts of the case of the assesseewherein it is shown that for a substantial period of time the revenueis locked in litigation and has still not been received. In such cases,the income would have been taxed without any liability for paymentby the recipient of those services. Therefore, in such circumstances,we do not find any fault with the cash method of accounting followedby the assessee.On careful analysis of the section 5 of the act, it is amply clear thatincome of the assessee is chargeable to tax when it accrues andarises. The assessee has right to offer such income if the same isthough accrued but not received, to offer it for taxation on receiptbasis. In this case, the bills that are not received by the assesseeare not at all admitted by the person who is supposed to pay it.Thus, there is no obligation of payment on the shoulder ofOrganizing Committee. Thus the outstanding payments, on the factsof the case, has neither accrued to the assessee, nor received by it.**[Paras 23, 24, 25, 26, 27, 28, 29, 30]**

**23. Sanjay Kumar Jain v. ITO (ITA No. 825/D/19)(25/07/19)(ITAT, Delhi)**

**SECTION 147 – REOPENING OF ASSESSMENT ON THE GROUND OF BOGUS CCM – WHERE THE ASSESSING OFFICER ISSUED NOTICE U/S 148 ONLY ON THE BASIS OF INFORMATION FROM INVESTIGATION WING WITHOUT ANY INDEPENDENT APPLICATION OF MIND – THE REOPENING WAS HELD THE BAD IN LAW.**

Held, After perusing the aforesaid reasons recorded, I find that 'information' was received from Asstt. DirUnit- 1(3), Ahmedabad and the AO has only relied on the said information and has not made any independent inquiry before recording his reasons to belive for opening assessment under section 147 of the Act which is also corroborated from the fact that he himself mentioned that, the name and details of the assessee has

been mentioned in the data of CD sent by the ADIT(Inv.) Unit 1(3), Ahmedabad and believed that income of the assessee has escaped assessment. It is further noted that the AO merely on the basis of conclusion made by the ADIT (Inv.) Unit1(3), Ahamedabad as mentioned in the reasons record, satisfied himself that income of the assessee has escaped for the assessment year under consideration and both the revenue authorites have not brought any material evidence on record which can prove that assessee taken any loss through CCM. I further note that the action of the AO has been taken mechanically on the basis of alleged report of Investigation Wing. The mere recording/ formulation of reasons on the basis of reproduction of information from Investigation Wing and, issuing notice for initiation of reassessment proceedings does not constitute application of mind much less independent application of mind. Hence, the proceedings are without jurisdiction. It is settled law that AO cannot act mechanically on the basis of report of Investigation Wing and to show that the AO has applied his mind, he must distinct all those materials and he must also show that what was material on record. Hence, initiation of proceedings is also based on non-application of mind much less independent application of mind. This view is also fortified by the decision of the Hon'ble Delhi High Court in the case of Pr. CIT v. G&G Pharma India Ltd. reported at 384 ITR 147 (Del). I further find that on exactly on similar reasons and facts and circumstances of the case, ITAT SMC Bench, Delhi in the case of Radiance Stock Traders Pvt. Ltd. in ITA No. 4542/D/2018 vide order dated 29.11.2018 on identical issue of CCM has quashed the reassessment. I further find that the Tribunal in its decision dated 31.1.2019 in the case of Mohan Aggarwal, ACIT, CC-15, New Delhi in ITA No. 2497/Del/2018 (AY 2009-10) on identical issue of CCM has quashed the reassessment by following the aforesaid decision of the Tribunal dated 29.11.2018 Radiance Stock Traders Pvt. Ltd. in ITA No. 4542/D/2018 and also followed other similar other decisions. [Para 6.1]

**24. Nanak Chand Bansal vs. DCIT (ITA No. 1056/D/2017) (Dated: 03.07.2019)**

**153A - NO ADDITION ON ACCOUNT OF JEWELLERY FOUND DURING COURSE OF SEARCH AS THE SAME BELONGS TO WIFE OF ASSESSE AND NOT TO ASSESSE ITSELF**.

7. We have heard both the parties and perused all the relevant material available on record. From the perusal of the records it can be seen that thejewellery belongs to wife of the assessee and not belong to the assessee. Thus,the said jewellery cannot be added in the income of the assessee. The CIT(A)was not justified in confirming this addition to the extent of 200 gms. Jewelleryin the hands of the assessee, because the entire jewellery belong to the wife ofthe assessee as per the statement of the son of the assessee. Therefore GroundNos. 1 and 2 are allowed. As regards Ground No. 3, it is pertinent to note thatthe assessee and his wife are senior citizens who required medical attention at any instance and therefore the cash is required at home for emergencysituations. Therefore Ground no. 3 is allowed.

**25. Rishabh buildwell P. ltd. vs DCIT (ITA No. 2122/Del/2018), Rishabh buildcon P. ltd. vs DCIT(ITA No. 2163/Del/2018), R.G.V Fininvest P. ltd. vs DCIT (ITA No. 2123/Del/2018), R.G.V Fininvest P. ltd. vs DCIT (ITA No. 2162/Del/2018), Shristhi Computers P. Ltd. Vs DCIT (ITA No. 2124/Del/2018), Aggarwal Capfin Financial Services Pvt. Ltd. vs DCIT (ITA No. 2491/Del/2018)(04.07.19)(ITAT, Del)**

**Section 153D- Prior Approval of Joint Commissioner required for order u/s 153A(1)(b) or 153B(1)(b)- JCIT Approval conditional- Assessment by DCIT null and void**

Held, the approving authority has clearly mentionedthat the approval given is a technical approval. Moreover, he has directed the DCIT to ensure the seized materials and the findings of the appraisal report to be incorporated in the final assessment order. This clearly goesto proves that the approval given by the JCIT is not a final approval asrequired u/s 153D of theAct but a conditional approval subjected tomodifications by the DCIT after receiving of the approval which makes itan invalid, qualified, uncertain approval. This is not the mandate of theAct. It has also been laid down that whenever any statutory obligation iscast upon any authority, such authority is legally required to discharge theobligation by application of mind. The approval has to be statutory natureafter due application of mind, it should be neither technical nor proformaapproval which is envisaged u/s 153D of the Act (para 14). Hence, keeping in view the facts and circumstances of the case andpeculiarities of the instant case, owing to the judgment of the Hon'ble High Court of Bombay in the case of Pr CIT vs. Smt. Shreelekha Damani [ ITA no 668 of 2016 Dated:27th November, 2018 ], we hereby hold that the assessments completed by the DCIT do not stand in the eyes of law. Since the orders have been treated as null and void,any adjudication on other issues would be academic in nature only, hencerefrained to do so.(para 15)

**Note:relying on the judgment of the Hon'ble SupremeCourt in the case of NTPC v. CIT(1998) 229 ITR 383 SC wherein it hasexplained that the power of the Tribunal in dealing with the appealsunder Section 254 of the Act is " expressed in the widest possible terms". It allowed matters of question of law not raised earlier to be considered before tribunal.(para 8)**

**26. Dwarkadhis Buildwell Pvt. Ltd.v.CIT (ITA No.3097/D/14) (Dated 01/07/2019)**

**SECTION 263 READ WITH SECTION 147 OF THE ACT – REVISIONARY PROCEEDINGS UNDER SECTION 263 INITIATED BY THE CIT ON THE GROUND THAT THE ASSESSING OFFICER IN THE RE-ASSESSMENT PROCEEDINGS UNDER SECTION 147 DID NOT CONDUCT PROPER ENQUIRY WITH RESPECT TO INGREDIENTS OF SHARE APPLICATION MONEY**

**RECEIVED FROM VARIOUS APPLICANTS READ WITH PROVISIONS OF SECTION 68 OF THE ACT AND MIS-APPLIED THE DECISION OF SUPREME COURT IN THE CASE OF LOVELY EXPORTS – HELD THAT THE DECISION OF SUPREME COURT IN THE CASE OF LOVELY EXPORTS HELD THE FILED ON THE DATE OF PASSING THE RE-ASSESSMENT ORDER UNDER SECTION 147 AND THE DECISION OF DELHI HIGH COURT IN THE CASE OF NOVA PROMOTERS 342 ITR 169 WAS RENDERED LATER – THERE WAS ACCORDINGLY NO ERROR IN THE ORDER OF ASSESSING OFFICER IN COMPLETING ASSESSMENT ON THE BASIS OF LOVELY EXPORTS – FURTHER ENQUIRY WAS CONDUCTED BY THE ASSESSING OFFICER BY ISSUING NOTICE TO THE SHARE APPLICANTS – NO ERROR IN THE ASSESSMENT ORDER WARRANTING REVISION UNDER SECTION 263.**

Held,We find some force in the above arguments of the Ld.Counsel for the assessee. We Find the AO in the order passedu/s. 143(3) /147 has followed the decision of Hon'ble SupremeCourt in the case of Lovely exports (P) Limited (supra) in letterand spirit. In the office note, copy of which is available in thepaper book, it is seen that the Assessing officer had forwardedinformation to the concerned AO of the investor companies fortaking further necessary action against them. The relevantportion of the office note reads as under :-

"Office Note"

*From the record, it is seen that the following company has deposited belowmentioned amount of share application money with the assessee M/s. DwarkadishBuild Well Pvt. Ltd. C/o N. K. Jain, Advocate, Naya Bazar, Bhiwani. The assesseehas furnished information alongwith supporting documentary evidence with regardto amount of share application money and after verification of these amounts fromthe relevant books of a/c as well as from the bank statements, no addition is requiredto be considered in the said assessee company case. The information of thefollowing company are being referred/ sent to the concerned Assessing Officer fortaking further necessary action against the below companies.*

Thus when the AO passed the order u/s. 147 / 143 (3), wefind he has followed the decision of Hon'ble Supreme Court inthe case of Lovely Exports (P) Limited (supra) in letter andspirit. So far as the allegations of the Ld. CIT that subsequentdecision had come for which he referred to the decision ofHon'ble Delhi High Court in the case of Nova Promoters Finlease(supra) is concerned we find the Hon'ble Delhi High Courtpronounced the said decision on 15.02.2012 whereas the AO inthe instant case has passed the order u/s. 143(3)/147 on13.12.2011. Therefore, we do not find any merit in theallegation of the Ld. CIT of non consideration of the abovedecision since the same was not available at the time of passingof the assessment order.The Hon'ble Supreme Court in the case of G. M. MittalStainless Steel Private Limited (supra) at para 5 of the order hasobserved as under….So far as the allegation of the Ld. CIT that the AO shouldhave conducted further enquiry which were necessary to gatherrelevant material

which the AO failed to do and there was nonapplication of mind on the part of the AO is concerned, we findin the instant case thorough enquiries were conducted by theAO both at the time of original assessment and at the time ofreassessment proceedings. Full details giving the names,addresses, number of shares of nominal value and sharepremium amount of all the share holdersalongwith their bankstatements, copy of IT returns, PAN etc. were filed before theAO. Even if the share holders were bogus as per allegation ofthe revenue in view of the reasons recorded for reopening,however, as per prevailing law at that time in view of decision ofHon'ble Supreme Court in the case of Lovely Exports (P) Limited(surpa) addition could not have been made in the hands of theassessee and addition, if any, could have been made only in thehands of such bogus share holders. Since AO has taken aplausible view, therefore, it cannot be said that the order of theAO is erroneous. …. We find the Hon'ble Delhi High Court in the case of PCITVs. Delhi Airport Metro Express Private Limited vide ITANo.705/2017 order dated 05.09.2017 has held that for thepurpose of exercising jurisdiction u./s. 263 of the Act, theconclusion that the order of the AO is erroneous and prejudicial to the interest of the revenue has to be preceded by someminimal enquiry. If the PCIT is of the view that the AO did notundertake any enquiry, it becomes incumbent on the PCIT toconduct such enquiry. If the PCIT does not conduct such basicexercise then the CIT is not justified in setting aside the orderu/s. 263 of the IT Act. ….We find the Hon'ble Delhi High Court in the case of JyotiFoundation (supra) has held that where revisionary authorityopined that further enquiry was required, such enquiry shouldhave been conducted by revisionary authority himself to record finding that assessment order passed by the AO was erroneousand pre judicial to the interest of the revenue. We find Hon'bleDelhi High court in the case of Sunbeam Auto Limited (supra)has held that if the AO, while making an assessment, has madeinadequate enquiry that would not by itself give occasion to theCIT to pass order u/s.263 merely because he has differentopinion of the matter. Only in the case of "lack of enquiry" thatsuch a course of action would be open. It has further been heldin the said decision that where the view taken by AO was one ofthe possible views, therefore, the assessment order passed bythe AO cannot be held to be prejudicial to the interest of therevenue. The Hon'ble Delhi High court in the case of Anil KumarSharma (supra) has held that where it was discernible fromrecord that the AO had applied his mind to an issue in question,Commissioner could not invoke section 263 merely because hehas different opinion…. So far as the decision relied on by Ld. DR in the case ofDeniel Merchants (P) Ltd. (supra) is concerned, the Ld. DR couldnot controvert the submission of the Ld. Counsel for theassessee that no enquiry was conducted in the said casewhereas in the case of the assessee enquiries were conductedtwice i.e. during the original assessment proceedings andsecondly during the reassessment proceedings. Therefore, thedecision relied on by Ld. DR is not applicable to the facts of thepresent case. We find from a perusal of the paper book that theassessee during the course of original assessment proceedingsas well as during reassessment proceedings had filed therequisite details as called for by the AO and the AssessingOfficer after considering the same and following the decision ofHon'ble Supreme Court in the case of Lovely Export (supra)which was

prevailing at the time of passing of the ordercompleted the assessment and he has informed the AO of theinvestor companies to pass appropriate order. Therefore, in viewof our discussion in the preceding paragraphs the order of theAO in the instant case cannot be held as erroneous. Since forinvoking jurisdiction u/s. 263 the twin conditions i.e. ordermust be erroneous and the order must be prejudicial to theinterest of revenue must be fulfilled and since, we have heldthat the order is not erroneous, therefore, the twin conditionsare not satisfied. Therefore, the Ld. CIT in our opinion could nothave invoked jurisdiction u/s. 263 of the IT Act. We, therefore,set aside the order of the CIT passed u/s. 263 of the IT Act andthe grounds raised by the assessee are allowed…..In the result, the appeal filed by the assessee is allowed.**[Paras 21, 22, 25]**

**27. T.I. Steels P. Ltd. v. ITO (ITA No. 2176/D/17)(08.07.19)(ITAT, Del)**

**SECTION 263 – THE PR.CIT CANNOT SET-ASIDE THE ASSESSMENT ORDER WITHOUT POINTING OUT HOW THE ASSESSMENT IS ERRONEOUS OR PREJUDICIAL TO THE INTEREST OF THE REVENUE – PR.CIT CANNOT REMAND THE MATTER BACK TO AO FOR THE PURPOSE OF FURTHER ENQUIRY – THE ORDER U/S 263 WAS HELD TO BE NOT SUSTAINABLE.**

Held, We have considered the arguments of both the parties and find that the case of Ballarpur Industries Ltd. is not applicable to the facts of the case. After the assessee filed the report in Form 10CCB before the ld. Pr. CIT, the ld. Pr. CIT has not brought anything on record whether there were any in congruencies in the said report. Nullifying or set aside of the assessment order will serve any fruitful purpose unless it is determined by the ld. Pr. CIT that the assessee is not eligible for deduction after going through the audit report and bringing out as to how it is erroneous and prejudicial to the interest of Revenue. We find no such attempt has been made by the ld. Pr. CIT to determine the loss to the revenue. The ld. Pr. CIT has set aside the order with the directions to reframe the assessment after examining the validity and allowability of the deduction u/s 80IC of the Act as claimed by the assessee. In the instant case the assessee has already prepared a separate profit & Loss account for each fiscal unit and claimed the profits from these fiscal units as eligible for deduction under chapter VI-A. Now it remains to be seen whether the profits & gains have been correctly computed as if these units are the only source of income. These are submitted in Form 10CCB.The Principal Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. The word record is further explained that as under:

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Further, the PCIT cannot remand the matter to the Assessing Officer for further enquiries or to decide whether the findings recorded are erroneous without a finding that the order is erroneous and how that is so. A mere remand to the Assessing Officer implies that the PCIT has not decided whether the order is erroneous but has directed the Assessing Officer to decide the aspect which is not permissible. Reliance is placed on the judgment in the case of ITO v. DG Housing Projects [2012] 343 ITR 329 (Delhi) (HC) wherein it was held that the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. ……It was also in that case that the said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits.

The ratio of the judgment is applicable to the present case. What is to be examined primarily is that whether the assessee is eligible for deduction or not by way of earning profit by manufacturing activity in the backward areas, Himachal Pradesh in this case which has not been carried out by the Revenue except refusing the allowability of deduction on hyper technical ground which cannot be accepted. **[Para 6,7 & 8]**

**28. Smt. Manita v. Pr.CIT (ITA No. 3432/D/19)(12.07.19)(ITAT, Delhi)**

**SECTION 263 – REVISION OF CIT – BOGUS LONG TERM CAPITAL GAIN U/S 10(38) – WHERE THE CASE WAS SELECTED FOR SCRUTINY ON THE VERY GROUND OF SUSPICIOUS LONG TERM CAPITAL GAIN AND THE ASSESSING OFFICER CARRIED OUT NECESSARY ENQUIRY BEFORE ACCEPTING THE CLAIM - MERELY BECAUSE ASSESSMENT ORDER IS NON SPEAKING IS NOT SUFFICIENT – AS THE AO HAS MADE ENQUIRY, EXPLANATION-2 OF SECTION 263 IS NOT APPLICABLE - THE ASSESSMENT ORDER WAS NEITHER ERRONEOUS NOR PREJUDICIAL TO THE INTEREST OF THE REVENUE.**

Held, The A.O. in this case passed the assessment order under section 143(3) because the case was selected for scrutiny for the reasons of suspicious long term capital gains on shares. The A.O. called for explanation of assessee and assessee filed reply time to time which are part of the record. The explanation of assessee is supported by all the

evidences and material on record as to how the assessee has entered into sale and purchase of shares and how the sale consideration have been received by assessee through banking channel. The transaction was conducted through the Demat account. The A.O. after making a deep investigation into the issue of long term capital gains also noted in the assessment order that written submissions of the assessee along with copies of Demat account, source of investment in shares, bank account, copies of share certificates, copy of account of Mathiyan Construction are placed on record. It would, therefore, prove that A.O. examined the issue of long term capital gains with reference to sale of shares at assessment stage in the light of evidence and material on record. Thus the reasons for which the case was selected for scrutiny have been satisfied by the A.O. Learned Counsel for the Assessee has pointed out several documents in the paper book to show that on the issue of long term capital gains, A.O. raised a query to the assessee which is duly responded by assessee supported by all the documentary evidences. The assessee also filed copies of bank statement, cash flow and cash book to prove availability of funds with the assessee to make investment with M/s. Mohit Ispat (P) Ltd., and expenses incurred for construction of home. All these documentary evidences were before A.O. Thus, it is not a case of even inadequate enquiry or improper enquiry as is alleged in the show cause notice under section 263 of the I.T. Act. It is merely stated in the notice under section 263 of the I.T. Act that A.O. failed to make enquiry on these aspects. However, the record produced before us shows all the three issues have been explained by assessee before A.O. supported by documentary evidences. When similar submissions were made by the assessee before the Ld. Pr. CIT, nothing adverse have been pointed out in the impugned order as to how the A.O. has not made enquiries at assessment stage on all these issues. PB-13 is cash flow statement of assessee for assessment year under appeal in which all the above items have been mentioned on which proposed notice under section 263 have been issued. All these facts were before A.O. at the assessment stage and all the details of sale and purchase of shares on which long term capital gains exemption was claimed have been mentioned in the return of income itself. Thus, there was no reason to believe that the A.O. did not examine this issue at the assessment stage. Further, the case was selected for scrutiny because the suspicious long term capital gains earned by assessee. This information must be based on information received from Investigation Wing. Therefore, Ld. D.R. was not justified in contending that report of Investigation Wing have not been considered by the A.O. Since it was the sole reason for completing the scrutiny assessment, therefore, it could not be believed that A.O. would not have gone through the material available before him on record. May be the A.O. has not discussed the details in the assessment order but it would not give right to the Ld. Pr. CIT to hold that no investigation or enquiry have been made at assessment stage. It appears that A.O. has taken one of permissible view in the matter as per Law and if the Ld.Pr. CIT does not agree with the view of the A.O, the assessment order could not be treated as erroneous in so far as it is prejudicial to the interests of the Revenue. Considering the totality of the facts and circumstances noted above in the light of material on record, we are of the view that it is not a case of inadequate or no enquiry, thus, Explanation-2 to

Section 263 of the I.T. Act would not be attracted in the matter. In this view of the matter, the assessment order could not be held to be erroneous in so far as it is prejudicial to the interests of the Revenue. We, accordingly, set aside the impugned order under section 263 of the I.T. Act and restore the assessment order. **[Para 6]**

**29. ACIT vs M/s Resurgere Mines and Minerals India Ltd (ITA No:-1531/Del/2017) (Dated: 18.07.2019)**

**S. 271(1)(c) – NO PENALTY ON DIFFERENCE OF OPINION BETWEEN THE ASSESSEE AND THE AO REGARDING VALUATION OF STOCK - ADDITION HAS ALREADY BEEN DELETED BY ORDER OF CO-ORDINATE BENCH OF ITAT IN AFORESAID ITA NO.6600/DEL/2014 - SINCE THE QUANTUM ADDITION ALREADY STANDS DELETED - THE PENALTY LEVIED U/S 271(1)(C) OF THE ACT HAS NO LEGS TO STAND.**

**S.271(1)(c) – NO PENALTY FOR DISALLOWANCE U/S 14A OF THE I.T. ACT BEING A DEBATABLE MATTER - THAT EVERY ADDITION MADE IN ASSESSMENT ORDER DOES NOT LEAD TO PENALTY U/S 271(1)(C) OF THE ACT - HON'BLE SUPREME COURT IN THE CASE OF CIT VS RELIANCE PETRO PRODUCTS PVT.LTD. [2010] 189 TAXMANN 322 (SC) FOLLOWED.**

5. We have heard both sides. We have considered materials on recordcarefully. As far as the penalty levied in respect of aforesaid addition ofRs.1,69,57,108/- is concerned, we note that this addition has already beendeleted by order of Co-ordinate Bench of ITAT in aforesaid ITANo.6600/Del/2014. Since the quantum addition already stands deleted, thepenalty levied u/s 271(1)(c) of the Act has no legs to stand. When the quantumaddition stands deleted, the corresponding penalty levied u/s 271(1)(c) of theAct is unsustainable. In coming to this conclusion, we are guided by the decision of Hon'ble Supreme Court in the case of K.C.Buildersvs ACIT [2004]135 taxmann 461 (SC) in which the Hon'ble Supreme Court held that "wherethe additions made in the assessment order, on the basis of which penalty forconcealment was levied, are deleted there remains no basis at all for levying thepenalty for concealment, and therefore, in such a case no such penalty cansurvive and the same is liable to be cancelled." Therefore, the penalty leviedu/s 271(1)(c) of the Act in respect of the aforesaid addition of Rs.1,69,57,108/-is held to be untenable and the order of the CIT(A) on this issue is upheld.

5.1. As far as the penalty levied in respect of the aforesaid addition ofRs.71,223/- u/s 14A r.w. Rule 8D is concerned, we find that the Ld.DR hasnot disputed the facts, submissions and contentions contained in the aforesaidsynopsis filed from the assessee's side during the appellate proceedings inITAT. In the facts and circumstances of this case, therefore, and having regardto the synopsis filed from assessee's side, we reject the contention of the Ld.DRthat every addition made in assessment order should

invariably lead to penalty u/s 271(1)(c) of the Act. For this purpose, we take guidance from the order ofthe Hon'ble Supreme Court in the case of CIT vs Reliance Petro ProductsPvt.ltd. [2010] 189 taxmann 322 (SC) in which the Hon'ble Supreme Courtheld that "a mere making of claim, which is not sustainable in law by itself, willnot amount to furnishing inaccurate particulars regarding income of theassessee." After careful perusal of the afore-said synopsis filed from assessee'sside, and after careful perusal of the order of CIT(A) in this issue, relevantportion of which is already reproduced earlier in this order; we are of the viewthat, in the facts and circumstances of the case, no interference from our sideis warranted in the order of the Ld.CIT(A) deleting the penalty u/s 271(1)(c) ofthe Act in respect of the aforesaid addition of Rs.71,223/- u/s 14A r.w. Rule8D. Accordingly, the order of Ld.CIT(A) on this issue is also upheld.

**30. Rishabh Buildwell Pvt. Ltd. vs. DCIT (ITA No. 6880/D/2018) (Dated: 03.07.2019)**

**Section 271(1)(c) - THE PROVISIONS OF THE EXPLANATION 5A TO SECTION 271(1)(c) OF THE ACT AND 271AAB OF THE ACT HAVE TO BE INTERPRETED STRICTLY - UNLESS, THERE IS AN ACTUAL CONCEALMENT OR NON-DISCLOSURE OF THE PARTICULAR OF THE INCOME THE PENALTY CANNOT BE IMPOSED - FURTHER, WHEN THE REVISED INCOME IS ACCEPTED AND THE INCOME IS ASSESSED AS PER THE REVISED INCOME THERE IS NO SCOPE OF PENALTY – IN ORDER FOR EXPLANATION-5 TO APPLY, IT IS NECESSARY THAT THERE MUST BE CERTAIN ASSETS (SUCH AS MONEY, BULLION ETC.) FOUND IN THE POSSESSION OF THE ASSESSEE DURING THE SEARCH, AND THAT THE ASSESSEE MUST CLAIM THAT SUCH ASSETS HAVE BEEN ACQUIRED BY HIM BY UTILIZING HIS INCOME.**

16. Explanation-5 was specifically inserted to deal with the situation where higher income was disclosed in the return filed consequent to a search operation, and theassessee claimed that such addition of income did not imply that there wasconcealment. In other words, but for the insertion of Explanation-5, it would be open tothe assessee to contend that additions made to his income in the return filed after thesearch operation, were only to buy peace and did not tantamount to concealment. Thisalso flows from the language of Explanation-5 itself, wherein the words used by theLegislature are "be deemed to have concealed the particulars of his income", whichshows that there is a deeming fiction by virtue of which such additional income isconsidered as concealment. If such additions in the income in the return filedconsequent to a search, were to automatically evidence concealment under Section271(1)(c), there would be no need for Parliament to enact a deeming fiction in the formof Explanation-5; such a reading would render Explanation-5 otiose and without anypurpose. This is also consonant with the view arrived at in the earlier part of

thisdecision, i.e. mere increase of income in the return filed pursuant to Section 153A wouldnot be sufficient to show concealment under Section 271(1)(c).

17. For the Revenue to invoke Explanation-5, it would have to prove that its requirements are clearly fulfilled in the present case. In order for Explanation-5 to apply,it is necessary that there must be certain assets (such as money, bullion etc.) found in the possession of the assessee during the search, and that the assessee must claim that such assets have been acquired by him by utilizing his income. Moreover, such income must be in relation to a particular previous year that has either ended before the date of the search or is to end on or after the date of the search and such income is declared subsequently in the return of income filed after the search. Therefore, it is only when assets are found during the search which the assessee claims have been acquired by him by utilizing his income for any particular previous year, and then declares such income in a subsequent return filed after the date of search, would it bedeemed that the assesee has concealed his income. In other words, the assets seized during the search must relate to the income of the particular assessment year whose return is filed after the date of the search. Such a conclusion is only logical, considering that assessment under the Act is with respect to a particular assessment year and the penalty imposed under Section 271(1)(c) would also be for concealing income in that particular assessment year, which concealment was revealed by the discovery of certain assets in the assessee's possession during the search conducted under Section132. {Refer PR. Commissioner of Income Tax Vs Shri Neeraj Jindal (Delhi High Court)}
19. Keeping in view the facts that there is no difference between returned income and the assessed income, keeping in view the fact that the Revenue has not brought any material for levy of penalty, Keeping in view the judgments which were enunciated that the return filed in response to notice 153A of the Act needs to be treated as returned filed u/s 139 of the Act for the purpose of assessment, we hereby delete the penalty levy u/s 271(1)(c) of the Act.

**31. Vodafone Idea Ltd. v. ACIT (ITA No. 3366-3368/D/15)(10.07.19)(ITAT, Del)**

**SECTION 271C –PENALTY FOR NON DEDUCTION OF TDS – THE ISSUE OF TDS ON DISCOUNT PROVIDED TO PREPAID SIM DISTRIBUTORS IS A DEBATABLE ONE WHERE VARIOUS COURTS ARE TAKING DIVERGENT VIEWS – THERE WAS REASONABLE CAUSE FOR NON DEDUCTION OF TDS – PENALTY DELETED.**

Held, We have heard both the parties and perused all the relevant material available on record. The issue on which the penalty u/s 271C is imposed is debatable as different courts have taken diverse views. Therefore, the fact remains that the assessee has reasonable cause for non deduction of tax at source on the discount allowed to the prepaid distributor as there are decisions of the Hon'ble High Courts and Tribunal

taking diverse views. Thus, it is contesting issue and the assessee has reasonable cause not to deduct the tax at source. Therefore, the action of non deduction of tax in the present case will not attract the penalty u/s 271C. **[Para 10]**