ITAT Bar Monthly Reporter- December, 2019

1. Digite Inc. vs. ACIT [ITA No.4918/Del/2012] Dated 19.11.2019

SECTION 9(1)(vi) AND ARTICLE 12(4) of DTAA - THAT WHETHER THE ASSESSING OFFICER IS CORRECT IN TREATING THE INCOME FROM SALE OF SOFTWARE PRODUCT/LICENSE AS ROYALTY WHICH IS TAXABLE AT THE RATE OF 15%. THAT WHETHER THE SERVICES IN CONNECTION ARE TAXABLE AS FTS AS PER ARTICLE 13 (4) (A) OF THE INDO US DTAA – Held No.

30. We find the Mumbai Bench of the Tribunal in the case of ADIT (IT) Mumbai Vs. First Advantage Private Limited reported in 77 taxman.com 195 has held that Payment made by assessee to US company for use of software owned by US company, when assessee would use software only for internal business operations and would not sub-license or modify same, could not be considered as royalty within meaning of article 12(4) of DTAA.

31. We find the Coordinate Bench of the Tribunal in the case of ACIT Vs. Landmarks Graphics Corporation reported in 87 taxman.com 311 has held that where assessee, a US based company, did not have PE in India and its activities were not covered by deeming fiction of article 5(2) of India - USA DTAA, income earned by it from sale of software to Indian companies which was 'off the shelf software, was not taxable In India.

32. We find the coordinate Bench of the Tribunal in the case of Black Duck Software Inc Vs. DCIT reported in 86 taxman.com 62 has held that where assessee, a US based company, granted a non-exclusive, non-transferable software license to Indian customer for a specific time period, since copyright in said software programme was retained by assessee, payment received by it was not liable to tax in India as royalty.

33. We find the Delhi Bench of the Tribunal in the case of Aspect Software Inc Vs. ADIT reported in 61 taxmann.com 36 has held that consideration received by assessee for supply of 'contact solutions' used for better management, customer interaction, comprising of sale of hardware alongwith license of embedded software to end user is not royalty under article 12 of DTAA between India and USA. Provision of implementation and maintenance services are inextricably and essentially linked to supply of software; where supply of software is itself not taxable as 'royalty', these services are also not royalty.

34. Respectfully following the decisions cited (supra) we hold that the payment received by the assessee from its customers from sale of software products/ licenses is not in the nature of the royalty u/s. 9(1)(vi) of the IT Act, 1961 and also as per article 12 (3) (a) and

article 12(3) (b) of the Indo US DTAA. In our opinion the said amount received by the assessee is normal business income of the assessee on account of sale of copy righted products (licenses) and not taxable in India in the absence of permanent establishment. The various decisions relied on by the Ld. DR are not applicable to the facts of the case and are distinguishable. The grounds raised by the assessee are accordingly allowed.

2. JITF Water Infra (Naya Raipur) Ltd. v. ITO (ITA No. 1102 & 1103/D/18)

SECTION 28 –SUBSIDY (CAPITAL V. REVENUE RECEIPT) – FINANCIAL ASSISTANCE RECEIVED BY ASSESSEE UNDER A CONTRACT – THE CHARACTER OF SUBSIDY IN THE HANDS OF AN ASSESSEE IS TO DETERMINED KEEPING IN VIEW THE PURPOSE FOR WHICH IT IS GIVEN – SUBSIDY FOR SETTING UP OF WATER TREATMENT PLANT, PROVING STORAGE OF WATER IN UNDER DEVELOPED AREA – THE SUBSIDY WAS HELD TO BE OF CAPITAL NATURE

Held, 12. As mentioned elsewhere the bone of contention is the treatment of financial assistance received by the assessee from NRDA. In our considered opinion, taxation of grant/subsidy by whatever name called is determined by the purpose for which the grant/subsidy is granted. This view is fortified by the decision of the Hon'ble Supreme Court in the case of V.S.S.V. Meenakshi Achi 60 ITR 253 in which the Hon'ble Supreme Court held that the character of the subsidy in the hands of the recipient is to be determined having regard to the purpose for which the subsidy has been given. This principle has been reiterated by the Hon'ble Supreme Court in the case of Sahni Steel & Press Works Ltd. 228 ITR 253, wherein the Hon'ble Supreme Court held that the character of a subsidy in the hands of the recipient whether Revenue or Capital is to be determined having regard to the purpose for which the subsidy is given. It was further held that if the purpose of the subsidy is to help the assessee to set up its business or complete a project the subsidy is to be treated as having been received for capital purposes, whereas if the subsidy is given to the assessee for assisting him in carrying out the business operations and is given only after and conditionally been commencement of production such subsidy is to be treated as assistance for the purpose of the trade and would constitute revenue receipt. This principle was once again reiterated by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals 306 ITR 392.

13. Considering the afore-stated ratio laid down by the Hon'ble Supreme Court and considering the nature of financial assistance given by NRDA to the appellant, we are of the considered view that the financial assistance is capital in nature and the amount received by the appellant is capital receipt.

3. DCIT vs Great Eastern Energy Corporation Ltd [ITA No. 3310/Del/2015] Dated 20/11/2019

S. 37(1) - THAT WHETHER THE LISTING FEES PAID TO THE STOCK EXCHANGE SHALL HAVE TO BE ALLOWED AS REVENUE EXPENDITURE – HELD YES

10. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case, the appellant has shifted its global depository receipt exchange from AIM London stock exchange to the main market London stock exchange without increasing any capital but to provide a bigger platform to global depository receipt holders to trade their holding. The learned assessing officer has not shown that there is any increase in the capital base of the assessee. The learned CIT – A has allowed the claim of the assessee relying upon the decision of the honourable Gujarat High Court in case of CIT vs. Alembic Chemical Works Co Ltd 201 ITR 250 wherein the annual listing fees paid to stock exchange was held to be admissible business deductible expenditure. The Honourable Highcourt held that in view of the CBDT Circular No. F. 10/67-65/IT (A1) dated 26-8-1965 it is obvious that the listing fees paid to the stock exchange shall have to be allowed as revenue expenditure. The Tribunal had rightly taken the view that listing fees shall have to be paid by the company to the stock exchange every year and that no enduring benefit arises to the company by payment. of annual listing fees. Even otherwise, listing of shares in the stock exchange has high relevance so far as the public limited company is concerned. The status of the company is one in which public is substantially interested and for that purpose listing of shares in the stock exchange would assume importance so far as the public limited company is concerned. The business of the company also carries better prestige and better status when its shares are listed in the stock exchange. Such listing adds several advantages to the business carried on by the company, particularly in the matter of confidence of customers and loyalty of employees, which generate value. Thus, the expenditure on account of listing fees paid to the stock exchange could not be said to be capital expenditure, and that it shall have to be regarded as expenditure of revenue nature. Therefore, for the reasons we do not find any infirmity in the order of the learned CIT – A in deleting the above disallowance noting that there is no increase in the capital base of the assessee company. In view of this, we dismiss ground number 1 of the appeal of the learned AO.

THAT EXPRESS PROVISION OF DISALLOWANCE OF THE CORPORATE SOCIAL RESPONSIBILITY EXPENDITURE IS PROVIDED UNDER EXPLANATION –2 OF THE PROVISIONS OF SECTION 37 (1) OF THE INCOME TAX ACT WITH EFFECT FROM 1/4/2014 BY THE FINANCE (NUMBER 2) ACT, 2014. THUS, PRIOR TO THAT IT IS CLEAR THAT NO SUCH DISALLOWANCE WAS PROVIDED IN THE LAW.

23. We have carefully considered the rival contentions and perused the orders of the lower authorities. The learned CIT – A has upheld the disallowance relying upon his own decision in case of Power Finance Corp Ltd. The above decision has been reproduced by the learned CIT – A in his order at page numbers four. The main reason for confirming the disallowance was that if the appellant"s claim is accepted that would mean that similar expenditure would have to be allowed in case of private assessee as well. According to him, such expenditure in the case of private assessee apparently falls under donation or expenditure for charitable purpose whose deduction is covered under provisions of section 80 G of the income tax act. Therefore, he also did not follow his predecessors order allowing 50% of such claim as allowed to the assessee in assessment year 2011 – 12. Firstly for the reasons stated in allowing the claim of the assessee for assessment year 2011 – 12 in the instant order following the decision of the honourable Karnataka High Court in case of CIT vs. Infosys Ltd (supra) , we do not find any reason to sustain the order of the learned CIT – A upholding the above disallowance. Further the reasons given by the learned CIT – A that as the PSU are directed by Government Of India to incur certain expenditure in the form of corporate social responsibility, if such expenditure are allowed to them as deduction, then in case of private corporate assessee also the above expenditure is to be allowed. We do not find this „just" reason for confirming the disallowance. Express provision of disallowance of the corporate social responsibility expenditure is provided under explanation – 2 of the provisions of section 37 (1) of the income tax act with effect from 1/4/2014 by The Finance (Number 2) Act, 2014. Thus, prior to that it is clear that no such disallowance was provided in the law. As the honourable Karnataka High Court has held that such expenditure is allowable to the assessee u/s 37 (1) of the income tax act as it is wholly and exclusively incurred for the purposes of the business, we are of the view that such disallowance can only be made after 1/4/2015, if at all. Accordingly, ground number 1 and 2 of the appeal of the assessee
are allowed.

4. DCIT vs M/s. Moet Hennessy (I) Pvt. Ltd.(ITA No.1051/Del./2016)(AY 2011-12)
M/s. Moet Hennessy (I) Pvt. Ltd. vs DCIT (ITA No.1070/Del./2016)(AY 2011-12)

SECTION 37(1)-ASSESSEE IS INTO THE BUSINESS OF IMPORTING OFWINES AND SPIRITS FROM ITS OVERSEASASSOCIATED ENTERPRISES (AES),AND IS INTO THE DISTRIBUTION OF THE SAME IN THE INDIAN MARKET HAVINGEXCLUSIVE DISTRIBUTION RIGHTS-ASSESSEE IN ORDER TO PROMOTE SALE OF BRANDS, WHICH WERE OWNED BY ASSESSEE'S AE IN FOREIGN JURISDICTION, INCURRED AMP EXPENSES IN INDIA- DRP HAS DISCARDED THE BLT IN DETERMINING THE AMPEXPENSES INCURRED BY THE TAXPAYER QUA AMP EXPENDITURE BUTPROCEEDED TO CONFIRM THE ADDITION ENTIRELY ON THE NEW GROUND THATTHESE EXPENSES ARE TO BE DISALLOWED U/S 37 (1) OF THE ACT-WHETHER LD. DRP HAS POWER TO TAKE UP THE NEW ISSUE WHICH HASNEVER BEEN AGITATED/DECIDED

BY THE LD. TPO/AO- HELD, NO- ON MERITS- AMP EXPENSES CONSIDERED AS REVENUE IN NATURE HAVING BEEN INCURRED FOR COMMERCIAL EXPEDIENCY

So, we are of the considered view that disallowance made bythe AO u/s 37(1) of the Act pursuant to the directions issued by theDRP is not sustainable in the eyes of law. So, question framed isanswered in affirmative (para 16)

So, following the aforesaid decision rendered by thecoordinate Bench of the Tribunal, we are of the considered viewthat AMP expenditure cannot be considered as capital expenditureby any stretch of imagination, hence the same are revenue in naturehaving been incurred for commercial expediency.(para 19)

The next contention raised by the taxpayer is that theexpenditure incurred by the taxpayer is not prohibited by law.When we examine the order passed by the ld. DRP it has come onrecord that ld. DRP/AO have observed that in view of the CableTelephone Network Rules and Guidelines in the form of ASCICode laid down by the Advertising Standards Council of India(ASCI), the AMP expenses incurred by a liquor distributor onadvertisement and sales promotion expenses are prohibited by law,hence not allowable u/s 37 (1) of the Act.(para 20)

Perusal of the order passed by the ld. DRP/AO goes to provethat the DRP/AO has taken general view and has not brought thecase of the taxpayer under any specific rules & regulations ofCable TV Network Rules/ ASCI nor they have analyzed the natureof expenses. The ld. AR for the taxpayer drew our attention tosection 22(2)(c) of the Cable TV Act which lays down that if theproducts are advertised on national television to whom these rulesapply, only then it can be treated in violation of the said rules.There is no finding of facts by the AO/DRP as to how the CableTV Act has been violated. Furthermore, when we examine ASCIcode it is not a profit company u/s 25 of the Companies Actworking as a self-regulatory body for protection of the interest ofconsumers and is not empowered to exercise any legislative powersunder central or state statutes, so the violation of ASCI code, ifany, is not prohibited by law. Moreover, AO/DRP have notbrought on record to show as to how the taxpayer has violatedASCI code, rather proceeded on the basis of general observations. (para 21)

Furthermore, there is not an iota of evidence on file to provethat the taxpayer has incurred expenditure to advertise its productson television or use minors to conduct its marketing activities andthus, the question of violating Cable Rules or ASCI Code does notarise, as is evident from the detail of expenditure given by thetaxpayer at page 220 of the paper book.(para 22)

Moreover, it is undisputed fact on record that the taxpayerhas never availed of the services of cable networking and ASCI forincurring AMP expenses and this fact has

been brought to thenotice of ld. DRP vide letter dated 16.11.2015, available at pages243 to 248 of the paper book. But the ld. DRP instead of returningfindings on the facts decided the issue on the basis of generalobservations by taking shelter in the Cable TV network and ASCIcode which is not sustainable in the eyes of law. (para 23)

Furthermore, in the subsequent years i.e. AYs 2012-13,2013-14, 2014-15, 2015-16 & 2016-17, AO took diametricallyopposite stand qua AMP expenses by disallowing the same u/s 37
of the Act, which has been treated as revenue expenses by theTribunal in taxpayer's own case in AY 2012-13 & 2013-14(supra).(para 24)

Furthermore, when undisputedly identical AMP expenseshave been incurred by the taxpayer since 2009-10 and has beenallowed by the Tribunal in AYs 2009-10 & 2010-11, conversestand taken by the taxpayer in AY 2011-12 is not sustainable beinghit by rule of consistency as has been held by Hon'ble SupremeCourt in Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC)and Municipal Corporation of City of Thane vs. Vidyut MettalicsLtd. (2007) 8 SCC 688.(para 25)

In view of what has been discussed above, disallowancemade by the AO/DRP on account of AMP expenses to the tune ofRs.6,64,24,161/- is not sustainable, hence ordered to be deleted.So, grounds no.1 & 2 of taxpayer's appeal are determined in favourof the taxpayer.(para 26)

5. DCIT v. Mahavir Multitrade P. Ltd. (ITA No. 1139/D/17)(27/11/19)

SECTION 37(1) – PAYMENT OF PENALTY UNDER A CONTRACT - THE ASSESSEE WAS SUBJECTED TO PENALTY FOR BREACH OF CONTRACTUAL OBLIGATION AND SUPPLY OF DEFECTIVE COAL – THE AO DISALLOWED THE CLAIM BY TREATING THE SAME AS OF PENAL NATURE – HELD, PAYMENT OF SUM UNDER A CONTRACT FOR FAILURE TO MEET CONTRACTUAL OBLIGATION CANNOT BE TERMED AS OFFENCE OR INFRACTION OF LAW – TERMINOLOGY USED UNDER THE CONTRACT WOULD NOT AFFECT THE CLAIM UNDER THE PROVISIONS OF SECTION 37

Held, 10. It is therefore clear that the contract between the assessee and the buyers is clear in its terms that there was a specification as to the quality of coal that has to be supplied and should there be any variation in such quality, the price will be adjusted accordingly. In case of supply of coal with the high moisture under low grass calorific value, the buyer makes deduction on such account. So, the contract clearly stipulates the consequences of variation in the quantity and quality of coal that has to be supplied by the assessee to the buyers. Further, case of the assessee has been that they did not pass on the liability incurred by them on this count to their sellers. Learned Assessing Officer should have considered this aspect as to the possibility of assessee passing on

such liability to their sellers, which was not possible in case of the penalty paid for an offence or infraction of law.

11.As rightly held by the Ld.CIT(A),the inability to meet the contractual obligation by the assessee cannot be termed as an offence or infraction of law so as to deny the claim of the assessee by invoking the expression 1 to sec 37(1) of the Act. We are in agreement with the Ld.CIT(A) that the eligibility of an item to tax or tax deduction can hardly be made to depend on the label given to it by the parties and at the same time the absence of a specific label cannot be destructive of the right of an assessee to claim a deduction, if in fact, the consideration for the receipt can be attributed to the sources indicated in the section. Merely because the assessee categorised the claim under "penalty levied on the assessee company for not complying to the terms of the contract", is not permissible to the jump to the conclusion that such penalty was in respect of any offence or infraction of law committed by the assessee so as to invoke the provisions under Explanation 1 to section 37 (1) of the Act. The expression "penalty was levied on the assessee company for not complying to the terms of the contract", clearly indicates that it is a civil consequence for not complying with certain terms of contract and has nothing to do with any offence.

6. DCIT v. Kushal Infraprojects Industries India Ltd. (ITA No. 2802/D/15)(30/12/2019)

SECTION 40A(3)- PAYMENT TO SPECIFIED PERSONS - THE AO MADE DISALLOWANCE OF SALARY PAID TO RELATIVES OF DIRECTOR – THE ONUS IS ON THE AO TO PROVE THAT SALARY OR OTHER EXPENSE PAID TO SPECIFIED PERSONS IS EXCESSIVE OR UNREASONABLE - IN ABSENCE OF ANY SUCH ATTEMPT TO SHOW UNREASONABLENESS OR EXCESSIVENESS, THE DISALLOWANCE CANNOT BE MADE U/S 40A(3)

SECTION 2(14) – SALE OF AGRICULTURAL LAND – THE STATUS OF LAND HAS TO ADJUDGED FROM LATEST CBDT NOTIFICATION RELEVANT AT THE TIME OF PURCHASE OF LAND – IN THE PRESENT CASE, THE LAND IN QUESTION WAS SITUATED AT OUTSKIRTS OF DELHI AND CBDT NOTIFICATION DATED 06/01/1994 WAS RELEVANT FOR AY 2010-11 AS PER WHICH THE LAND DID NOT FALL WITHIN LOCAL LIMITS - THE CERTIFICATE OF TEHSILDAR AND PATWARI CERTIFIED THAT LAND IS SITUATED BEYOND 9 KMS FROM LOCAL MUNICIPAL LIMITS –- MERE SELLING OF LAND WITHIN SHORT SPAN OF TIME IS NOT SUFFICIENT TO DENY CLAIM OF EXEMPTION OF CAPITAL GAIN ON SALE OF AGRICULTURAL LAND – THE LAND WAS HELD TO BE AGRICULTURAL LAND

Held, . We have considered the rival submissions and do not find any infirmity in the Order of the Ld. CIT(A) in deleting the addition. Section 40A(2)(a) deals with incurring of the expenditure in respect of which payment is made to the relatives and in the opinion of the A.O. same is excessive and unreasonable having regard to the fair market value of the goods, services or facilities, for which payment is made. The A.O. has not made any such case that payment made to the relatives was on account of salary was excessive or unreasonable having regard to the fair market value of the goods, services or facilities, for which payment is made. The assessee has explained before the authorities below, the circumstances of which payments have been made to the relatives and also expenditure as to what services they have rendered for the assessee company along with their qualification. In earlier year, similar salary have been allowed deduction by the Revenue Department. There is nothing unreasonable in this regard. In any case, even for applying the provisions of Section 40A(2), it is for the A.O. to make-out a case that the expenditure incurred is excessive or unreasonable having regard to the fair market value of such services. However, no efforts have been made by the A.O. in this regard. Therefore, there were no justifications for the A.O. to disallow the salary payment to the employees who are relatives of the Director. The Hon'ble Supreme Court in the case of Upper India Publishing House Pvt. Ltd., 117 ITR 569 held that "before applying the provisions of Section 40A(2), A.O. should have proved expenditure is excessive or unreasonable." In the absence of any such finding by the A.O, there was no justification to disallow salary. The A.O. did not doubt the salary paid to the employees which is paid through banking channel and the employees have shown the same salary in their return of income, on which, TDS also deducted. Considering the totality of the facts and circumstances of the case and earlier record of the assessee, we do not find any justification to interfere with the Orders of the Ld. CIT(A) in deleting the addition. Ground No.1 of appeal of Revenue is dismissed.

19. We have considered the rival submissions. It is not in dispute that Tehsildar, Revenue Department and Patwari, Revenue Department have certified that the lands in question falls more than 8 KM from the Municipal limits. Since it is also not disputed that the lands in question at the time of purchase by assessee was agricultural land, therefore, it is governed by Delhi Land Reforms Act. The assessee did nothing in the agricultural land. The assessee did not make any request for conversion of the land use and did not made plotting in the said land. The assessee with great efforts purchased the lands in question from several Farmers and after making these efforts during the long period purchased the land and since some other party approached the assessee for purchase of the lands in question at a higher rate, the assessee has sold the lands to other party. Therefore, there is no question of assessee doing any business activity in the agricultural land. The Revenue Authorities have also certified that at the time of purchase by assessee, the land was cultivated as agricultural land by the Farmers. Therefore, land use was agricultural land only. No land use was changed at any point of time. The CBDT has issued notification dated 06.01.1994 under section 2(14)(iii)(b) of the I.T. Act regarding urbanisation of area. This notification has clarified the area which

have fall outside the local limits of Municipality and as regards Delhi, it is explained that the area up to the distance of 8 KM from the limits of Municipal Corporation in all directions shall have to be excluded. No other notification has been issued by CBDT thereafter. Therefore, issue shall have to be considered in the light of aforesaid circular. Section 2(14) deals with the capital asset and exception is provided in sub-clause (iii) of Section 2(14) of the I.T. Act. It has two parts of agricultural land in India not being lands situated:

"2(14)(iii) (b) in any area within such distance, not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette."

20. The learned D.R. contended that the case of the assessee would fall in Section 2(14)(iii)(a) of the I.T. Act. However, while applying the aforesaid provision it has to be proved that population of that area was more than 10000 as per the last preceding Census. Further, no such case has been made-up by the A.O. The AO has not brought any material on record to satisfy if the said provision is applicable to the case of the assessee and what is the population of that area where the land in question is situated. Therefore, contention of Learned D.R is rejected that provisions of Section 2(14)(iii)(b) of the I.T. Act are not applicable. It is specified in section 2(14)(iii)(b) that the agricultural land which is situated beyond 8 KM from the local limits of the Municipality were referred to in item (a) (supra) as the Central Government may having regard to extend of and scope of urbanising of that area and other relevant factors specified in this behalf by the Notification in the Official Gazette. Therefore, sub-clause (a) to Section 2(14)(iii) is excluded by sub-clause (b) of the aforesaid Section by issuing notification by the CBDT. It is well settled Law that the CBDT instructions are binding on Income Tax Authorities. According to the Notification Dated 06.01.1994 if the land in question is situated outside 8 KM from the Municipal limits, it would be agricultural land and would not fall within the definition of "capital asset". No other notification has been issued by the CBDT. Therefore, the case of the assessee is supported by Certificate of Patwari as well as Tehsildar and Sub-Divisional Magistrate of Delhi in which it is clarified that the land in question is situated more than 9 KM from the municipal limit and the population of the area is about 7000 only. Therefore, contention of the Learned D.R. is rejected. It may also be noted here that Amendment in the Act is made in the year 2014 which is not relevant to the matter in issue. The North Municipal Corporation Delhi is created in the year 2011 and they have issued certificate in the year 2013. Since it was not in existence in assessment year under appeal, therefore, such notification issued by North Municipal Corporation Delhi is not relevant. The assessee has admittedly sold the agricultural land as it is so there were no intention to do any business activity, therefore, period of holding would not be relevant. The intention of the assessee is therefore clear that assessee purchased the agricultural land and sold the agricultural land as it is. The assessee never treated the said agricultural land as stock in

trade and never converted into non agricultural land. The assessee did not create any plot in the said land and no developmental activities have been done and no facilities have been provided. The assessee did not make any advertisement for sale of the land. The character of the land in the hands of assessee as agricultural land has not changed. The agricultural land in question is classified in revenue record as agricultural land and actual cultivation was done as per the record. The AO has not produced any evidence on record to show agricultural land was used for nonagricultural purposes. The AO has also not brought information/evidence on record. The assessee had been carried on activities of buying and selling of the land in a systematic and regular manner. It is well settled Law that Certificate of the Tehsildar and Patwari who are the designated Officers and is Competent Authority and are authorised to issue Certificate measuring distance from Municipal Limits which relevant. The ITAT, Jaipur Bench in the case of Satya Dev Sharma Vs. Income Tax Officer, Ward 5(2), Jaipur taxmann.com 149 (supra) held as under:

"IT : For purpose of application of item (b) of sub-clause (iii) of section 2(14) and to measure KMs from radius of Municipal Corporation, relevant date would be date of notification and not date of sale of land in question"

21. The ITAT, Jaipur Bench in the case of Smt. (Dr.) Subha Tripathi Vs. Deputy Commissioner of Income-tax, Cirle-6, Jaipur 34 taxmann.com 286 held as under:

"IT : If agricultural land fell beyond 8 kms of municipal limits on date of publication of relevant CBDT notification but fell within 8 kms on date of sale of land, it would still fall outside term 'capital asset'."

22. The ITAT, Jaipur Bench in the case of Dinesh Kumar Jain Vs. Income-tax Officer, Ward 6(1), Jaipur 78 taxmann.com 53 held as under:

"IT : Amendment to section 2(14) by Finance Act, 2013 cannot apply for assessment year 2011-12; for this year distance of agricultural land from nearest municipality was to be measured by approach road."

23. Since the land in question is dealt by Delhi Land Reforms Act and nothing is brought on record of violation of the aforesaid provisions and the Competent Authority under the Delhi Land Reforms Act, Certified that the lands in question falls beyond 8 KM from the Municipal Limits, therefore, there is nothing wrong in the findings of the Ld CIT(A) in holding that land in question is agricultural land and amount earned on sale of the land to be capital receipt. The decisions relied upon by the Learned D.R. would not support the case of the Revenue. Considering the totality of the facts and circumstances, we do not find any infirmity in the order of the Learned CIT(A) in allowing the claim of assessee. We, therefore, do not find any merit in the departmental appeal on this ground and the same is dismissed accordingly.

7. Lokvir Kapoor vs ACIT [ITA No. 1532/Del/2019] dated 20.11.2019

S. 45 - THAT WHETHER BENEFIT OF INDEXATION HAS TO BE GRANTED TO THE ASSESSEE FROM THE YEAR IT BOOKED THE RESIDENTIAL PROPERTY AND NOT THE YEAR IN WHICH IT WAS REGISTERED IN THE NAME OF THE ASSESSEE OR THE YEAR IN WHICH POSSESSION IS GIVEN TO ASSESSEE – HELD YES

16. We have carefully considered the rival contention and perused the orders of the lower authorities. Honourable Delhi High Court in case of CIT vs Ramakrishnan 363 ITR 59 has held that in order to determine the taxability of capital gain arising from sale of property, it is date of allotment of property which is relevant for the purpose of computing holding period and not date of registration of conveyance deed. Though the above decision was with respect to the provisions of section 2 (42A) of the income tax act 1961 where the plot was allotted and the plot was sold. Therefore, the same asset, which was allotted, was existing on the date of allotment and on the date of conveyance deed. Thus, admittedly the above decision was with respect to competition of the holding period with respect to the same property. The assessee also relied upon the decision of the honourable Punjab and Haryana High Court in case of Vinodkumar Jain vs CIT 344 ITR
501 where there was an allotment of flat on 27/2/1982 and allotment and position was on 15/05/86, sold on 23/7/87, it was held that holding period of the property was to be computed from the date of allotment of the flat. The other all decisions relied by the learned authorised representative also dealt with the issue that whether the property is a long-term capital asset or a short-term capital asset. It does not matter in deciding the above issue that here issue is required to be decided whether the cost of acquisition incurred by the assessee prior to the date of possession/registration of that property in the name of the assessee should be indexed from that date on which part consideration was paid or from the later date on which the registration was made of the property in favour of the assessee. Like section 2 (42A) of the act, the indexed cost of acquisition also says that it is to be computed from the date when the asset was first held' by the assessee. It does not require the indexed cost of acquisition from the date on which the property was acquired/purchased/registered in the name of the assessee. Therefore according to us the date on which the assessee paid the booking money for allotment of the house, he ‗held' the property from that date, he might have ‗acquired/ purchased' the property on later date. The basic reason for granting indexation of the cost of acquisition, which is linked with the cost inflation index, is to tax only the real income of the assessee and not the capital gain being appreciation of the property including inflation in the price (increase in the cost of living). Therefore, as the intention is to tax only the appreciation in the property excluding the appreciation in the price of the property due to inflation, the assessee must be granted the indexation of the cost in the financial year in which it has incurred/paid, irrespective of the fact that house property

is subsequently registered in the name of the assessee or the possession is granted to the assessee of that property later on.

8. Sriwant Wariz v. ACIT (ITA No. 2914/D/19)(18/12/19)

SECTION 48 – CAPITAL GAIN – PERIOD OF HOLDING – THE PERIOD OF HOLDING IS TO BE RECKONED FROM THE DATE OF AGREEMENT TO SELL AND NOT DATE OF ACTUAL REGISTRATION– THE ASSET WAS HELD TO BE LONG TERM ASSET

Held, 8. I have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions relied on by the ld. Counsel for the assessee. I find the assessee, in the instant case, has sold the residential property on 12th April, 2013 and there is no dispute of the same. For the computation of the capital gain arisen out of the aforesaid sale, the assessee has taken the date of purchase of the above property as 31.01.2009 which is the date of agreement to purchase as against the actual date of purchase i.e., 21.03.2013. I find the AO treated the date of purchase of the property as 21.03.2013 and determined the gain arising on sale of the property as short-term capital gain whereas, according to the assessee, the property is a long-term capital asset since the holding period is more than 36 months if the date of agreement to purchase the property is considered as the date of acquisition. I find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Nilam R. Kataria (supra). I find the Tribunal, after considering the various decisions, came to the conclusion that the period of holding of the asset has to be considered from the date of allotment of the property and not from the date of actual registration.

9. The various other decisions relied on by the ld. Counsel for the assessee also support his case to the proposition that for the purpose of considering the period of holding, the date of allotment is relevant. In view of the above discussion, I set aside the order of the CIT(A) and direct the AO to consider the date of agreement to sell as the date of acquisition and accordingly compute the long-term capital gain.

9. Geetika Sachdev v. ITO (ITA No. 6638/D/18)(02/12/2019)

SECTION 50C(2) – FAIR MARKET VALUE – WHERE DIFFERENCE BETWEEN SALES CONSIDERATION DISCLOSED BY THE ASSESSEE AND VALUE DETERMINED BY DVO IS LESS THAN 10% - THE SALES CONSIDERATION SHALL BE TREATED AS FULL VALUE OF CONSIDERATION FOR THE PURPOSE OF COMPUTING CAPITAL GAIN

Held, After perusing the aforesaid findings of the Tribunal, I find considerable cogency in the contention of the Ld. Counsel for the assessee that the issue in dispute involved in

ground no. 2 is squarely covered by the decision dated 12.01.2019 of the ITAT, Pune-B, Bench, in the case of Rahul Constructions vs. DCIT passed in ITA No. 1543/Pn/2007 (AY 2004-05) wherein, it has been held that the margin between the value as given by the assessee and the Departmental Valuer was less than 10 percent and the difference is liable to be ignored and the addition made by the lower authorities on this count cannot be sustained and accordingly, the same was deleted. Similarly, in the case in hand, the difference between sale consideration shown by the assessee at Rs. 90 lacs and fair market value estimated by the DVO at Rs. 98,40,000/- which was less than 10% and hence, the same is liable to be ignored and, therefore, the addition confirmed by the Ld. CIT(A) is not tenable and needs to be deleted. Therefore, respectfully following the precedent, as aforesaid, the addition in dispute is hereby deleted and ground no. 2 raised by the assessee is allowed. {Para 5.2]

10. Vinod Kumar Sharma v. ITO (ITA No. 7629/D/19)(06/12/2019)

SECTION 54 – COLLABORATION AGREEMENT – ASSESSEE ENTERED INTO COLLABORATION AGREEMENT WITH BUILDER TO GET HOUSE CONSTRUCTED ON LAND OWNED BY THE ASSESSEE- PURSUANT TO AGREEMENT, THE ASSESSEE WILL BE GIVEN TWO FLOORS AND ONE FLOOR WILL GO THE BUILDER – THE ENTIRE COST OF CONSTRUCTION WAS TO BE BORNE BY THE BUILDER AND NO ADDITION CONSIDERATION WAS RECEIVED BY THE ASSESSEE – THE ASSESSEE CLAIMED EXEMPTION U/S 54 ON THE GROUND THAT VALUE WAS REINVESTED IN CONSTRUCTION OF TWO FLOORS RECEIVED BY THE ASSESSEE – AO AND CIT(A) DISALLOWED THE PROPORTIONATE CLAIM OF EXEMPTION IN RESPECT OF ONE FLOOR – HELD, IN THE LIGHT OF DECISION OF DELHI HC IN THE CASE OF GEETA DUGGAL, THE CLAIM OF EXEMPTION U/S 54 IN RESPECT OF TWO FLOORS IS ALLOWABLE

Held, 3. At the time of hearing, Ld. Counsel for the assessee stated that assessee constructed his old house of the entire building consisting of ground floor, first floor and second floor through a Builder vide Collaboration Agreement 27.09.2012 in lieu of parting with first floor of the above property. He submitted that assessee did not get any amount from the builder Sh. Krishan Lal and the amount of long term capital gains was calculated on the basis of fair market value of the property at the time of Collaboration Agreement. The assessee claimed deduction u/s. 54 of the Act since the entire consideration for the first floor of the property was reinvested in the construction of the ground floor, second floor of the above mentioned property in dispute. He further submitted that the AO vide his order dated 28.12.2018 considered the 1/3rd of presumed cost of construction as capital gains and added the same in the income of the assessee without appreciating the fact that on the basis of collaboration agreement, the builder has incurred all the costs for the construction of the property. He further submitted that assessee has not parted with any part of the residential property except

the first floor of the house property in lieu of construction of the entire property by the builder. But the AO has wrongly mentioned that the assessee has sold the second floor of the property. Finally, he submitted that the assessee in lieu of the sale consideration of the first floor of the property, got the ground floor and the second floor of the property constructed from the builder which is only one unit and as such the assessee is entitled to exemption of capital gains in full and not proportionately as mentioned in the assessment order. He further submitted that the similar issue has already been adjudicated and decided by the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Geeta Duggal in ITA No. 1237/2011 vide judgment dated 21.02.2013. He draw our attention towards the relevant portion of the aforesaid judgement and requested that by respectfully following the said ratio the addition in dispute may be deleted by allowing the appeal of the assessee.

5. I have heard both the parties and perused the records, especially the orders of the revenue authorities alongwith the written submissions filed by the assessee as well as the provisions of section 54 of the I.T. Act and the case laws relied by the assessee's AR and Ld. CIT(A) in the impugned order. I am of the considered view that exactly similar issue has already been adjudicated and decided in favour of the assessee by the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Geeta Duggal in ITA No. 1237/2011 vide judgment dated 21.02.2013.

5.1 After going through the aforesaid judgement of the Hon'ble Delhi High Court in the case of CIT vs. Gita Duggal (Supra) and the orders of the revenue authorities on the issue in dispute, I am of the view that the issue in dispute is squarely covered in favour of the assessee by the aforesaid decision of the Hon'ble Delhi High Court in the case of CIT vs. Gita Duggal. Therefore, respectfully following the aforesaid judgment of the Hon'ble High Court of Delhi, I delete the addition in dispute and allow the appeal of the assessee.

11. Anita Miglani v. ITO (ITA No.2235/D/16) (Dated 18/11/2019)

SECTION 54F VIS-À-VIS SECTION 50C – WHETHER FOR THE PURPOSE OF EXEMPTION UNDER SECTION 54F, THE CONSIDERATION HAS TO BE AS PER SECTION 5OC OR THE ACTUAL CONSIDERATION – HELD THAT SECTION 50C BEING A DEEMING FICTION AND HAS A LIMITED APPLICATION, COULD NOT BE EXTENDED FOR EXEMPTION UNDER SECTION 54F OF THE ACT.

Held,We have heard both the parties and perused all the relevant materialsavailable on records. It is pertinent to note that the Assessing Officer admittedthe claim of the assessee for exemption u/s 54F(1)(b) in respect of investmenton long term capital gain but instead of taking actual sale considerationreceived, has adopted the figure of sale consideration by invoking Section 50C.This is not in accordance with the provision of Section 50C which has created adeeming fiction. Section 54F is an exemption provision

and it has given itsapplicability in itself, therefore, Section 50C will not come under picture. TheLong Term Capital Gain exemption is admissible u/s 54F(1)(b) of the IncomeTax Act, 1961 wherein total taxable gain comes to Rs.2,68,830/- only as theinvestment made by the assessee adopting the figure of the actual saleconsideration received in consequence with Section 54F of the Income Tax Act.Therefore, the CIT(A) while enhancing the addition has ignored the very effect ofthe provisions of Section 54F. Besides this, the CIT(A) while enhancement hasnot given any reasons as to why the enhancement is necessary and why theassessee is not justified in adopting the figure of the actual sale considerationreceived. Thus the Assessing Officer as well as CIT(A) failed to justify the standby making addition of Rs.30,17,456/- in respect of long term capital gainwithout granting exemption u/s 54F of the Income Tax Act. The appeal of theassessee is allowed.[**Para 8**]

12. DLF Info City Development (Kolkata) Limited vs ACIT [ITA No.894/Del/2018] dated 20.11.2019

S. 57(iii) - THAT WHEN THERE IS A DIRECT NEXUS BETWEEN EARNING OF INTEREST ON LOAN ADVANCED BY THE ASSESSEE AND PAYMENT OF INTEREST TO THE BANK ON LOAN DRAWN IN TERMS OF SANCTION LETTER, ASSESSEE IS ENTITLED TO NETTING OFF INTEREST IN TERMS OF SECTION 57 (III) AND SUCH CLAIM WAS TO BE ALLOWED.

19. We find the Hon'ble Delhi High Court in the case of Vodafone South limited Vs. CIT (supra), after considering the decision of Hon'ble Supreme Court in the case of Tuticorin Alkai Chemicals and Fertilizers Ltd. (supra) has held that where assessee having availed of loan from HSBC, advanced said amount to its holding company, i.e. SCL and since there was a direct nexus between earning of interest on loan advanced by assessee to SCL and payment of interest to HSBC on loan drawn in terms of sanction letter, assessee's claim for netting off of interest in terms of section 57 (iii) was to be allowed.

20. Similarly the Hon'ble Delhi High Court in the case of PCIT Vs. Jubilant Energy Nelp – V P Ltd. (supra) has held that where assessee paid interest to sister concern on money borrowed and subsequently it earned interest income on Inter-Corporate Deposits (ICD's), since there was direct nexus between interest paid and interest earned, interest paid to sister concern was deductable under section 57 while bringing interest income to tax as 'Income from other sources.

21. The various other decisions relied by the ld. Counsel for the assessee also support his case that such interest expenditure has to be allowed as deduction from such interest income if such interest income is treated as income from other sources. We, therefore,

hold that the assessee is entitled to netting of off interest expenditure and interest income.

13. Mohd. Tayyab v. ITO (ITA No. 4203/D/16)(27/11/2019)

SECTION 68 – CASH DEPOSIT IN THE BANK ACCOUNT – THE CONTENTION OF THE ASSESSEE WAS THAT CASH DEPOSITED IN THE BANK ACCOUNT WAS OUT OF UNDISCLOSED SALES PROCEED OF THE BUSINESS – THE LD. CIT(A) ACCEPTED THE EXISTENCE OF BUSINESS – HOWEVER, DIRECTED THE AO TO ASSESS PEAK CREDIT INSTEAD OF PROFIT – THE NATURE OF DEPOSIT IN THE BANK ACCOUNT INDICATES THAT SAME ARE ON ACCOUNT OF SALES PROCEEDS – HELD, ONCE THE EXISTENCE OF BUSINESS IS ACCEPTED AND THERE IS NO CONTRARY MATERIAL TO SHOW THAT DEPOSIT IN THE BANK WAS NOT IN THE NATURE OF SALES PROCEED, THE ADDITION OF PEAK IS NOT SUSTAINABLE- THE AO WAS ACCORDINGLY DIRECTED TO COMPUTE PROFIT @15% OF THE TOTAL CASH DEPOSIT

Held, The learned CIT – A were shown the copies of cash memos which were rejected by him stating that the alleged bill has been made probably purposefully in very illegible handwriting to show that the cash deposited is sales proceeds. He further held that assessee has not been able to prove the existence of peril unaccounted business activity. He further held that it is more plausible that assessee has indulged in any business activity, which is not disclosed to the income tax Department. He further held that appellant did indulge in business activity outside the books of accounts. However, he directed the AO to treat the peak credit as the income of the assessee and tomake addition accordingly. When the learned CIT – A has accepted that assessee is indulging in any business activity, there is no need to tax the whole of the income of the assessee either or to tax him on the peak credit basis on the above sum, more so, when there is no evidence available with the revenue that assessee is depositing cash which has not been generated from the sales of the assessee. The CIT in the time of invoking provisions of section 263 has directed the lower authorities to look into the debit and credit both of the bank statement to know about the nature of activities carried on by the assessee. Neither the assessing officer nor the learned CIT – A has looked into the bank statement of the assessee. Before us at page number 36 onwards the assessee has shown the bank statement with the banks in which cash is deposited. On looking at the cashbook, it is apparent that cash is deposited in the bank account and substantial sum has gone to the assessee himself or for the purpose of withdrawal from ATM. Part of the withdrawal is also to public school fees. Part of the withdrawal has also gone into the deposit of the mutual funds. Thus looking at the bank statement of the assessee it is apparent that assessee is depositing cash in the bank account to discharge his payments for school fees and investment in mutual fund as well as withdrawal in cash through various automated teller machines. On perusal of the bank account, it is not found that

assessee is depositing huge cash in his bank account and using that sum for giving some accommodation entries et cetera. The learned CIT – A has also reached at a conclusion that the amount of cash deposit in the bank account is out of sale proceeds, which is not disclosed, to the Department. When once it has been held by the revenue that the above sum is cash deposit because of undisclosed sales of the assessee, natural corollary would be to estimate profit thereon. The learned assessing officer has estimated the profit at the rate of 15% thereon in the earlierassessment orders. It has not been held that the above net profit rate adopted by the assessee is lower or not on by the assessee in his recorded books of account sales. Thus, we are of the view that above cash deposit cannot be added in the hands of the assessee nor it can be added on the peak basis but only net profit ratio should be applied to the above sum, which can be added to the total income of the assessee. In view of this, we direct the learned assessing officer to treat 15% of the cash deposited in the bank account as income of the assessee. [Para 5]

14. Agson Global Pvt. Ltd. v.ACIT (ITA No.3741-46/D/19) (Dated 31/10/2019)

SECTION 68 – DEMONETIZATION – HUGE CASH DEPOSITED DURING DEMONETIZATION PERIOD – WHERE SOURCE OF CASH DEPOSIT WAS EXPLAINED BY THE ASSESSEE AND THERE WAS HISTORY OF CASH SALES BY ASSESSEE PRIOR TO DEMONETIZATION PERIOD, CASH DEPOSITED COULD NOT BE DEEMED AS UNEXPLAINED CASH CREDIT UNDER SECTION 68 OF THE ACT

Held,We have carefully gone through the various standard operating procedureslaid down by the central board of direct taxes issued from time to time incase of operation clean. The 1st of such instruction was issued on21/02/2017 by instruction number 03/2017. The 2nd instruction wasissued on 03/03/2017 instruction number 4/2017. The 3rd instruction wasin the form of a circular dated 15/11/2017 in F.No. 225/363/2017 – ITA.IIand the last one dated 09/08/2019 in F.no.225/145/2019 – ITA.II. thoughsome of the instructions/circular are after the passing of the assessmentorder but it gives a hint that what kind of investigation, enquiry, evidencesthat the assessing officer is required to take into consideration for thepurpose of assessing such cases. In 1 of such instructions dated09/08/2019 speaks about the comparative analysis of cash deposits, cashsales, month wise cash sales and cash deposits. It also provides thatwhether in such cases the books of accounts have been rejected or notwhere substantial evidences of wide variation be found between thesestatistical analyses. Therefore, it is very important to note that whether thecase of the assessee falls into statistical analysis, which suggests that thereis a booking of sales, which is non-existent and thereby unaccounted moneyof the assessee in old currency notes (SBN) have been pumped into asunaccounted money. The instruction dated 21/02/2017 that the assessingofficer basic relevant information e.g. monthly sales summary, relevantstock register entries and bank statement to identify cases with preliminarysuspicion of back dating of cash and is or fictitious sales. The instruction isalso suggested some indicators for suspicion of back

dating of cash else orfictitious sales where there is an abnormal jump in the cases during theperiod November to December 2016 as compared to earlier year. It alsosuggested that abnormal jump in percentage of cash trails to on identifiablepersons as compared to earlier histories will also give some indication forsuspicion. Non-availability of stock or attempts to inflate stock byintroducing fictitious purchases is also some indication for suspicion offictitious sales. Transfer of deposit of cash to another account or entity,which is not in line with the earlier history. Therefore, it is important toexamine whether the case of the assessee falls into these parameters arenot…. We have analyzed the figures of sales and cash deposit for the last twoyears as under… i. On analyses of sales, it is apparent that sales in F Y 2014-15 wereRs 237.44 Crores, which increased to Rs. 412.52 crores in F Y 2015-16. The jump in sales is Rs. 175.08 crores, which is 73%,compared to earlier years. The sales in F Y 2015-16 of Rs 412.52 CrIncreased to Rs 633.74 cr in F Y 2016-17, which resulted in to jumpof Rs. 221.34 Cr resulting in to increase by 53.66 %. The % increasein sales in F Y 2105-16 compared to F Y 2014-15 of 73.74 % and% increase in sales in FY 2016-17 is only 53.66 %. Thus in the yearof demonetization % increase in sales in less than earlier year.

Growth in sales compared to earlier two years in case of the assesseeshows similar trend. Thus, it cannot be said that assessee hasbooked non-existing sales in its books post demonetization.ii. Sales in November 2014 was Rs 16.49 Crores where as sales inNovember 2015 was Rs 45.18 crores, Thus resulting in to jump insales of Rs. 28.69 Cr. The Jump In sales of November 2015 from Rs45.18 crores to sales in November 2016 of Rs. 47.73 crores wasmeager sum of Rs. 2.55 crores. Comparative Jump sales in November2015 was 173 % where as comparative jump in sales of November2016 of Rs. 47.73 Crores to sales of November 2015 of Rs 45.18Crore was meager 5.64 %. Thus compared to earlier years there isno substantial increase in sales of November 2016 (Postdemonetization). There is no higher booking of sales by the assesseecompared to earlier years which can justify the stand of the revenuethat assessee has booked non existing sales in November 2016.iii. Sales in December 2014 was Rs 22.26 Crores where as sales inDecember 2015 was Rs 97.35 crores, Thus resulting in to jump insales of Rs. 75.09 Cr. The decrease in sales of December 2015 fromRs 97.35 crores to sales in December 2016 of Rs. 69.83 crores wasdecrease of Rs 27.52 crores. Comparative Jump in sales inDecember 2015 was 337 % where as comparative Downfall in salesof December 2016 of Rs. 69.83 Crores to sales of December 2015 ofRs 97.35 Crore was downfall of 28.26 %. Thus compared to earlieryears there is substantial down fall in sales of December 2016(Post demonetization). Thus, it cannot be said that trend of sales inthis year post demonetization, assessee has booked higher sales.iv. On analyses of cash sales to cash deposit ratio it was noted that infinancial year 2014 – 15 assessee recorded cash sales of INR 237.44crores against which the assessee deposited INR 242.65 crores.Therefore the amount of cash deposit in the bank account isequivalent to the cash is recorded by the assessee for the year subjectto a minor difference. For financial year 2015 – 16 assessee recordedcash sales of Rs. 412.52 crores against which the cash deposit is INR4 28.19 crores. Therefore, for financial year 2015 – 16 also the cashdeposit is

almost equal to the amount of cash sales recorded by theassessee. For financial year 2016 – 17 assessee recorded cash salesof Rs. 633.86 Crores against which assessee deposited cash in bankaccount of Rs. 633.74 crores. For this year, in addition, amount ofcash deposit is less than cash is recorded by the assessee. Thus, it isapparent that whatever cash sales recorded by the assessee for theyear is deposited equal amount of cash in its bank account.v. On analysis of the month wise sales it is apparent that in the monthof May, June and October there is a substantial jump in the salescompared to earlier year. However, the revenue has not questioned it.It is also not the case of the revenue that by backdating the entries inits accounting software it has increased the sales fictitiously.vi. Further jump in sales in the month of March 2017 compared to samemonth in earlier year shows phenomenal jump of more than thousandpercent. It has been accepted by the revenue. Therefore, it clearlysuggests that there is a growth in the business of the assessee beyondpre demonetization and post demonetization.vii. It is not the case of the revenue that assessee has not shown therelevant stock register before the assessing officer. The assessee hasmaintained the complete stock tally in its accounting software. Suchbooks of accounts are audited, quantitative records produced beforethe tax auditor, such quantitative records are certified by tax auditand no questions have been raised by the assessing officer. Thus, itcannot be said that the figures of sales and purchases are notsupported by the quantity details.viii. Another ground cited by the A.O in support of the impugned addition isthat the stock position was short by nearly Rs. 450 crores as againstthe stock recorded in the books of account. While alleging so, the A.Ohas completely overlooked the fact that the godown of the ssessee atAgson Global Logistics Park, Sonepat, Haryana wherein a part of thestock of the Assessee was stored was not covered under the searchaction. The stock lying at the said premises was not taken intoconsideration while arriving at the physical stock as on the date ofsearch, thus resulting in the alleged difference of Rs. 450 crores.Though originally at the time of recording of the statement of themanaging director on the date of such there were certaindiscrepancies in the stock however later on it is stated by the learnedauthorised representative that they were reconciled after inclusion ofthe stock at Sonipat and ultimately there was no discrepancy in thephysical stock found during the course of search as well as stock atGurgaon at Sonipat with the book stock. There was thus actually nodifference in the stock physically lying with the Assessee vis-à-vis thestock as per books of accounts as on the date of search. Thissubmission of the assessee is not controverted by the learnedassessing officer as well as the learned CIT DR. It was not also shown to us that there was any discrepancy in the physical stock foundduring the course of search and stock as per the books of account ifthe stock at the Sonipat go down was taken into consideration. Thereis no whisper about the alleged shortage of stock during theassessment proceedings, deviation proceedings and also in remandproceedings. During assessment proceedings, we also directed AOto show the shortage of stock of Rs 450 Crore, which is also thebasis of addition along with the panchanama and response toexplanation of assessee about stock lying at godown at Sonipatas stated by the assessee. There is no reference in any of thestatements recorded by the investigation wing with respect to suchshortage of stock. Even in the appraisal

report produced before usthere is no such finding about shortage of stock. Even in thesubmissions made by the learned CIT DR there is no reference madeto such shortage of stock during the course of search proceedings.There is no addition in any of the assessment year including thesearch year with respect to any such shortage of stock. Noquantitative details of stock physically verified as well as the bookstock found by the search party were shown to us, which suggestedthat there is a shortage of stock after considering stock lying atSonipat.**[Paras 125, 126]**

15. Neeta Breja v. ITO (ITA No. 524/D/17)(25/11/19)

SECTION 69 – CASH DEPOSIT – THE AO CONSIDERED IN ADDITION ON THE GROUND THAT THERE WAS INORDINATE DELAY IN DEPOSIT OF CASH WHICH WAS WITHDRAWN FROM THE BANK ACCOUNT – THE CASH DEPOSIT WAS SUPPORTED FROM CASH FLOW STATEMENT, BANK STATEMENT, CASH BOOK WITH NARRATION – THERE IS NO EVIDENCE THAT CASH SO WITHDRAWN WAS USED SOMEWHERE ELSE- THE CASH DEPOSIT CANNOT BE TREATED AS UNEXPLAINED MERELY BECAUSE THERE IS LONG GAP BETWEEN WITHDRAWAL AND DEPOSIT

Held, 11. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case it is not disputed that the amount of cash was explained as available with the assessee in the hands to deposit in the bank. Assessee has substantiated the availability of the cash by producing the cash flow statement, day-to-day cash book, Ledger account of the Bank with narration and the complete bank statement. Same were disbelieved by the learned assessing officer for the only reason that there is an inordinate delay in deposit of the cash in the bank account. Identical issue arose before the honourable Delhi High Court in case of CIT vs Kulwant rai in 291 ITR 36 wherein the honourable Delhi High Court.

12. In the present case also the learned assessing officer or the learned CIT A did not show that above cash was not available in the hands of the assessee or have been spent on any other purposes. Further the coordinate bench in ACIT vs Baldev Raj Charla 121 TTJ 366 (Delhi) also held that merely because there was a time gap between withdrawal of cash and cash deposits explanation of the assessee could not be rejected and addition on account of cash deposit could not be made particularly when there was no finding recorded by the assessing officer or the Commissioner that apart from depositing this cash into bank as explained by the assessee, there was any other purposes it is used by the assessee of these amounts. In view of above facts, the ground number 1 of the appeal of the assessee is allowed and orders of lower authorities are reversed.

16. Mamurpur Cooperative Thrift And Credit Society Ltd. V. ACIT (ITA No. 1255/D/19)(02/12/19)

SECTION 80P – ALLOWABILITY OF DEDUCTION ON INTEREST EARNED ON FIXED DEPOSIT WITH BANK – WHERE FIXED DEPOSIT WERE KEPT WITH BANK TO AVAIL CREDIT FACILITY FOR UTILIZATION OF THE SAME FOR GRANTING FURTHER MONEY TO MEMBERS- THE INTEREST EARNED ON SUCH DEPOSIT SHALL BE CONSIDERED FOR THE PURPOSE OF BUSINESS- THE CLAIM OF DEDUCTION WAS HELD TO BE ALLOWABLE.

Held, I have heard both the parties and perused the records, the impugned order as well as the case law relied by the Ld. Counsel for the assessee. I find that the ITAT, 'D' Bench, New Delhi vide its order dated 19.12.2014 passed in the case of ACIT, Circle 38(1), New Delhi vs. M/s Jawala Cooperative Thrift & Credit Society Ltd., New Delhi has adjudicated the similar and identical issue and decided the same in favour of the assessee by holding as under:-

"9. We have heard rival parties and have gone through the material placed on record. We find that total income earned by the assessee included income on fixed deposits placed with Bombay Mercantile Bank, interest income from a scheduled bank and dividend income from Delhi Cooperative Bank. From the certificate as placed at page book page 30, we find that Bombay Mercantile Cooperative Bank is a cooperative society registered under Maharastara Cooperative Societies Ltd. and we further find that the said society has been assessed u/s. 143(3) as a cooperative society and its income was allowed to the exempt u/s. 80P(2)(i) as held by Mumbai Tribunal in ITA No. 4128 and 4129 vide its order dated 30.11.2005, for assessment year 1990-91 and 1991-92 and further by Mumbai Tribunal vide order dated 07.9.2011 in ITA No. 5292 for assessment year 1997-98. Therefore, it is held that fixed deposits placed with Bombay Mercantile Bank falls within the exemption granted by Section 80O(2)(d) of the Act. The assessee was also eligible under the provisions of Section 80O(2)a(i) as the funds placed by assessee in the form of fixed deposits can be said to be kept for the purpose of business of the assessee as the assessee had availed credit facilities also against such fixed deposits which were again used for the purpose of business of assessee. Moreover, under similar circumstances, Chandigarh Bench in ITA No. 996/2009 as noted by Ld. CIT(A) has decided in favour of assessee. The dividend income is exempt for all persons including assessee. The interest income from bank amounting to Rs. 18,190/- is though not exempt u/s. 80(p)(2)(d) but is exempt u/s. 80P(2)(i) of the Act. The case law of Totgar's Cooperative Society was rightly distinguished by Ld. CIT(A). Therefore, keeping in view all facts and circumstances, we do not find any infirmity in the order of the Ld. CIT(A).

10. In view of above, appeal filed by the Revenue is dismissed."

After perusing the aforesaid finding of the Tribunal, I am of the considered view that the issues in dispute are squarely covered by the aforesaid decision. Therefore,

respectfully following the aforesaid precedent, the addition in dispute is hereby deleted and the appeal filed by the assessee is allowed. [Para 4 & 4.1]

17. Alcatel Lucent India Ltd. vs ACIT (ITA No. 4706/Del/2018) (AY 2014-15)

SECTION 92C:ASSESSEE PROVIDED INTRAGROUPMARKETING, TECHNICAL SUPPORT AND CONTRACT SOFTWARE DEVELOPMENT SERVICES-COMPARABLE COMPANY WAS A SOFTWARE PRODUCT COMPANY BUT NO SEGMENTAL DETAILS WERE AVAILABLE IN THIS RESPECT- WHETHER, THUS, SAID COMPANY WAS TO BE EXCLUDED FROM FINAL LIST OF COMPARABLES TO ASSESSEE - HELD, YES [IN FAVOUR OF ASSESSEE]

SECTION 92C: ASSESSEE PROVIDED INTRAGROUP MARKETING, TECHNICAL SUPPORT AND CONTRACT SOFTWARE DEVELOPMENT SERVICES-COMPARABLE COMPANY WAS ENGAGED IN PROVIDING BOTHSOFTWARE SERVICES AND PRODUCT DEVELOPMENT- WHETHER IT WAS TO BE EXCLUDED FROM FINAL LIST OF COMPARABLE TO ASSESSEE- HELD, YES [IN FAVOUR OF ASSESSEE]

The segmentals of the said division are not available and insuch facts and circumstances where the concern picked up haddifferent functional profile, the margins of the said concern cannot beapplied in order to benchmark the international transactionundertaken by the assessee. The Tribunal in assessee's own case inAssessment Year 2013-14 vide para 4 has observed that the saidconcern was engaged in both product and development of softwaredevelopment services and hence, needs to be excluded from the finalset of comparables. The functional profile of the said concerncontinues to be same and consequently, we direct its exclusion fromthe final list of comparables. (para 12)

Now coming to the next concern i.e. Mindtree Ltd. Thefinancials of the said concern are placed at pages 1 to 182 of theAnnual report Compilation and the said concern is engaged indiversifying field whose segmental were also not available. Theassessee had selected the said concern because of its engagement inproviding software services to its AE; but the TPO for the year underconsideration had applied the entity level results of the said concernsas no segmental were available. We have perused the Annual ReportCompilation at page 69 of the Paper Book under which the Revenue isrecognized from different services/manufacturing etc. but bifurcationof revenue is industry-wise and not function-wise. In the absence ofthe same, there is no merit in the observation of the TPO that thesegmentals were available and hence, can be applied forbenchmarking the international transaction of provision of softwareservices. We find no merit in the order of the Assessing Officer/TPOin this regard and hold that in the absence of the segmentals beingavailable, the said concern cannot be selected as

functionallycomparable to the assessee. The Tribunal in Assessment Year 2013-14 had also excluded the said concern from final list of comparables.Accordingly, we direct the Assessing Officer to exclude the saidconcern i.e. Mindtree Ltd. from the final list of the comparables.(para 13)

The next concern which has been argued for its exclusion isAcropetal Technologies Ltd. The financials of the said concern areavailable at pages 356 to 449 of the Paper Book of Annual ReportCompilation and it transpires that the said concern recognizedrevenue from both software services and products. The reportingunder the head 'income from operations' was from softwareservices/products/solutions. Under the head 'direct cost', theassessee had debited cost of materials, project expenses and sellingand marketing expenses, which constitute 84% of the total cost. Insuch facts and circumstances, the concern Acropetal TechnologiesLtd. cannot be held to be functionally comparable to the assessee,which is purely engaged in providing software services to its AE.Hence, we direct its exclusion. (para 14)

The last concern which is under adjudication is InfobeansTechnologies Ltd. The Annual report of the said concern is at pages261 to 282 of the Paper Book of Annual Report Compilation. At page267 of the Paper Book of Annual Report Compilation, the Revenue isrecognized from operations and at page 274 of the Paper Book ofAnnual Report Compilation, the break-up is given up for sale of exportas revenue from operations. Further, for the year underconsideration, Infobeans Technologies Ltd. had declared that it wasengaged in providing custom development services to offshore andwas engaged in software engineering services in different fields. Nosegmentals were available. In such facts and circumstances, we findno merit in inclusion of the said concern in the final list ofcomparables. We direct its exclusion and also direct the AssessingOfficer to re-compute the arms length price of the international
transaction, if any in the hands of the assessee, after excluding 04concerns as directed in the para above. Thus, Ground Nos. 6 & 6.1raised by the assessee are allowed.(para 15)

18. MSD Pharmaceuticals (P) Ltd v. DCIT (ITA No. 1423/D/15)(23/12/2019)

SECTION 92C – AMP EXPENSES – ASSESSEE ENGAGED IN THE BUSINESS OF DISTRIBUTION OF PHARMACEUTICAL DRUGS – DIRECT SELLING EXPENSES INCURRED FOR CREATING AWARENESS AND TO BOOST SALES CANNOT BE RECHARACTERIZED AS AMP EXPENSES FOR THE BRAND – THESE EXPENSES CANNOT BE CONSIDERED AS INTERNATIONAL TRANSACTION AND ARE ALLOWABLE AS REVENUE EXPENSES

SECTION 92C – AMP EXPENSES – THE ONUS IS ON THE REVENUE TO SHOW EXISTENCE OF ANY ARRANGEMENT FOR INCURRING AMP EXPENSES – IN ABSENCE OF ANY ARRANGEMENT BETWEEN ASSESSEE AND ITS AE, THERE

CAN BE NO GROUND OR BASIS OF ASSUMING INTERNATIONAL TRANSACTION OF AMP EXPENSE

SECTION 92C – SUBVENTION PAYMENT RECEIVED FROM AE– THE PURPOSE OF SUBVENTION PAYMENT IS TO REIMBURSE PART OF OPERATING EXPENSE - THE AO/TPO CHARACTERIZED THE SAME AS OTHER INCOME AND EXCLUDED THE SAME WHILE COMPUTING PLI– HELD, SUBVENTION PAYMENT IS TO PROTECT THE INTEREST OF THE COMPANY AND SAME IS IN THE NATURE OF OPERATING INCOME.

Held, 28. The said proposition has been applied by the different Benches of the Tribunal in deciding the issue of the benchmarking of AMP expenses. The proposition laid down by the Hon'ble High Court in various decisions including Maruti Suzuki (supra) and Whirlpool of India Ltd. (supra) have been applied that for an international transaction to exist within the meaning of section 92B of the Act, the onus was on the Revenue to show that there existed agreement, understanding or arrangement, that Indian entity would incur AMP expenditure for the assessee or on behalf of its AE, who owned the brand; in the absence of any such action in concert, there cannot be any presumption of arrangement and it cannot be held that incurring of AMP expenditure was in the realm of an international transaction. The incurring of any expenditure on AMP in order to boost its sales and to bring awareness of its products and where the expenditure was not incurred at the instance or behest of the AE and also where there is no arrangement or agreement or allocation or contribution by the AE towards reimbursement or any part of the AMP expenditure, then it cannot be said that there existed an international transaction between the assessee and its AE, which have to be benchmarked under the transfer pricing provisions. The Hon'ble High Court in Maruti Suzuki (supra) has laid down that the onus is open to revenue to demonstrate that there existed arrangement between the assessee and its AE under which the assessee was obliged to incur AMP expenses to promote the brand of the AE and in the absence of the same, no functional transaction can be said to exist.

32. In the facts of the present case, the Assessing Officer/DRP/TPO have given a finding that there was no arrangement between the assessee and its AE, as far as incurring of AMP expenditure was concerned. However, the Assessing Officer/DRP/TPO observed that the AMP expenditure was an international transaction which had not been benchmarked by the assessee, which needed to be benchmarked and he goes on to determine the price of the said transaction by applying BLT. In the facts before us, we hold that the expenses which were booked by the assessee were for promotion of drugs, which undoubtedly have been imported by the assessee from its AE, but while spreading awareness to promote its sales, it cannot be said, in the absence of any agreement or arrangement to the contrary, that the assessee was promoting the brands of its AE. Since the expenditure incurred by the assessee was neither incurred at the instance or behest of its AE nor there was any understanding or arrangement between the parties to allocate or contribute any part of the expenditure or towards

reimbursement of any part of AMP expenditure, then no transaction or international transaction could be said to be involved between the assessee and its AE. In the absence of the same, the incurring of the expenditure by the assessee for its needs of the business is purely a domestic transaction and not governed by any of the transfer pricing regulations. The Courts upheld that the onus is upon the Revenue to demonstrate that there existed an arrangement between the assessee and its AE under which the assessee was obliged to incur excess amount of AMP expenses to promote the brands owned by the AE. In the case of the assessee, there is clear finding of the revenue that there was no such arrangement between the assessee and its AE.

33. There is no provision either in the Act or in the Rules to justify the application of BLT for computing the arms length price and also in the absence of BLT, the existence of an international transaction vis- à-vis the AMP expenditure cannot exist. Further, we hold that there cannot be a quantification of adjustment for determining the AMP expenses incurred by the assessee after applying the BLT, to hold the same to be excessive and thereby an existence of international transaction between the assessee and its AE. We find no merit in exercise carrying of Assessing Officer/DRP/TPO in this regard and delete the Transfer pricing adjustment made on account of AMP expenditure. Accordingly, we delete the adjustment on account of transfer pricing analysis of AMP expenditure.

39. We have heard the rival contentions and both the authorized representatives. First of all the issue relates to the subvention income received by the assessee amounting to Rs.77.12 crores. As per the understanding between the parties vide clause 5 to schedule (A) of the sales agreement between MSD India and MSD BV, it was agreed upon that since in the initial years of operation, it was anticipated that the assessee would incur significant start up operating cost and would incur losses in these years, so in order to assist the assessee in its initials years of operation, for transfer pricing purposes, MSD BV would make subvention payments to the assessee to reimburse part of operating expenses. The amount of the subvention payments were to be mutually agreed upon between the parties. It was further provided that "the transfer pricing subvention payments/reimbursement of operating expenses under the agreement, shall be payable as per the groups normal inter company payment procedures". The Ld.AR for the assessee referred to page 60 & 65 of the Paper Book to point out that subvention income received by the assessee has been offered as other income and has been brought to tax. This aspect is not disturbed by the authorities below as the TPO had not disturbed the benchmarking of distribution segment. The assessee further points out that the subvention payment was inextricably linked to the distribution activity carried on by the assessee. In the initial years, the assessee had incurred losses as these were its initial years of operations. So to reimburse part of the operating expenses, the AE made subvention payments to the assessee which may be considered as operating receipt of the assessee.

40. We find that similar issue arose before the Pune Bench of the Tribunal in Nalco Water India Ltd. vs ACIT in ITA No.742/Pun/2017, relating to Assessment Year 2012-13 order dated 06.09.2019 wherein intention to pay subvention amount was for limited period so as to ensure that the assessee therein did not become sick company. The assessee therein had also offered the said subsidy as taxable in its hands as noted by para 9 of order. Coming to the treatment of the subvention /subsidy received by the assessee from its parent company and whether the said subvention amount was operating in nature and the same had to be included as receipt in the hands of the assessee, while computing the PLI for the year under consideration, it was held as under:-….

41. Following the same parity of reasoning, we hold that the subvention amount received by the assessee before us is operating in nature and the same has to be included as operating income, while computing PLI in the hands of the assessee. The assessee in the present appeal has not raised any issue about its taxability and hence, the said status is not disturbed.

19. Flovel Energy Pvt. Ltd. vs ACIT (ITA No.6485/Del/2019)(AY 2011-12)

SECTION 143(2)- FAILURE OF AO, IN RE-ASSESSMENT PROCEEDINGS, TO ISSUE NOTICE UNDER SECTION 143(2) PRIOR TO FINALIZING RE-ASSESSMENT ORDER, CANNOT BE CONDONED BY REFERRING TO SECTION 292BB - HELD, YES- ASSESSING OFFICER ISSUED NOTICE ON ASSESSEE UNDER SECTION 148 - ASSESSEE INFORMED ASSESSING OFFICER THAT RETURN ORIGINALLY FILED SHOULD BE TREATED AS RETURN FILED PURSUANT TO NOTICE UNDER SECTION 148 - THEREAFTER ASSESSING OFFICER WITHOUT ISSUING NOTICE UNDER SECTION 143(2) TO ASSESSEE PASSED REASSESSMENT ORDER - WHETHER FAILURE BY ASSESSING OFFICER TO ISSUE NOTICE UNDER SECTION 143(2) WAS FATAL TO ORDER OF REASSESSMENT - HELD, YES [IN FAVOUR OF ASSESSEE]

The Hon'ble Delhi High Court in the case of PCIT vs. Jai Shiv Shankar Traders Pvt. Ltd. (supra) has held that failure of the Assessing Officer to issue notice u/s 143(2) in reassessment proceedings, prior to finalizing reassessment order cannot be condoned by referring to section 292BB and is fatal to the order of reassessment. Various other decisions relied on by the assessee in the case law compilation also support his case that in absence of issue of notice u/s 143(2) even in reassessment proceedings, the order becomes invalid and has to be quashed. Since, in the instant case, the assessee filed the letter stating that the return filed originally may be treated as return filed in response to notice u/s 148 and since the notice u/s 143(2) was not issued within the statutory period and since the assessment was not completed u/s 144 nor any interest u/s 234A has been charged which indirectly proves that the assessee, in fact, has filed the letter stating that the return filed originally may be treated as return filed in response to

notice u/s 148, therefore, respectfully following the decision of the Tribunal in assessee's own case for the immediately preceding assessment year, we hold that the assessment order passed by the Assessing Officer is not in accordance with law and has to be quashed. The legal ground raised by the assessee challenging the validity of the assessment order is accordingly allowed. Since the assessee succeeds on the legal grounds, the various other grounds raised by the assessee become academic in nature and, therefore, are not being adjudicated.(para 19)

20. Neelam Arora vs ITO (ITA No. 2689/Del/2019)(AY 2010-11)

SECTION 147- APPROVING AUTHORITY HAS GIVEN APPROVAL TOTHE REOPENING OF ASSESSMENT BY MENTIONING ONLY THAT "YES. I AM SATISFIED",- WHETHER THE REASON GIVEN IS SUFFICIENT TO INITIATE PROCEEDING U/S 147- HELD, SINCE APPROVING AUTHORITY HAS GIVEN APPROVAL TOTHE REOPENING OF ASSESSMENT IN A MECHANICAL MANNER WITHOUT DUE APPLICATION OFMIND- REASSESSMENT IS HEREBY QUASHED

Since in the present case the approving authority has given approval tothe reopening of assessment in a mechanical manner without due application ofmind by mentioning only that "YES. I AM SATISFIED", in the Reasons forInitiating Proceedings u/s. 147 For obtaining the Approval of the Pr. CIT, Delhi-23, New Delhi, and therefore, the legal issue no. 4 in dispute is squarelycovered by the aforesaid finding of the Tribunal, hence, respectfully followingthe aforesaid precedent i.e. ITAT, SMC, Bench, New Delhi decision dated21.8.2019 in the case of Gopal Chand Manudhra and Sons; DamyantiMundhra;Ramdev Mundhra; Shriya Devi Mundhra and Gopal Chand Mundhra vs. ITO,Wards 55(5), New Delhi decided in ITA No. 1375; 1721; 1722; 1523-1524/Del/2019 respectively relevant to assessment year 2011-12, thereassessment is hereby quashed and accordingly the legal ground no. 4 isallowed. Since the assessee succeeds on this legal ground challenging thevalidity of reassessment proceedings, the addition on merit is not beingadjudicated being academic in nature. The appeal filed by the assessee isaccordingly allowed.(para 4.2)

21. Shri Devki Nandan Bindal v. ITO (ITA.No.4271/Del./2019)(18/12/19)

SECTION 147 – THE REASSESSMENT PROCEEDINGS WERE INITIATED SOLELY ON THE BASIS OF INFORMATION FROM INVESTIGATION WING - THE ASSESSING OFFICER HAS NOT CONDUCTED ANY FURTHER ENQUIRY AND RECORDED WRONG FACTS IN THE REASONS – THE REOPENING WAS HELD TO BE ON THE BASIS OF BORROWED SATISFACTION

SECTION 147 – SCOPE – THE ASSESSING OFFICER HAS POWER TO TRAVEL BEYOND REASONS BUT THERE MUST BE COGENT REASON FOR THE SAME – ALSO, IT IS INCUMBENT UPON AO TO ISSUE NOTICE TO THE ASSESSEE BEFORE VENTURING INTO ISSUES OTHER THAN THOSE RECORDED IN THE REASONS

Held, 7.3. It may also be noted here that the A.O. in the reasons recorded for reopening of the assessment has merely recorded that Rs.15 lacs accommodation entry taken by the assessee has escaped assessment. However, at the re-assessment stage, A.O. made further addition of Rs.52.91 crores on account of deposits in the bank account of the assessee. No reasons have been mentioned as to why such addition have been made and what was the purpose in making the addition. The entire deposit in the Bank account of the assessee could never be unexplained. Even the Investigating Agency have not made any allegation against the assessee if that amount was an accommodation entry taken by the assessee ? The Ld. D.R. admitted that no notice have been issued by the A.O. while proposing to make this addition of Rs.52.91 crores. The issue is, therefore, covered in favour of the assessee against the Department by Judgment of Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Limited vs., CIT [2011] 336 ITR 136 (Del.)

7.4. Similar view is taken by the ITAT, Mumbai GBench in the case of Juliet Industries Ltd., Mumbai vs., ITO 6(3)(3), Mumbai (supra). Considering the totality of the facts and circumstances, we are of the view that A.O. has recorded non-existing, incorrect and wrong facts in the reasons recorded for reopening of the assessment. The A.O. did not applied his mind to the report of Investigation Wing. The A.O. merely believed report of Investigation Wing without making further scrutiny at the assessment. The A.O. merely reproduced report of Investigation Wing without making further scrutiny of the same. The A.O. merely reproduced report of Investigation Wing and crux of statement of Shri Kishori Sharan Goel for reopening of the assessment in the matter. Therefore, it was merely a borrowed satisfaction without application of mind. We, therefore, held that initiation of re-assessment proceedings in the instant case is illegal, bad in law and is liable to be quashed. In this view of the matter, we set aside the orders of the authorities below and quash the reopening of assessment under section 147/ 148 of the Income Tax Act, 1961.

22. Sanatan Dharam Shiksha Samitee v.Income Tax Officer (ITA No.871/D/17) (Dated 18/11/2019)

SECTION 147 -WHERE AN ISSUE WAS ORGINALLY EXAMINED BY THE ASSESSING OFFICER UNDER SECTION 143(3), REASSESSMENT UNDER SECTION 147 CAN BE CONDUCTED ONLY IF NEW MATERIAL COME TO THE POSSESSION OF ASSESSING OFFICER – FURTHER, REOPENING IS NOT PERMISSIBLE ON THE BASIS OF REVENUE AUDIT OBJECTION – REOPENING

OF ASSESSMENT ON THE BASIS OF REVENUE AUDIT OBJECTION AND CHANGE OF OPINION IS QUASHED.

Held,We have heard the rival submissions and perused the materialavailable on record. The perusal of original assessment order passedu/s.143(2) of the Act dated 23.11.2012 shows that the AO has dulyexamined and scrutinized the details submitted during the course ofssessment proceedings and has applied his mind regardingexemption u/s.10(23C)(iiiab) of the Act. The AO had obtainednecessary information and allowed the same by observing in para 2of the assessment order…. This fact of examination and disclosure of information is furthersupported by the reply furnished by the assessee in response tonotice u/s. 142(1) dated 03.02.2012 vide letter dated 16.05.2012[placed at paper book page no. 3 and 4] and letter dated 21.11.2012[placed at paper book, page no. 5 to 7]. Therefore, the assessee hasmade compliance to the specific query raised by the AO tosubstantiate its claim that the assessee exists solely for educationalpurpose and substantively financed by the Government. Therefore,there was no new material which had come into possession of the AOto form a belief that by reason of non-disclosure truly and fully allmaterial facts, necessary for assessment, the income chargeable totax has escaped assessment. The ld.Counsel has placed reliance onthe decision of Hon'ble Delhi High Court in the case of CIT Vs. UshaInternational Ltd.[2012] 348 ITR 485 (Delhi) wherein by majorityview, it was held that "the assessment proceedings cannot be validlyreopened u/s.147 of the Act, even within 4 years, if an assessee hasfurnished full and true particulars at the time of original assessmentwith reference to the income alleged to have escaped assessment, ifthe original assessment was made u/s.143(3). So long as theassessee has furnished full and true particulars at the time of originalassessment and so long as the assessment order is framed undersection 143(3) of the Act, it matters little that the assessing officer didnot ask any question or query with respect to one entry or note but hadraised queries and questions on other aspect. Section 114(e) of theEvidence Act can be applied to an assessment order framed undersection 143(3) of the Act, provided that there has been a full and truedisclosure of all material and primary facts at the time of originalassessment. In such a case if the assessment is reopened in respectof matter covered by the disclosure, it would amount to change ofopinion."… Therefore, the fact in the instant case shows that it amounts tochange of opinion, as the assessee has disclosed full and trueparticulars at the time of original assessment made under section143 (3) of the Act. This view is further supported, by the decision ofHon'ble Supreme Court decision as relied by the ld.Counsel in thecase of CIT Vs. Kelvinator India Ltd., [2010] 320 ITR 561 (SC) whereinit was held that the AO has power to reopen the assessment u/s.147provided AO has reason to believe that income has escapedassessment and there is tangible material to come in to thepossession of the AO, that there is escapement of income, mere"change of opinion" cannot per-se be reason to reopen theassessment. In the present case, there is no new tangible material,which had come into the possession of the AO, therefore, reopeningon the same material amounts to mere change of opinion, which isnot permissible under the law. Similarly, the ld.Counsel has placedreliance in the case of

Oriental Insurance Company Vs. CIT [2015]378 ITR 421 (Delhi) wherein it was held that it cannot be disputedthat the exemption claimed by the AO in respect of the profit on sale/redemption of investment was duly disclosed and the AO has alsoopined on the merits of taxability of profits of sale / redemption ofinvestment. The income from profit on sale/redemption ofinvestments is now sought to be taxed as income, which had escapedassessment. Thus, in our view, clearly represents a change in theopinion with regard to the taxability of the income in question. It waswell settled that the power under Section 147 of the Act is not a powerof review but a power to reassess. Permitting reopening ofassessment on a change of opinion as to the taxability of the incomeof the Assessee is, thus, outside the scope of Section 147…..We further find that the reopening has been done in the presentcase on the basis of Revenue Audit Objection which does notconstitute an information for the purpose of reopening of assessmentas held by the Hon'ble Supreme Court in the case of CIT Vs. LukasTVS Ltd., (supra), CIT Vs. Kelvinator India (supra) and Hon'ble DelhiHigh Court in the case of CIT Vs. M/s. India Iron and Steel Ltd., andM/s. Xerox Modi Corp. Ltd., Vs. DCIT (2013) 350 ITR 300 (Del)….. We Further observed that before introduction of Rule 2BBBwith effect from 12.10.2014, where the person having voting powernot less than 20% was deemed to have substantive interest in thebusiness of the company as per section 40(2)(a) of the Act as held bythe Hon'ble Karnataka High Court in the case of CIT Vs. DeshiyaVidyaSalalSamiti [ITA No.1133/2008 [PB-114-121]. Therefore, Rule2BBB introduced with effect from 12.10.2014 is not applicable for theyear under consideration. In view of these facts and circumstances,the reopening in the instant case amounts to change of opinion andit is based on audit objection and as no new tangible material hasbeen brought on record. Therefore, we hold that the reopening ofassessment was not valid; accordingly, the same is quashed. In viewof this, Ground No.1 to 6 & 8 of assessee's appeal are allowed.**[Paras14, 15, 16, 17, 18]**

23. M/s. Tourism India Management Enterprises P. Ltd. v. DCIT (ITA No. 1209/D/19)(04/12/2019)

SECTION 147 – NOTICE U/S 143(2) – SERVICE OF NOTICE BY AFFIXTURE WAS HELD TO BE INVALID SINCE THE AO HAD CORRECT ADDRESS AND NO ATTEMPT WAS MADE TO SERVE THE NOTICE THROUGH NORMAL PROCEDURE - THERE WAS NO REASON TO ASSUME THAT ASSESSEE WILL EVEADE OR REFUSE TO ACCEPT THE NOTICE – IT WAS HELD THAT NOTICE U/S 143(2) WAS NOT PROPERLY SERVED – THE ASSESSMENT WAS HELD TO BE BAD IN LAW IN ABSENCE OF VALID SERVICE OF NOTICE U/S 143(2)

Held, 12. Bare perusal of notice issued u/s 143(2) dated 04.09.2014 and another notice issued by way of affixation dated 29.09.2014 go to prove that this was an exercise undertaken by the Assessing Officer in futility just to bring the entire assessment process within limitation. When it is specific case of the Assessing Officer as mentioned

in para 4.5 that original service was valid, the service of notice by way of affixation was just issued as abundant precaution to safeguard the interest of the revenue it goes to prove that mandatory notice u/s 143(2) has never been served upon the assessee within prescribed period. When notice u/s 143(2) dated 04.09.2014 was never served upon the assessee having been sent on wrong address, there is no question of resorting to service of notice by way of affixation on correct address.

13. When we examine para 3 of the order dated 03.02.2016 passed by the AO vide which objection raised by the assessee were disposed off, it is categorically mentioned that :

"Moreover, when no confirmation was received from the assessee, the AO issued another notice on 29/09/2014 on the address mentioned at return filed by it i.e. K-124, CHITRANJAN PARK, NEW DELHI-110019. Since, the AO was bound to serve the above notice on or before 30.09.2014 and due to shortage of time the AO was left with no option but to serve the same by way of affixture. The notice was duly affixed through inspector on 29.09.2014."

14. We are of the considered view that aforesaid para 3 of the order makes it amply clear that the first notice was issued on wrong address of the assessee and then AO rectified the mistake and to overcome the limitation to get the notice served before the 09.02.2014 rushed to serve the notice dated 29.09.2014 by way of affixation. Issuance of notice on the wrong address never confers any right on the Assessing Officer to get the notice served u/s 143(2) by way of affixation. Because notice by way of affixation is only to be served on the assessee when his correct address is not available or he has refused to accept the service of notice as its not an empty formality.

15. Further more when we examine notice dated 04.09.2014 issued u/s 143(2) available at page 26 and intimation issued u/s 200A dated 26.09.2011 and notice of demand issued u/s 156 of the Income Tax Act dated 21.09.2011 available at page 41 and 42 it is again at the address of the assessee available with the revenue department i.e. K-1/124, CR Park, New Delhi- 110019. In these circumstances it is difficult to comprehend as to how the address of assessee mentioned on notice u/s 143(2) dated 04.09.2014 of Shalimar Bagh has entered into the record. On the one hand, the revenue has claimed that the first notice dated 04.09.2014 was deemed served then it is beyond comprehension as to what was the need for issuance of 2nd notice dated 29.09.2014 to served by way of affixation. So the entire exercise goes to prove that notice u/s 143(2) has never been served upon the assessee on or before 03.09.2014.

16. Moreover, when we advert to the procedure laid down in Code of Civil Procedure, 1908 notice by way of affixation can only be issued only when notice issued in the ordinary course could not be served despite reasonable effort and the Assessing Officer was satisfied enough to reach the conclusion that service in the ordinary course cannot be effected in the ordinary course. More over there is no material on the file showing any order passed by Revenue Officer reaching the conclusion that the service in this

case cannot be effected in the ordinary course and as such he has resorted to get the service of assessee effected through substitute service.

17. Furthermore when we examined notice of affixation available at page 27 to 29 of the paper book processing server has not complied with the provisions contained in order V Rule 20 of CPC by effecting the service by affixation in the presence of some independent witness. More particularly when there is no material on record that assessee has evaded the service of summons or has left the place of his last address to some unknown place only then service by way of substitute service can be resorted to. In the instant case, when there is no such material on the record because the first notice was issued on 04.09.2014 on non-existant address of the assessee and then Revenue Officer rushed to serve the notice by way of affixation without recording any satisfaction, the entire assessment proceedings are null and void. Moreover in the instant case when the revenue knew correct address of the assessee since 2008, there is no question of issuing the notice dated 04.09.2014 at the wrong address and suddenly resorted to served the notice by way of affixation at the correct address. It appears that the entire exercise has been completed in haste to meet with the statutory requirement of limitation to serve the notice up till 03.09.2014, which cannot be treated as a valid service by any stretch of imagination even.

24. Pramod Kumar Sahai v. ITO (ITA No. 5758/D/13)(20/12/2019)

SECTION 147 – VALIDITY OF REASONS –AO RECORDED REASONS ON THE BASIS OF ENQUIRIES CONDUCTED U/S 133 OF THE ACT – SINCE NO PROCEEDING WAS PENDING BEFORE ISSUANCE OF NOTICE U/S 148, THE ENQUIRIES U/S 133 CONDUCTED PRIOR TO ISSUE OF NOTICE WITHOUT APPROVAL OF COMPETENT AUTHORITY HAVE NO SANCTITY UNDER THE LAW – THE REOPENING ON THE BASIS OF INVALID ENQUIRY WAS HELD TO BE INVALID.

ASSESSING OFFICER IS DUTY BOUND TO PROVIDE COPY OF REASONS TO THE ASSESSEE – FAILURE TO PROVIDE REASONS DESPITE SPECIFIC REQUEST WILL RENDER THE ENTIRE PROCEEDINGS NULL AND VOID

Held, 9. We have heard both the sides patiently and perused the materials on record carefully. It is not in dispute that reasons recorded by the Assessing Officer for coming to the belief that income had escaped the assessment, was neither supplied by the Assessing Officer to the assessee ; nor the assessment records were produced before the Ld. CIT(A). The reasons so recorded, if any, have neither been provided to the Ld. CIT(A), nor is there any offer from Revenue's side to produce the same before the Income Tax Appellate Tribunal. In fact, as mentioned in foregoing paragraph 8 of this order, the reasons recorded by the Assessing Officer, if any, for coming to the belief that income had escaped assessment, are not available. The Ld. Departmental Representative had also admitted at the time of hearing before us, that apart from the

assessment order dated 12.12.2008 there was nothing else which can be produced to support the belief arrived at that income had escaped assessment. The validity of assumption of jurisdiction by the Assessing Officer u/s 147 read with Section 148 of Income Tax Act is to be examined on the basis of the reasons recorded by the Assessing Officer for coming to the belief that income had escaped assessment. Such reasons have to be recorded before assumption of Jurisdiction u/s 147 of I.T.Act (i.e. before issue of notice u/s 148 of I.T.Act). Any developments which take place after assumption of jurisdiction u/s 147 of I.T.Act (i.e. 148 of I.T.Act) has no relevance for deciding whether the AO had reason to believe, before assumption of jurisdiction u/s 147 of I.T.Act (i.e. before issue of notice u/s 148 of I.T.Act) that income had escaped assessment. When such reasons are not made available by Revenue either to the assessee or to the appellate authorities [Ld. CIT(A) as well as ITAT]; we have to conclude that the onus has not been discharged by Revenue to justify assumption of jurisdiction u/s 147 of I.T.Act through issue of notice under section 148 of Income Tax Act. When the assumption of jurisdiction u/s 147 read with section 148 of I.T.Act lacks validity, the resultant assessment order lacks legitimacy. On this ground alone, the aforesaid assessment order dated 12.12.2008 deserves to be annulled. However, we further note that the Assessing Officer has not furnished reasons for issue of notice u/s 148 of I.T.Act to the assessee in spite of order of Hon'ble Supreme Court in the case GKN Driveshafts (India) Ltd. vs. ITO (2003) 259 ITR 19 whereby the Assessing Officer is bound to provide reasons recorded by him for issue of notice u/s 148 of I.T.Act to the assessee once the assessee has filed return in response to the notice issued u/s 148 of Income Tax Act.

9.1 Moreover, we have perused second paragraph of the assessment order, which refers to the inquiry made by the Assessing Officer before issue of notice u/s 148 of Income Tax Act on 07.12.2007. The Assessing Officer, in the absence of any proceedings pending before him, has no authority to conduct any inquiry, except when prior permission has been taken by the Assessing Officer for conducting the inquiry u/s 133 of I.T. Act from the competent authority specified in second proviso to Section 133 of I.T.Act. There is nothing on record to show that the Assessing Officer had obtained prior approval of the competent authority specified in second proviso to Section 133 of I.T.Act. to undertake such inquiry. As noted in foregoing paragraph no. 8 of this order, the ld. DR had admitted that no proceedings were pending before the AO prior to issue of notice u/s 148 of I.T.Act. Thus, we find that the Assessing Officer has conducted inquiries without authority of law before issue of notice u/s 148 of I.T.Act. Thus, the assumption of jurisdiction by the AO u/s 147 of I.T.Act read with section 148 of I.T.Act is based on inquiries conducted without the authority of law. We are of the firm view that assumption of jurisdiction u/s 147 r.w.s. 148 of I.T.Act on the basis of inquiries conducted without the authority of law lacks legitimacy. Assumption of jurisdiction must be held to be unauthorized, when the inquiries made for assuming the jurisdiction were unauthorized in law; and the assessment order passed in pursuance of unauthorized assumption of jurisdiction u/s 147 r.w.s. 148 of I.T. Act, also lacks

legitimacy. On this ground also, the assessment order dated 22.12.2008 deserves to be annulled.

25. Umesh Kumar Tyagi vs. ITO [I.T.A. No. 2978/Del/2019] dated 22.11.2019

SECTION 148 – THAT THE APPROVAL TO THE REOPENING OF ASSESSMENT IS GRANTED IN A MECHANICAL MANNER WITHOUT DUE APPLICATION OF MIND BY MENTIONING ONLY "YES, I AM SATISFIED THAT IT IS A FIT CASE FOR ISSUE OF NOTICE U/S. 148" - THE LEGAL ISSUE IN DISPUTE IS SQUARELY COVERED BY ITAT, SMC, BENCH, NEW DELHI DECISION DATED 26.9.2019 IN THE CASE OF KRISHNA PRINT PACK, MEERUT VS. ITO, WARD 1(3), MEERUT DECIDED IN ITA NO. 5135/DEL/2018 - THE REASSESSMENT IS HEREBY QUASHED AND ACCORDINGLY THE LEGAL IS ALLOWED.

26. Santur Infrastructure Ltd. v. ACIT (ITA No.6844/Del./2014)(18/12/2019)

SECTION 194C/PENALTY 271C –EDC PAID TO HUDA – EDC WAS PAYABLE UNDER A CONTRACT BETWEEN ASSESSEE AND GOVERNMENT DEPARTMENT DTCP AND THERE WAS NO CONTRACT BETWEEN ASSESSEE AND HUDA – IN ABSENCE OF ANY PRIVITY OF CONTRACT WITH HUDA, THE TDS PROVISIONS U/S 194C ARE NOT APPLICABLE TO EDC PAYMENT – EVEN OTHERWISE, IN ABSENCE OF ANY CLARITY PRIOR TO CBDT CIRCULAR DATED 23.12.2017, THE PENALTY U/S 271C CANNOT BE IMPOSED

Held, 9. We are of the considered view that when payment of EDC has been made by the assessee in accordance with licence granted by the DTCP, the payment made to HUDA was not made in pursuance of any work contract or under statutory obligation meaning thereby that when the assessee has no privity of contract with HUDA rather the assessee has privity of contract with DTCP, a Government Department of Haryana, as per Agreement (supra) and the HUDA has merely received the payment for and on behalf of DTCP, the assessee was not required to deduct the TDS.

11. When we examine aforesaid contention raised by the ld.DR for the Revenue in the light of the facts and circumstances of the case in which EDC have been paid to HUDA for Financial Years 2013-14, 2014-15, 2015-16 & 2016-17 (upto December 2016) as mentioned by the ld. CIT (A) in para 2.1 of his order, it goes to prove that prior to 23.12.2017, the date of CBDT circular, there was no clarity whatsoever as to the deduction of tax on EDC. When there was no clarity with the assessee prior to 23.12.2017, if TDS was to be deducted by the assessee on payment of EDC, it provided a "reasonable cause" u/s 273B of the Act that TDS was not required to be deducted.

27. M/s. Crystal Crop Protection P. Ltd. v. DCIT (ITA No. 1539/D/16)(19/12/2019)

SECTION 254 – ADDITIONAL GROUND – INCOME TAX APPELLATE TRIBUNAL HAS POWER TO ADMIT AND DECIDE FRESH ADDITIONAL GROUND WHICH WAS NOT RAISED BEFORE LOWER AUTHORITIES – THE ASSESSEE RAISED ADDITION GROUND BEFORE ITAT REGARDING NON TAXABILITY OF EXCISE SUBSIDY ON THE GROUND THAT SAME IS OF CAPITAL NATURE EVEN THOUGH IT WAS OFFERED AS INCOME IN THE RETURN – HELD, THE ROLE OF THE ITAT IS TO DETERMINE CORRECT TAXABLE INCOME OF THE ASSESSEE - EVEN IF FRESH CLAIM RESULTS IN REDUCTION OF RETURNED INCOME, SAME IS ADMISSIBLE – COMPLETE LEGISLATIVE HISTORY ANALYZED – CONSEQUENTLY, THE ADDITIONAL GROUND WAS ACCEPTED AND DECIDED IN FAVOUR OF THE ASSESSEE.

EXCISE AND INTEREST SUBSIDY RECEIVED BY THE ASSESSEE FOR SETTING UP MANUFACTURING UNIT IN JAMMU AND KASHMIR –THE PURPOSE OF SUBSIDY WAS ENCOURAGE DEVELOPMENT UNDERDEVELOPED AREAS – THE SAME WAS HELD TO BE CAPITAL NATURE

Held, 12. While dealing with the case of NTPC, the Hon'ble Apex Court enunciated that it would not be proper if the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) and it amounts to taking too narrow a view of the powers of the Appellate Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Thus, we find that the Courts have always upheld the powers of the Tribunal or rather directed the Tribunals to assess the correct tax liability of the assessees. In case the assessee has wrongly or owing to lack of knowledge pays tax on an item of amount which is not taxable in accordance with the provisions of the Income Tax Act, the assessee would have every right to pray for right taxation of his taxable income.

13. Thus, it can be said that the claim of the assessee has to be considered based on the fact that whether the amounts in question or taxable or not, notwithstanding the fact that the assessee has suo-moto offered the amounts to taxation already. For determination of the issue whether the Assessing Officer or the Tribunal empowered to consider the plea of the assessee, the provisions of the Act are examined.

21. Further, we also note that the relief sought cannot be refused merely because the assessee has omitted to claim the relief as held by the Hon'ble Supreme Court in Anchor Pressings P. ltd. Vs. CIT 161 ITR 159. Hence, keeping in view the entire facts on record, the judicial pronouncements of the Hon'ble Apex Court on the issue of allowability of

the claim, we hereby hold that the assessee is eligible to raise the issue at appellate levels.

22. Having said so, the issue whether the Excise Duty subsidy and interest subsidy can be treated as capital receipt is examined. The similar subsidy has been allowed as capital receipt and also the issue of computation of profits u/s 115JB has been examined by the Co-ordinate Bench of Tribunal in ITA No. 3837/Del/2016 in the case of M/s Dhanuka Agritech Ltd. wherein the appeal of the assessee is allowed. The same is squarely applicable to the facts of the instant case. Further, the matter stands squarely covered by the order of the Hon'ble Jammu & Kashmir High Court in the case of Shri Balaji Alloys Vs CIT 333 ITR 335.

28. M/s. Charbuja Marmo (India) Pvt. Ltd. v. Pr. CIT (ITA.No.4749/Del./2019) (31/12/2019)

SECTION 263 – SECTION 147 – THE VALIDITY OF REASSESSMENT PROCEEDINGS CAN BE SUBJECT MATTER OF CHALLENGE WHILE DISPUTING THE REVISIONARY JURISDICTION U/S 263 – WHERE THE NOTICE U/S 148 WAS BAD ON ACCOUNT OF INVALID APPROVAL U/S 151, SUCH DEFECTIVE ORDER CANNOT BE SUBJECT MATTER OF REVISIONARY PROCEEDINGS U/S 263 – THE ORDER U/S 263 WAS HELD TO BAD IN LAW

Held, 6. We have considered the rival submissions. It is well settled Law that since re-assessment proceedings are invalid and bad in law, therefore, such proceedings could not be revised under section 263 of the I.T. Act. It is also well settled Law that validity of the re-assessment proceedings are to be judged on the basis of the reasons recorded for reopening of the assessment. It is also settled Law that while granting sanction under section 151 of the I.T. Act to the reasons and reopening of the assessment, the Competent Authority should apply their mind and could not grant sanction/approval in a mechanical manner.

6.7. Considering the issue involved in the present appeal in the light of above decisions, it is clear that the Addl. CIT and Ld. Pr. CIT while granting approval for reopening of the assessment under section 147/148 of the I.T. Act merely stated "Yes", which would show that they have not applied their independent mind and merely accorded sanction without going through any material on record. The issue is thus covered against the Revenue by the aforecited decisions in which even on more facts the approval was not found valid. Therefore, the issue is covered by the above decisions of the Tribunal in which even on better footing the re-assessment order was quashed and ultimately it was held that such proceedings could not be reopened in collateral proceedings under section 263 of the I.T. Act, 1961. The Learned Counsel for the Assessee has pointed-out several inconsistencies in the reasons which also show that the reasons are recorded just

by reproducing the report of the Investigation Wing without application of mind. The issue is, therefore, covered in favour of the assessee by the above Orders of the Tribunal. Following the same we hold that reopening of the assessment in this case is invalid, bad in law and therefore, such re-assessment proceedings could not be reopened under section 263 of the I.T. Act, 1961. It may also be briefly noted that the A.O. in the reasons recorded in the assessment order has mentioned that assessee has received accommodation entries in assessment year under appeal from five parties in a sum of Rs.70 lakhs and after reopening of the assessment, A.O. called for the details and documents from the assessee and was satisfied with the explanation of assessee, therefore, the of proceedings under section 263 of the I.T. Act by the Ld. Pr. CIT could not have substituted the view taken by the A.O. In view of these facts and circumstances, we are of the view that initiation of proceedings under section 263 of the I.T. Act are not justified. The same are bad in law and invalid. We, accordingly, set aside the Order of the Ld. Pr. CIT passed under section 263 of the I.T. Act and quash the same. Resultantly, the re-assessment order Dated 05.12.2016 under section 147/143(3) of the I.T. Act, 1961 by the A.O. is restored. Appeal of assessee is accordingly allowed.

29. Anil T.Kriplani vs The CIT (IT-2) (ITA No.506/Del/2019)(AY 2010-11)

SECTION 263- WHETHER IN ORDER TO INVOKE SECTION 263 ASSESSING OFFICER'S ORDER MUST BE ERRONEOUS AND ALSO PREJUDICIAL TO REVENUE AND IF ONE OF THEM IS ABSENT, I.E., IF ORDER OF INCOME-TAX OFFICER IS ERRONEOUS BUT IS NOT PREJUDICIAL TO REVENUE OR IF IT IS NOT ERRONEOUS BUT IS PREJUDICIAL TO REVENUE, RECOURSE OF SECTION 263(1) CANNOT BE TAKEN - HELD, YES- ASSESSEE ADOPTED VALUE OF HIS PROPERTY AT RS.95.28 LAKHS AS A FAIR MARKET VALUE AS ON 1-4-1981 ON BASIS OF A VALUATION REPORT - COMMISSIONER WAS OF THE VIEW THAT THE ASSESSING OFFICER HAS FAILED TOCORRECTLY DETERMINE THE FAIR MARKET VALUE AS ON 01.04.1981 - WHETHER LAW TO BE APPLIED IN INSTANT CASE IS SECTION 55A(A) WHEREIN REFERENCE COULD BE MADE TO DVO ONLY IF VALUE DECLARED BY ASSESSEE IS IN OPINION OF ASSESSING OFFICER LESS THAN ITS FAIR MARKET VALUE - HELD, YES - WHETHER WHEN VALUE OF PROPERTY ADOPTED BY ASSESSEE WAS MUCH MORE THAN FAIR MARKET VALUE EVEN AS DETERMINED BY DEPARTMENTAL VALUATION OFFICER, INVOCATION OF SECTION 55A(A) WAS NOT JUSTIFIED - HELD, YES

We have heard the rival contentions and perused the record. Theissue arising in the present appeal is against the exercise of jurisdictionu/s 263 of the Act, wherein the Commissioner has the power, incase theassessment order passed by the Assessing Officer is erroneous and alsoprejudicial to the interest of the Revenue. The requirement of law is thatboth the conditions of the section i.e. order being erroneous and

prejudicialto the interest of the Revenue, have to be fulfilled incase the Commissionerwants to exercise his power u/s 263 of the Act. The Hon'ble Supreme Courtin Malabar Industrial Co. Ltd. Vs. CIT (supra) had held that twin conditionsof section 263 of the Act are to be satisfied and in case one of them isabsent i.e. order of the Assessing Officer is erroneous but not prejudicial tothe interest of revenue or if it is prejudicial to the interest of revenue, butnot erroneous, then recourse cannot be made to section 263(1) of the Act.Further, it has been laid down by the Hon'ble Supreme Court in the saidcase that the provisions cannot be invoked to correct each and every type ofmistake or error committed by the Assessing Officer, it is only when anorder is erroneous that the section will be attracted and incorrectassessment of facts or incorrect application of law will satisfy therequirement of order being erroneous. In the same category falls the orderspassed without applying the principles of natural justice or withoutapplication of mind. It was further held by the Apex Court that the phaseprejudicial to the interest of revenue has to be read in conjunction witherroneous order passed by the Assessing Officer. Every loss of revenue asconsequent of an order of the Assessing Officer cannot be treated asprejudicial to the interest of revenue; for example, when Income Tax Officeradopted one of the courses permissible in law and it has resulted any lossof revenue or where two views are possible and the Income Tax Officer hastaken one view with which the Commissioner does not agree, it cannot betreated as erroneous order which is prejudicial to the interest of revenueunless the view taken by the ITO is unsustainable in law.(para 10)

Before going into the merits whether the value has been correctlydetermined or not, we may refer to the decision of Hon'ble Bombay HighCourt in CIT vs Puja Prints (supra) wherein it has been laid down that theprovisions of section 55A(a) of the Act cannot be applied and no reference ispossible to be made to the DVO for determining the market value of theproperty at a figure less than that shown by the assessee. Accordingly, theAssessing Officer had no authority to make any such reference to the DVOto determine the value of the property i.e. cost of acquisition as on01.04.1981, at any price less than the price shown by the assessee. Insuch facts and circumstances of the case, the Assessing Officer has toaccept the valuation shown by the assessee as on 01.04.1981. The saidvaluation is supported by a report of the Registered Valuer and other salesinstance during the period. In such facts and circumstances, we find nomerit in the exercise of the jurisdiction by the Commissioner u/s 263 of theAct. Hence, we reverse the same and hold the said order passed u/s 263 ofthe Act as both invalid and bad in law. Thus, grounds raised by theassessee are allowed.(para 12)

30. Nokia Solutions and Networks India Pvt Ltd vs. Addl.CIT [ITA No. 1013/DEL/2015] dated: 21.11.2019

THAT WHETHER THE AO IS INCORRECT IN MAKING ADDITION OF UNEARNED REVENUE WHICH HAS BEEN OFFERED FOR TAX IN THE SUBSEQUENT YEARS – HELD YES

19. In light of the contractual terms and conditions, on perusal of the summary of unearthed revenue, as mentioned elsewhere, clearly shows the F.Ys in which Revenue has been recognised. This is in consonance with the well recognized Accounting Standard – 7 issued by the Institute of Chartered Accountants, which is the highest accounting body created by an Act of the Parliament and the same cannot be brushed aside lightly.

20. In our considered opinion, as managed services are to be rendered for 42 months, income thereof is spread over four years since services are rendered for 10 months in the F.Y. under consideration commensurate amount is booked in the current year and the balance is treated as unearned revenue at the year-end as these services are provided by indeterminate number of acts over a specified period of time. Revenue is, therefore, recognised on straight-line basis over a period for which services are to be rendered.

21. Needless to mention her that same accounting principle has been accepted in earlier A.Y. It is also pertinent to note that the assessee has offered tax in subsequent years amount as and when services are rendered and, therefore, by any stretch of imagination, it cannot be said that there is some revenue leakage. For this proposition, we derive support from the decision of the Hon'ble Supreme Court in the case of Excel Industries 358 ITR 295.

31. Precision Gauges and Tools P. Ltd. v. ACIT (ITA No. 7982/D/18)(03/12/19)

CLIENT CODE MODIFICATION (CCM) – THE AO AND CIT(A) DISALLOWED THE CLAIM OF LOSS ON THE GROUND THAT SAME IS BOGUS AND MANIPULATED THROUGH CCM – THERE WAS NO INFORMATION FROM INVESTIGATION AGAINST THE ASSESSEE OR ITS BROKER – THE BROKER HAD CONFIRMED THE GENUINENESS OF TRANSACTIONS VIDE ITS REPLY TO AO – THERE IS NO EVIDENCE OF ANY UNDERHAND COMMISSION BEING PAID – THE DECISION OF APEX COURT IN THE CASE OF SEBI V. RAKHI TRADING P. LTD. HAS NO BLANKET APPLICABILITY AND SAME HAS TO BE TESTED ON FACTS OF EACH CASE – THE DISALLOWANCE OF CLAIM OF LOSS WAS DELETED.

Held, It is noted that Assessing Officer and the Ld. CIT(A) failed to advert to the facts of the case in their proper perspective. While it is true that some brokers have in the past

indulged in interpolation and manipulation through the CCM facility, yet it is equally true that all CCM transactions cannot be said to be interpolated or manipulated. Interpolation and manipulation may possibly happen in fringe cases. Both the Assessing Officer and the Ld. CIT(A) were seemingly obsessed with the report of the DI (Inv), Ahmedabad and the case laws on the subject. Both of them failed to note even the basic facts of the subject case. The Assessing Officer failed to note that there was no information from the DI (Inv) with regard either to the assessee or his broker having indulged in any objectionable transaction. He also failed to note that in this case CCM had not been done in the last two months of the year as opined by him. The corrections as effected in the CCMs were of a most nominal amount of Rs. 2 Lakhs plus which could not lie in the realm of manipulation. The broker of the assessee on enquiry had confirmed that the modifications were all genuine. The Assessing officer had not found any evidence of any under-hand commission having been paid to the broker for manipulations. Whatever was paid to the broker was all through regular channels and was at the rates as prescribed by the stock exchange. The Assessing Officer failed to also note these punching errors occurred in seriatim only in the month of January of that year whereas the assessee's trading in share transactions was spread over the entire year. The fact that the error which occurred could be the product of a novice's mistake at the broker's end has been completely lost sight of by the Assessing Officer. The Ld. Commissioner (Appeals) while deciding the issue was overtaken by the decision of the Apex Court in SEBI vs. Rakhi Trading Pvt. Ltd. Ld. CIT(A) in his enthusiasm to apply the ratio of the case appears to have overlooked the indispensible conditions spelt in the decision itself. In the circumstances it is noted that since the nominal loss as incurred by the Assessee and claimed as such is due to genuine errors in CCM as explained to the Assessing Officer in details and there is nothing irregular about it, hence, the same is directed to be allowed and addition made on this account is hereby cancelled by allowing the appeal of the assessee. [Para 5.5]

32. ACIT v. Jaypee Financial Services Ltd. (ITA No. 4266/D/16)(03/12/19)

CLIENT CODE MODIFICATION (CCM) – THE AO MADE ADDITION OF NET PROFIT/LOSS ARISING ON ACCOUNT OF CCM ON THE GROUND THAT GROUP COMPANIES OF THE ASSESSEE HAS DONE MANIPULATED CCM TRANSACTIONS USING ASSESSEE'S CLIENT CODE – THE CIT(A) DELETED THE ADDITION BY HOLDING THAT ASSESSSEE IS NEITHER A MEMBER OF ANY EXCHANGE NOR EXECUTED ANY CCM TRANSACTION – IT WAS ALSO HELD BY CIT(A) THAT CCM TRANSACTIONS EXECUTED BY GROUP CONCERNS ARE GENUINE AND THERE IS NO ADVERSE REPORT OF SEBI – HELD, CCM IS INTERNAL MATTER OF BROKER AND ASSESSEE HAS NO CONTROL OVER IT – FURTHER, NO ATTEMPT HAS BEEN MADE BY THE AO TO FIND OUT WHETHER THE TRANSACTION IS BOGUS OR NOT – NO EVIDENCE THAT CCM WAS DONE ON BEHEST OF ASSESSEE – CCM WAS

DONE WITHIN PERMISSIBLE LIMIT SET BY SEBI – THE ORDER OF CIT(A) DELETING THE ADDITION WAS UPHELD

Held, 11. We find some force in the argument of the Ld. Counsel for the assessee. We find force in the argument of the Ld. Counsel for the assessee that client code modification is the internal matter of the broker and assessee has no control over it. The AO in the instant case has not spelt out as to on which scrips the assessee has shifted the profit. We find the AO nowhere in the assessment order has mentioned of any statement of broker of the assessee regarding the admission of any client code modification. We find in the instant case the addition has been made by the AO despite assertions by the assessee that it was not a registered broker on the stock exchange. There is also nothing on record to suggest that the CCM was done at the behest of the assessee. Further, there is no addition or adverse view taken in the case of the other person with whose accounts presumption is being made that transaction has been shifted. Admittedly there is nothing on record that the revenue has gone to the broker to find out as to who is the beneficiary of the CCM. Further the transactions have not been held to be non genuine. So far as the argument of the Ld. DR that the Client Code Modification is akin to penny stock is concerned, we do not find any merit in the said arguments. In case of the penny stocks shares are purchases at a very low price and were sold immediately after one year at astronomically high price just to claim the benefit of deduction u/s. 10 (38) or as the case may be. However, in case of CCM there is no such purchase at low price and sale at high price and it is on account of some punching error which has been rectified subsequently. We, therefore, do not find any merit in the argument of the Ld. DR that CCM is akin to penny stock. [Para 11]

12. We find an identical issue had come up before the Mumbai Bench of the Tribunal in the case of M/s. DCIT Vs. Comet Investment (P) Ltd. vide ITA No.5802/Mumbai/2017 order dated 13.05.2019.

14. The various other decisions relied on by the Ld. Counsel for the assessee also supports his case that no addition can be made by the AO where CCM is done by the broker.

15. Since in the instant case it is an admitted fact that the assessee is not a member of any exchange and cannot execute CCM and the transactions on account of CCM done by the group concerns are not found to be false or untrue and since SEBI or the stock exchange has not taken any action treating the transactions to be non genuine and volume of CCM occurred are within the permissible limit allowed by the SEBI, therefore, in view of the discussions above and relying on the decisions cited (supra) we are of the considered opinion that there is no perversity in the order of the CIT(A) deleting the addition. Accordingly the same is upheld and the grounds raised by the revenue are dismissed.