ITAT Bar Monthly Reporter- FEBRUARY, 2020

1. ITO(E) v. Om Charitable Trust (ITA No. 2061/D/17)(03/02/2020)

SECTION 11 – CARRY FORWARD OF LOSS I.E. EXCESS APPLICATION OF PRECEDING YEARS – THE ASSESSEE TRUST IS ENTITLED TO SET OFF OF LOSS BROUGHT FORWARD FROM PRECEDING YEAR AGAINST INCOME OF CURRENT YEAR AND SAME CAN BE CLAIMED AS APPLICATION IN TERMS OF PROVISIONS OF SECTION 11 OF THE ACT.

Held, We have heard the rival submissions of the parties and perused the relevant material on record. Thought the Assessing Officer did not give any comment on the carry forward of the losses, however, the learned CIT(A) allowed the carry forward of the losses observing as under:

"……I, therefore find that the contention of the assessee is correct and the loss of Rs (-) 4,15,70,160/- to be brought forward, set off from the current income, if any or in case of loss of current year i.e Rs.(-)1,64,41,978/- in the impugned matter the total of Rs(-) 5,80,12,138/- is hereby carried forward to the subsequent years. I am further fortified in my above findings by various judgments of the Hon'ble ITAT Delhi benches which have consistently held in favour of the assessee on this issue. In the case of Director of Income Tax Vs Raghuvanshi Charitable Trust [2011] 197 Taxmann 170 Delhi it has been held that section 11 of the Income Tax Act, 1961 Charitable or religious trust Exemption of income from property held under trust- Whether a trust can be allowed to carry forward deficit of current year and to set off same against income of subsequent year would amount to application of income of trust for charitable purposes in subsequent year within the meaning of section ll(l)(a) - held Yes. I have also decided the similar issue in favour of the assessee in the case of Devender Kumar Garg Charitable Trust for the A/Y 2011-12 vide order dated 18-11-2015 in ITA number 541/2013-14. Thus following the rule of consistency and in respectful agreement with the aforesaid order of Hon'ble ITAT, I allow the surplus/loss of Rs (-)4,15,70,160/- as brought forward from A/Y 2011-12 along with current year's loss of Rs.1,64,41,978/- totaling to Rs (-)5,80,12,138/- be allowed to be carried forward to A/Y 2013-14. The AO is directed to compute the loss accordingly and allow the same to be carried forward to A/Y 2012-14."

The identical issue has been decided by the Tribunal (supra) in assessment year 2011-12 observing as under:

"15. After considering the rival submissions, we do not find any justification for Ld. CIT(A) to reject the claim of assessee. Ld. Counsel for assessee rightly contended that the authorities below have failed to appreciate that income has to be computed commercially even in cases covered u/s 11-13 of the Act and resultant loss, if any, arising due to surplus application of income has to be computed and carry forward to the next year to be set off therein. The AO has not given any findings on the same. The Ld. CIT(A) without examining the issue in detail dismissed the claim

of assessee because section 11 provides for exemption of income of charitable organization. However, it is a fact that assessee claimed carry forward of the losses for subsequent year as per law which should have been appreciated and should be considered in favour of the assessee. This issue is covered by above judgment referred above. We, accordingly, set aside the orders of the CIT(A) and restore this issue to the file of the AO with direction to allow the claim of assessee after verifying the facts on record. The AO shall give reasonable sufficient opportunity of being heard to the assessee. In the result, Cross Objection of the assessee is allowed for statistical purposes."

Respectfully following the finding of the Tribunal (supra), the finding of the learned CIT(A) is upheld. Ground nos. 2 & 3 of appeal of the Revenue are dismissed. [Para 4.1 to 4.3)

2. ITO(E) v. All India Fine Arts and Crafts Society (ITA No. 5293/D/16)(26/02/2020)

SECTION 11 -RECEIPT FROM RENTING OF PROPERTY WOULD NOT AFFECT THE CHARITABLE CHARACTER OF THE SOCIETY WHICH IS ENGAGED IN CHARITABLE ACTIVITIES AS PER ITS OBJECT – THE RENT RECEIPTS WERE ULTIMATELY UTILIZED FOR THE PURPOSE AND OBJECTS OF THE SOCIETY - THE REJECTION OF EXEMPTION U/S 11 WAS HELD TO BE NOT SUSTAINABLE.

3. M/s Nav Bharat ShikshaSamitivs CIT (ITA No:- 5952/D/2016) (Dtd 10.02.2020)

SECTION 12A READ WITH SECTION 12AA OF I.T. ACT ASSESSEE'S APPLICATION FOR REGISTRATION CANNOT BE REJECTED RELYING ON IRRELEVANTCONSIDERATIONS, MERELY ON THE BASIS OF AN UNSUSTAINABLE CONCLUSION. ANYREJECTION OF ASSESSEE'S APPLICATION FOR REGISTRATION UNDER SECTION 12A READWITH SECTION 12AA OF I.T. ACT HAS TO BE SUPPORTED BY A SPEAKING ORDERSTATING IN CLEAR TERMS IN WHAT MANNER THE REQUIREMENTS UNDER SECTION 12AREAD WITH SECTION 12AA OF I.T. ACT HAVE NOT BEEN FULFILLED BY THE ASSESSEE – ASSESSEE CAN SEEK REGISTRATION U/S 12A EVEN AT A LATER DATE IF HE DID NOT APPLY IN THE EARLIER YEAR

(D) We have heard both sides patiently. We have also perused the materialsavailable on record. It is not in dispute that the assessee is engaged in the activity ofeducation which qualifies as "charitable purpose" within the meaning of Section 2(15) ofI.T. Act. It is also not in dispute that there is no reference in the impugned order dated27.09.2016 of Ld. CIT(E), whatsoever, to any facts and circumstances which can besaid to be violative of provision of Section 12A read with Section 12AA of I.T. Act. Nomaterials have been brought to our attention from the Revenue's side either in theimpugned order dated 27.09.2016 of Ld. CIT(E) or in the submissions made by

the Ld.CIT(DR), at the time of hearing before us; to show how any of the provision underSection 12A read with 12AA of I.T. Act are not fulfilled by the assessee. In the factsand circumstances of this case, we agree with the contention of the Ld. Counsel forassessee that **it is of no relevance, for the purposes of registration under Section 12A read with Section 12AA of I.T. Act, whether or not tax was deducted at source from salary of the staff.** In the facts and circumstances of thiscase, we also agree with the contentions of Ld. Counsel for assessee that, **it is of no relevance, for registration under Section 12A read with Section 12AA of I.T. Act, if salary has been paid partly in cash and partly by cheque.** We also agreewith the contention of the Ld. Counsel for assessee that **there is nothing in law to prevent the assessee from applying for registration under Section 12A read with Section 12AA of I.T. Act, at a later stage, if such registration was not sought for by the assessee in earlier years.** The conclusion of Ld. CIT(E), that thestand taken by the assessee was not commensurate with the scheme of the Act, hasbeen reached in vacuum without any speaking order to justify and without mention ofany relevant factor to warrant this drastic conclusion. Such a conclusion isunsustainable. The reasons mentioned by Ld. CIT(E) in his impugned order dated27.09.2016, rejecting assessee's application for registration under Section 12A readwith Section 12AA of I.T. Act, are totally irrelevant considerations as far as decisiongranting registration under Section 12A read with Section 12AA of I.T. Act is concerned**. Assessee's application for registration under Section 12A read with Section 12AA of I.T. Act cannot be rejected by Ld. CIT(E) relying on irrelevant considerations, merely on the basis of an unsustainable conclusion. Any rejection of assessee's application for registration under Section 12A read with Section 12AA of I.T. Act has to be supported by a speaking order stating in clear terms in what manner the requirements under Section 12A read with Section 12AA of I.T. Act have not been fulfilled by the assessee.** AsLd. CIT(E) has failed in these respects, his impugned order dated 27.09.2016 cannot beupheld. In view of the foregoing, we direct the Ld. CIT(E) to grant registration to theassessee under Section 12A read with Section 12AA of I.T. Act.

4. Deepak Garg v. ITO (ITA No.3175/D/17) (Dated 19/02/2020)

SECTION 28/41 – GOLD INTRODUCED BY FATHER IN THE BUSINESS OF ASSESSEE – LIABILITY AGAINST THAT GOLD WAIVED OFF ON DEATH OF FATHER – SUCH WAIVER WAS NOT TAXABLE UNDER SECTION 28 OR 41(1) OR 68 OF THE ACT.

Held,We have gone through the record in the light of submissions made on either side. It could be seen from the record, as pleaded by the assessee both before the Assessing Officer and CIT(A), the case of the assessee has been that his father died intestate on 15.05.1993 leaving behind five legal heirs and some gold bars; that the assessee commenced his business in the latter half of financial year 2010-11 relevant to assessment year 2011-12; with a view to utilize the gold bars and ornaments left behind by his father, the assessee passed a general entry on

04.02.2012 admitting the purchase amount by Rs.5 lacs and crediting it to separately opened ledger account in the name of his father; that during the financial year 2011-12, the assessee purchased gold ornaments etc. worth Rs.40 lacs by crediting a corresponding amount of Rs.40 lacs to ledger account opened in his own name under the legal advice since the gold did not belong to him exclusively but equally belong to other legal heirs of his father… In so far as the books of account of the assessee are concerned, the Assessing Officer examined the books of account and accepted the trading results by stating that "the assessee is engaged in the business of Trading in bullions and all types of gold and diamond jewellery under the name and style of M/s. Sai Jewels. During the year under consideration, the assessee has declared Gross Turnover at Rs.71,34,82,470/- and Gross Profit of Rs.22,04,057/- yielding G.P. rate of 0.22%. After debiting expenses in P&L account, the Net Profit of Rs.4,93,828/- has been declared. The details furnished with respect to trading results supported with bills and vouches were examined and placed on record." …. The entire question in this matter revolves around whether the liability of the assessee towards the gold of his father introduced into the business of assessee ceased to exist or not. According to assessee, he alone is not entitled to inherit the entire estate of his decease father, but along with him, four other legal heirs are there upon whom the estate of his deceased father devolves. On this aspect, the assessee produced before the CIT(A) affidavits of other legal heirs and we have gone through such affidavit to be found from page 47 to 56 of the paper book, wherein, wife and children of late Dharam Chand Garg (father of assessee) stated in unequivocal terms that the deceased left behind five legal heirs and the deceased owned a debt of Rs.45 lacs from M/s. Sai Jewels on account of sale of goods to them. This particular aspect is not in dispute. Further, the Assessing Officer accepted the purchase of gold and approved the trading results. Having accepted the trading results, it is not open for the Assessing Officer to say that the assessee introduced unexplained and unaccounted money into the capital…. In this set of circumstances, the only question that arises for our consideration is whether really there was any cessation of liability of assessee in respect of his father's gold that was purchased during the year. As rightly contended by the ld. AR, inasmuch as the other legal heirs are available and the debt is acknowledged in the books of account of the assessee, it cannot be said that the liability ceased to exist. As a matter of fact, it cannot be said that such a liability ceased to exist on the death of assessee's father because the father of assessee died way back in theyear 1993 and the introduction of gold of father into the business ofassessee took place in the assessment years 2011-12 and 2012-13 only…. In Mahindra & Mahindra Ltd. (supra), Hon'ble Supreme Courtclearly held that unless the benefit accrued to the assessee is in nature ofcash or money, section 28 has no application and in the absence ofcessation of liability, section 41(1) has no application. What all thathappened in this matter is that the assessee introduced the gold leftbehind by his father into his business and had shown the trade liability inhis own name in the name of other family as a whole or individual legalheir. We, therefore, are of the considered opinion that such an actcannot be termed either as introduction of unaccounted or unexplainedmoney into the capital or that the trade liability ceased to exist. For thesereasons, we find it difficult to sustain the addition made by the Assessing Officer and confirmed by the ld.

CIT(A). Ground of appeal is accordinglyallowed…. In the result, the appeal is allowed..**[Paras 7, 8, 9, 10, 11, 12]**

5. **M/s National Housing Bank vs DCIT (ITA No:- 477/D/2017) (AY 2012-13) (Dtd 10.02.2020)**

SECTION 32 ENTIRE DEPRECIATION CLAIM IS ALLOWABLE IF NO SEGREGATION OF VALUE OF LAND AND BUILDING AVAILABLE

(E) We have heard both sides. We have also perused the materials available onrecord. It is not in dispute that the issue in dispute in the present appeal is squarelycovered in favour of the assessee by aforesaid orders in the case of Joint Commissionerof Income-Tax vs. Rajesh Exports Ltd. (supra) and order dated 28.03.2019 of CoordinateBench of ITAT, Delhi, (supra). Also, no distinguishing facts and circumstanceshave been brought to our notice by either side to persuade us to take a view differentfrom the view taken by the ITAT in the aforesaid orders in the case of JointCommissioner of Income-Tax vs. Rajesh Exports Ltd. (supra) and order dated28.03.2019 of Co-ordinate Bench of ITAT, Delhi, (supra). For ease of reference, therelevant portion of the aforesaid order dated 28.03.2019 of Co-ordinate Bench of ITATin assessee's own case is reproduced below:

"25. AO as well as id. CIT (A) has disallowed an amount of Rs.40,44,605/- claimed as depreciation on office building on the ground that the same is attributable towards cost of land.

26. Ld. AR for the assessee contented that in the absence of any segregation of value of land, depreciation has been claimed on the basis of total cost paid to India Habitat Centre because land is also leasehold being subject to amortization and effectively the total cost paid for the premises will be considered For amount of depreciation. Ld. AR relied upon the decision rendered by the coordinate Bench of the Terminal in CIT vs. Rajesh Exports Ltd. (2006) 9 SOT 28 (Bang.) which has further than relied upon by the co-ordinate Bench of the Tribunal in ease of ITO vs Millennium Spire India Management (P) Ltd. ITA No.3297/Del/2013.

27. Operative part of the aforesaid decisions rendered by the coordinate Bench of the Tribunal in CIT vs, Rajesh Exports Ltd. (supra) is extracted for ready perusal as under:

"Under section 32(1) of the Act, the word "building" is to be interpreted as the superstructure and not land. Where the assessee purchases building and the purchase price (as per sale deed) is a composite one (sale deed does not indicate the prices of land and building separately), then no distinction at feast in the consideration paid to the vendor can be made. However, if there is a clear-cut identity in respect of price paid to the land and building (Le., sale deed indicates price of land and building separately), then Assessing Officer is right in allowing depreciation only an the building."

28. In this case also, when the assessee bank does not have any segregation value of land and building of the said premises and it has paid composite price, the entire depreciation claim is allowable under Section 32 of the Act. So, following the aforesaid decision rendered by the Co-

ordinate Bench of the Tribunal in CIT vs. Rajesh Exports Ltd. (supra), and when it is categoric case of the assessee that the purchase price of land and building is composite one and it has no segregation of value of land and building separately, disallowance made by the AO/ CIT (A) is not sustainable in the eyes of law. So, Ground No. 5 to 8 of ITA No. 6888/Del/2014 (AY 2011-12) of assessee's appeal is determined in favour of the assessee."

(E.1) Respectfully following the aforesaid order dated 28.03.2019 of Co-ordinateBench of ITAT in assessee's own case, we also decide the issue in dispute in thepresent appeal before us, in favour of the assessee and direct the AO to allow theassessee's claim for depreciation amounting to aforesaid Rs. 36,40,145/-.

(F) In the result, appeal filed by Assessee is allowed.

6. **DCIT vs M/s. Abro Technologies Pvt. Ltd. (ITA. No.4687/D/2016) (Dtd 25.02.2020)**

SECTION 36(1)(ii) - NO DISALLOWANCE OF COMMISISON PAID TO DIRECTORS - IF DIRECTORS IN TERMS OF BOARD RESOLUTION ARE ENTITLED TO RECEIVE COMMISSION FOR RENDERING SERVICES AND IF IT WAS IN TERMS OF EMPLOYMENT ON THE BASIS OF WHICH THEY HAVE BEEN RENDERING SERVICES.

After considering the rival submissions and on perusal of the impugned orders, we find that there is no dispute on fact that the Directors were given commission for promoting sales and increasing the sale of the company by their efforts and over the period of time the assessee's turnover has increased manifold and also the profit. Further, similar commission paid to the Directors in terms of same agreement has been allowed in the past by the Assessing Officer himself in orders passed in scrutiny proceedings u/s 143(3). If directors in terms of Board resolution are entitled to receive commission for rendering services to the company and if it was in terms of employment on the basis of which they have been rendering services, then such remuneration/ commission is part and parcel of salary. It is also not disputed that TDS has been deducted on such commission as salary. Otherwise also, the payment of dividend is made in terms of Companies Act, 1956 which has to be paid to all the shareholders equally and dividend is basically a return of investment and not salary or part thereof. This proposition has been upheld by Hon'ble Jurisdictional High Court in the case of **AMD Metplast Pvt. Ltd. vs. DCIT, 341 ITR 563,** wherein Their Lordships were required to answer the following substantial question of law:……..

In the result, the appeal of the Revenue is dismissed.

7. Universal Buildrise LLP v. ITO (ITA No. 172/D/19)(21/02/2020)

SECTION 40A(2) – WHERE TAX RATE IN THE HANDS OF PAYER AND PAYEE IS SAME, THERE CAN BE NO CASE OF ANY DIVERSION OF INCOME – MANAGERIAL REMUNERATION PAID TO DIRECTOR WAS TAXED AT HIGHEST RATE IN THE HANDS OF DIRECTOR – THE PROVISIONS OF SECTION 40A(2) SHALL NOT APPLY

Held, On the perusal of record and after hearing both the authorized representatives, the limited issue which arises is against the disallowance of the managerial remuneration paid to the Managing Director Sh. Anshul Chawla of Rs. 36 Lacs. [Para 4]

The Hon'ble Bombay High Court in CIT Vs. Indo Saudi Services (Travel) (P.) Ltd. (2008) 219 CTR 562 (Bom) had laid down the proposition that where the assessee and its subsidiary were in the same tax bracket and paid same rate of tax, there was no question of diversion of funds by paying higher rate to the subsidiary company and hence no disallowance under section 40(A)(2) of the Act. Applying the said proposition to the facts of the case where the Director Shri. Anshul Chawla is assessed to tax and has paid taxes on the said remuneration received by him then it cannot be said that there was diversion of funds by the assessee to its Managing Director for tax avoidance. Hence there is no merit in making any disallowance on account of the said managerial remuneration paid to the Managing Director. Accordingly, we direct the AO to allow expenditure of Rs. 36 Lacs. The grounds of appeal raised by the assessee are allowed.

8. M/s. Gagrat & Co. v.ACIT(ITA No.3194/D/17) (Dated 07/02/2020)

SECTION 43B – APPLICABILITY OF SECTION 43B TO TAX DEDUCTED ON LIABILITY ACCRUING DURING THE YEAR, BUT PAID IN THE SUBSEQUENT YEAR IN CASE OF ASSESSEE FOLLOWING CASH SYSTEM OF ACCOUNTING – ALTHOUGH ASSESSEE FOLLOWED CASH METHOD OF ACCOUNTING, BUT INCOME ACCRUED IN THE HANDS OF RECIPIENT AND TDS DEDUCTED – ACCORDINGLY, EVEN IF PAYMENT OF TDS WAS MADE IN SUBSEQUENT YEAR BUT PAYMENT WAS MADE TO SUCH PARTIES DURING THE RELEVANT YEAR ITSELF, MERELY BECAUSE THE TDS WAS DEPOSITED IN THE SUBSEQUENT YEAR WILL NOT MILITATE ALLOWABILITY OF EXPENDITURE UNDER SECTION 43B OF THE ACT.

Held, Ld. AR for the assessee challenging the impugned orderpassed by Ld. CIT(A) contended that the tax deducted at source bythe assessee u/s 194J for the Month of March, 2013 have been dulypaid on 11th April, 2013 i.e. much before the due date or before thedue date specified in Sub. section 1 of Section 139 of the IncomeTax Act, and as such there is no delay in deposit of the TDSdeduction. It is further contended by Ld. AR for the assessee thatu/s 43B the assessee in order to claim the deduction of TDSpayable is required to deposit the TDS deducted in the last monthof previous year, on or before the due date specified inSection139(1) of the Act. However, on the other hand the Ld. DRfor the revenue relied upon order passed by AO as well as

CIT(A)….Undisputedly the TDS deducted by the assessee u/s 194J for the month of March, 2013 has been duly paid on 11th March, 2013 which is well before the due date specified in Section139(1) of the Act. When the assessee has duly deposited the TDS before filing the return of income for the year under assessment, the same is allowable u/s 43B of the Act. No doubt, the assessee is following the cash method of accounting and has made cash payment to various parties after deducting TDS, the portion of which has been allowed by the AO as deductible expenditures, U/s 198 of the Acttax deducted at source by the assessee as per Income Tax Act is deemed to be income received by the recipient of the said income and as such TDS deducted by the assessee is deemed to have beenreceived by the recipient of the income and as such it cannot be held that the assessee has not paid the amount of tax deductible at source on or before the due date. So it cannot be held that the aforesaid amount of TDS has not been paid by the assessee while following the cash system of accounting…Hon'ble Delhi High Court in case of Commissioner of Income Tax XIII Vs. Naresh Kumar in Income Tax Appeal No. 24/2013 decided on 6th September, 2013 and Judgment of DelhiHigh Court in the matter of Commissioner of Income Tax Vs. Rajinder Kumar in Income Tax Appeal No. 65/2013 decided on 1st July, 2013 held that if the statutory liability of depositing theTDS has been fulfilled before the due date of filing of the return u/s 139(1) of the Act, the same are allowable expenses in the year to which it relates. This is also mandate of Section 43B of the Act. Even otherwise identical issue has been decided by the revenue itself in favour of the assessee in its own case in A.Y. 2008-09, 2010-11 and 2011-12, so rule of consistency has to be followed by the Revenue….Co-ordinate Bench of Tribunal in case of Associated Law Advisers, AntrikshBhawan Vs. ACIT, ITA No. 1122/Del/2017, A.Y. 2013-14 on 11.09.2019 decided the identical issue in favour of the assessee. So we are of the considered view that AO as well as Ld. CIT(A) have erred in making disallowance of Rs. 5,33,700/- on account of TDS, hence, ordered to be allowed / deleted. So ground no. 3 is determined in favour of the assessee. **[Paras6, 6.1, 6.2, 6.3]**

9. Ajay Khanna v. ACIT (ITA No. 6190/D/16)(03/02/2020)

SECTION 54 – REINVESTMENT OF CAPITAL GAIN FOR PURCHASE OF TWO RESIDENTIAL HOUSES- THERE IS NO BAR IN SECTION 54 WHICH PROHIBITS INVESTMENT IN MORE THAN ONE RESIDENTIAL PROPERTY – THE CLAIM OF EXEMPTION WAS HELD TO BE ALLOWABLE

Held, We have heard both the parties and perused the orders of the revenue authorities especially the judgment dated 14.3.2019 of the Hon'ble Madras High Court reported in [2019] 105 taxmann.com 151 (Madras) in the case of Tilokchand & Sons vs. Income Tax Officer, Ward-II (4), Madurai wherein the Hon'ble Court has held that "whether where assessee HUF sold its residential house and invested capital gain purchasing more than one residential houses within stipulated time limit, assessee would be entitled to benefit of exemption under section 54." For the sake of convenience, the relevant para no. 20 of the aforesaid judgment is reproduced as under:-

"20. We have discussed about the two decisions from the Karnataka High Court, which, in our opinion, dealt with similar controversy as is raised before us herein. The only difference which we find is that the purchase of the residential houses in the present case is at different address in the same city of Madurai. In D. Ananda Basappa case stated (supra), two flats in question were admittedly adjacent to each other and which were joined to become one residential house. In the case of Khoobchand M Makhija (supra), two door nos are given viz., 623 and 729, but the complete addresses and even the name of the city is not clear in the facts narrated in the said Judgment. But in our considered opinion, the difference of location of the newly purchased residential house(s) will not alter the position for interpretation of the word 'a residential house' to the effect that it may include more than one or plural residential houses, as held by the Karnataka High Court, with which we respectfully agree. The location of the newly purchased houses by the same assessee viz., HUF out of sale consideration received on the sale of original capital Asset or a residential house in the given circumstances of availability of such residential houses as per the requirement of the HUF will not alter the position of interpretation."

We have gone through the judgment passed by the Hon'ble Madras High Court in the case of Tilokchand & Sons vs. Income Tax Officer, Ward-II (4), Madurai (Supra), especially the para no. 20 as reproduced above and we are of the view that the issue in dispute involved in the present appeal is exactly similar to the aforesaid issue already adjudicated by the Hon'ble High Court, hence, the issue in dispute is squarely covered by the aforesaid judgement. Therefore, respectfully following the aforesaid precedent, the addition involved in the present case is hereby deleted and appeal of the assessee is accordingly allowed. [Para 4 & 4.1]

10. Nimbus (India) Ltd. v. DCIT (ITA No.929&930/D/19) (Dated 10/02/2020)

SECTION 68 – SHARE CAPITAL RECEIVED FROM VARIOUS AUTHORITIES WAS RETURNED BEFORE DATE OF SEARCH –AMOUNT OF INVESTMENT FOR SHARE CAPITAL BY THE INVESTOR COMPANY IN THE ASSESSEE COMPANY STOOD ACCEPTED IN THE ASSESSMENT OF THE INVESTOR COMPANIES – THE EXECUTIVES OF INVESTOR COMPANY CONFIRMED THE TRANSACTION IN RESPONSE TO NOTICE UNDER SECTION 133(6) ISSUED BY THE ASSESSING OFFICER – INVESTOR COMPANIES HAD SUBSTANTIAL CREDITWORTHINESS IN MAKING INVESTMENT – DECISION OF SUPREME COURT IN THE CASE OF NRA IRON & STEEL (P.) LTD AND DELHI HIGH COURT IN THE CASE OF NDR PROMOTERS HELD TO BE DISTINGUISHABLE – ADDITION UNDER SECTION 68 DELETED.

Held,From a perusal of the assessment orders passed in the case of these investorcompanies, we find the AO in all those cases has considered the investments heldby those companies for the purpose of computing the disallowance u/s 14A readwith Rule 8D. In the orders passed u/s 143(3) in the case of those investorcompanies, the AO has considered the opening balance of

investment and closingbalance of investments to arrive at the equity investments for computing thedisallowance u/s 14A r.w. Rule 8D. Therefore, when the AO of the investorcompanies was aware of the huge investments made by them and has consideredthe same for computing disallowance u/s 14A r.w. Rule 8D, we find merit in thearguments of the ld. Counsel for the assessee that the investments made by theinvestor companies are genuine.30. Further, a perusal of the income declared by the investor companies showsexcept for A.Y. 2014-15 in the case of M/s Pabla Leasing & Finance Pvt. Ltd., theinvestor companies for other years are showing substantial income. The mostcrucial fact in the instant case is that the submission of the ld. Counsel before thelower authorities that such non-cumulative non-participating optionally convertibleredeemable preference shares were redeemed to the investor companies in the F.Y.2014-15 much before the date of search has clearly been brushed aside by thelower authorities. We find, the Hon'ble Delhi High Court in the case of DIT vs.Modern Charitable Foundation (supra)…We, therefore, find force in the arguments of the ld. Counsel for the assesseethat when the redeemable preferential shares have been redeemed to the investorcompanies in subsequent years which is much prior to the search, therefore, theseinvestments are genuine. We further find from the various pages of the paper bookthat in response to the notice issued u/s 133(6) to the investor companies, thedirectors of the respective investor companies appeared before the AO whosestatements were recorded u/s 131 and they have confirmed to have invested in theshares of the assessee company. Not a single question was put to any of thedirectors of these investor companies as to why they have invested crores of rupeesin a non-listed company without any return. We, therefore, find merit in theargument of the ld. Counsel for the assessee that without discharging the onus caston the AO by not putting a single query to the directors of the investor companieswho appeared before him in response to notice u/s 133(6) and whose statementswere recorded u/s 131 on oath, the AO cannot make an allegation in the assessmentorder as to why they have invested in such non-descript company. So far as theallegation of the AO that the bank account show back to back entries is concerned,we find merit in the argument of the ld. Counsel that the investor companies havewithdrawn money from companies where funds were invested earlier and theyinvested money in the assessee company in the shape of preference shares and,therefore, this prudent financial planning should not be viewed adversely and,rather, it supports the case of the assessee that there was source of funds investedby the investor company in the shares of the assessee company. …So far as the decision relied on by the ld. DR in the case of NRA Iron &Steel (P) Ltd. (supra) is concerned, the same, in our opinion, is not applicable tothe facts of the present case since, in that case, the investor did not appear inresponse to the summons, the AO got field enquiries conducted in respect ofinvestor companies and notices were not served on such investor companies. Noneof the investors produced the bank statements to establish the source of funds inmaking such huge investments and investors were showing meager income in thereturn. However, in the instant case, the directors/MDs of the investor companiesappeared before the AO in response to notice u/s 133(6) and their statements u/s131 were recorded and they have confirmed to have invested in the shares of theassessee company. The investor companies have produced their bank statementsand were showing substantial income and, moreover, the AO, in the preceding

orsucceeding year in the case of the investor companies have accepted theinvestment made by them in the shares of the assessee company in the orderspassed u/s 153A/143(3). Therefore, the decision in the case of NRA Iron & Steel(P) Ltd.(supra), in our opinion, is not applicable to the facts of the present case… So far as the decision in the case of NDR Promoters Pvt. Ltd. (supra) isconcerned, the same also is not applicable in the facts of the present case especiallywhen the directors of the investor companies appeared before the AO whosestatements were recorded u/s 131 of the Act and who have confirmed to haveinvested in the assessee company, all the investor companies are assessed to tax,their orders have been passed u/s 143(3) in most of the years, the AO of theinvestor companies are aware of the huge investment made by them in variouscompanies since while computing the disallowance u/s 14A r.w. Rule 8D, the AOhas countered the huge opening and closing investment by them towardsshare capital for computing the average investment for the purpose of calculationof disallowance u/s 14A r.w. Rule 8D. Therefore, the decision in the case of NDRPromoters Pvt. Ltd. (supra) is also not applicable to the facts of the instant case.The various other decisions relied on by the ld. DR are also not applicable to thefacts of the present case and are distinguishable. In this view of the matter, we areof the considered opinion that the addition made by the AO and sustained by theCIT(A) is not justified. Accordingly, we direct the AO to delete the addition madeby him u/s 68 of the Act for both the years.**[Paras 29, 30, 31, 35, 36]**

11. Meenu Kapoor vs The ACIT (ITA No. 8333/Del/2019)(AY 2016-17)

SECTION 68: WHETHER ONCE ASSESSEE HAS PROVED IDENTITY, CREDITWORTHINESS AND GENUINENESS OF TRANSACTION, INTIAL BURDEN ON THE ASSESSEE IS DISCHARGED- HELD YES- SINCE NO FURTHER INVESTIGATION HAVE BEEN CARRIED OUT BY THE A.O. ON THE DOCUMENTARY EVIDENCES FILED BY ASSESSEE, THEREFORE, A.O. CANNOT FASTEN THE ASSESSEE WITH LIABILITY U/S 68

6.7. Considering the above discussion in the light of totality of the facts and evidences on record, it is clear that assessee produced sufficient documentary evidences on record to prove identity of the creditors, their creditworthiness and genuineness of the transaction. The A.O. did not make any enquiry with regard to asset and amount held by the creditors in their bank accounts with their source. Therefore, A.O. could not draw any adverseinference against the assessee. We may also note here thatin the Law assessee need not to prove source of the sourceas is held by Hon'ble Delhi High Court in the case of CIT vs.Dwarakadhish Investment P. Ltd., [211] 330 ITR 298 (Del.)and Judgment of Hon'ble Allahabad High Court in the caseof Zaffar Ahmed & Co. 30 taxmann.com 269 (All.). Theassessee however, in the present case has even provedsource of the source of the creditors. Therefore, there is noquestion of considering it to be unexplained credits in thehands of the assessee. The A.O. suspected the loan amountbecause the assessee filed return of income at Rs.30 lakhsonly and made investment of Rs.11.65 crores. Since

theassessee explained that sufficient loan amount have beentaken from the family for purchase of property for family,ten in that event, A.O. shall have to consider theexplanation of assessee in the light of fact that assesseemade investment in purchase of property from the familysource. In the absence of any investigation from the side ofthe A.O. on the documentary evidences filed on record,there were no justification to make the addition. We,accordingly, set aside the Orders of the authorities belowand delete the entire addition.

12. Rajendra Kumar v. DCIT (ITA No. 1959/D/17)(27/02/2020)

SECTION 69 – THE ASSESSEE PURCHASED PROPERTY FOR CONSIDERATION WHICH WAS LESS THAN STAMP DUTY VALUE – THE LESS PURCHASE PRICE WAS DUE TO VARIOUS FACTORS AFFECTING THE LOCATION AND CONDITION OF THE PROPERTY – THE ASSESSING OFFICER TREATED THE DIFFERENCE BETWEEN PURCHASE PRICE AND VALUE DETERMINED BY DVO AS UNEXPLAINED INVESTMENT – HELD, THE TRANSACTION UNDER DISPUTE WAS NEITHER COVERED U/S 50C NOR 56(2) – THERE WAS NO EVIDENCE OR MATERIAL TO SHOW PAYMENT OF ANY UNDERHAND CONSIDERATION – THE ADDITION U/S 69 WAS DELETED

Held, We find sufficient force in the above arguments of the Ld. Counsel for the assessee. We find the assessee before the AO had categorically mentioned that both the properties were situated in slum area and were very old and tenanted properties. Further the assessee had filed sale deeds of properties in the similar vicinity at about the same time which were also sold at a price below the circle rate. In the present case since the assessee is a buyer of the property and not the seller of the property, therefore, the provisions of section 50C are not applicable. Similarly the assessment year involved is 2011-12 and, therefore, the provisions of section i.e. 56 (2)(vii) (b), which were introduced by finance bill 2013 w.e.f. 01.04.2014 are also not applicable. As per the said amendment if the immovable properties are purchased /received for inadequate consideration, i.e. less than stamp duty value by Rs.50,000/- or more, then the difference between the stamp duty value and inadequate consideration shall be taxable in the hands of the individual or HUF as income from other sources. We further find the AO in the instant case has conducted independent enquiry by recording the statement of the seller of both the properties wherein he has categorically admitted by stating the reasons for selling the property at price below the prevalent circle rates. Further nothing has been brought on record to prove that the assessee has paid anything extra over and above the value of agreement in any other form of consideration. Nothing has been brought on record that money has emanated from the assesee's coffers. The sole reliance in the instant case is the basis of estimates made by the DVO in the valuation report. It has been held in various decisions that additions cannot be made on the basis of surmises and conjectures in the absence of any tangible material on record. Since in the instant case assessee has purchased old tenanted properties situated in slum areas, filed copies of sale deeds of properties in the similar vicinity at about the same time which were sold at price below

the circle rate, also filed valuation report of registered valuer and the seller of the properties has appeared before the AO and has confirmed to have sold the property at the price mentioned in the sale deed only and there is no material available before the revenue authorities that assessee has paid anything more than what is mentioned in the sale deed, therefore, we are of the considered opinion that no addition is warranted in the instant case by invoking the provisions of section 69 of the Act, IT 1961. We, therefore, set aside the order of the CIT(A) and direct the AO to delete the addition. The grounds raised by the assessee are accordingly allowed. [Para 13]

13. AT Kearney Ltd. – India Branch v. ADIT (ITA Nos.7722 & 7723/Del/2017) (25/02/2020)

SECTION 92C – COMPUTATION OF ALP – COMPARABLES – PUBLIC SECTOR COMPANIES CANNOT BE CONSIDERED AS VALID COMPARABLES AS THEY ARE NOT DRIVEN BY PROFIT MOTIVE ALONE AND ALSO WORKS TOWARDS FULFILMENT OF OTHER SOCIAL OBJECTIVES AS WELL.

Held, We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the ld. Counsel for the assessee is basically challenging the inclusion of the three companies, namely, WAPCOS Ltd. (Seg.); Antrix Corporation Ltd.; and Edserv Softsystems Ltd. from the list of comparables. So far as Antrix Corporation Ltd. and WAPCOS Ltd. (Seg.) are concerned, both these companies are Government of India Undertakings. While Antrix Corporation Ltd., is under the administrative control of the Department of Space and is the commercial arm of Indian Space Research Organisation and involved in building satellites, WAPCOS Ltd. is a Mini Ratna Public Sector Enterprise under the aegis of Union Ministry of Water Resources and provides services in all facets of water resources, power and infrastructure sectors in India and abroad. The Hon'ble Bombay High Court in the case of CIT vs. Thyssen Krupp Industries India (P) Ltd., has held that Public Sector Undertakings are not driven by profit motive alone, but, such other considerations also weigh such as discharge of social obligations, etc., and hence, they cannot be considered as comparable with the private companies. Respectfully following the above decision of the Hon'ble Bombay High Court and observing that WAPCO Ltd and Antrix Corporation Ltd. are Government of India Undertakings, we hold that these two companies cannot be held as comparable with the assessee company and are to be rejected. [Para 20.10]

14. Shaktiman Cements Ltd. v. ACIT (ITA No. 2779/D/17)(07/02/2020)

SECTION 115BBE – THE BROUGHT FORWARD LOSSES OF EARLIER YEARS IS ELIGIBLE TO BE SET-OFF AGAINST ADDITION MADE U/S 68 R.W.S 115BBE UPTO AY 2016-17 – CBDT CIRCULAR NO. 11/2019 DATED 19TH JUNE, 2019.

Held, On going through the para no. 4, we find, the CBDT categorically held that the assessee is entitled to set-off of losses till the assessment year 2016-17. The case of the assessee before us pertains to assessment year 2013-14 and hence the set-off claimed by the assessee on the undisclosed income is legally valid. Hence, the addition made by the Assessing Officer is hereby directed to be deleted. [Para 5]

15. Sh. Manoj Kumar v. ACIT (ITA No. 1627/Del./2016)(24/02/2020)

SECTION 124/127 – NOTICE BY NON JURISDICTIONAL ASSESSING OFFICER – WHERE ASSESSEE WAS REGULARLY ASSESSED IN RANGE 38, NEW DELHI, THE NOTICE U/S 143(2) ISSUED BY RANGE 21 MERELY ON THE BASIS OF PAN IS INVALID – THE CORRECT JURISDICTION OF CASE IS TO BE DECIDED AS PER CBDT NOTIFICATION - SUBSEQUENT TRANSFER OF CASE TO CORRECT JURISDICTION AND REISSUE OF NOTICE U/S 143(2) AFTER THE EXPIRY OF TIME LIMIT WILL NOT HAVE ANY EFFECT ON INVALIDITY OF NOTICE U/S 143(2) WHICH WAS ISSUED BY NON JURISDICTIONAL ASSESSING OFFICER – FAILURE TO RAISE OBJECTION TO NOTICE IS NO CONSEQUENCE – SECTION 292BB WILL BE OF NO HELP AND SAME CANNOT CURE INVALID NOTICE.

Held, The learned Counsel, then further referred to the notification issued by the Commissioner of Income-tax, Delhi-XIII, New Delhi on 01/08/2001 along with corrigendum dated 14/08/2001, under which Range-38 was given jurisdiction over the persons having income from business of the contactorship, including supply of the labour for carrying out any work in that territorial area of the National Capital Territory of Delhi to the Joint Commissioner of Income-tax, Range-38, New Delhi. The assessment in the case of the assessee for assessment year 2007-08, was completed by the Assistant Commissioner of Income Tax, Circle 38(1), New Delhi, who falls under the jurisdiction of Range -38, New Delhi. A copy of the assessment order is placed on page 12 to 14 of the paper-book. The assessment for assessment year 2009-10 has also been completed by the Income Tax Officer, Ward - 38(2), New Delhi, who also falls under the jurisdiction of Range-38, New Delhi. In view of the notification and assessment orders passed by the Income Tax Department, it is undisputed that during relevant period jurisdiction over the assessee being a labour contactor lied with Range-38, New Delhi. [Para 3.5]

3.6 The assessee filed return of income electronically mentioning the correct jurisdiction, however, the case was selected for scrutiny and first notice under section 143(2) of the Act for commencing scrutiny assessment was issued on 01/09/2011 by the Deputy Commissioner of Income, Circle -21(1), New Delhi. A copy of notice is placed on page 19 of the paper-book. This is also the admitted position that this notice has been issued by the Assessing Officer not having jurisdiction over the case.

3.7 The assessee did not make compliance of the above notice issued under section 143(2) of the Act and subsequent show cause notice under section 144 of the Act dated 25/07/2012 has been

issued at another address. In response to this show-causenotice, the assessee filed letter dated 08/08/2012 and submitted that correct jurisdiction over the assessee lied with ward 38(2), New Delhi. The case was, accordingly then transferred to Income Tax Officer, Ward -38(2), New Delhi, who issued the notice under section 143(2) on 30/08/2012, a copy of which is available on page 22 of the paper-book. Thereafter, subsequent notices have been issued by the Income Tax Officer, Ward-38(2) and assessment was completed by him on 01/03/2013.

3.8 During the course of appellate proceeding before the Ld. CIT(A), the then Assessing Officer, filed remand report wherein, he admitted that the jurisdiction over the assessee lied with ward 38(2) , New Delhi but at the time of the issuance of notice under section 143(2) dated 01/09/2011, the PAN was lying with circle 37(1), New Delhi. The Assessing Officer has also admitted that the case was transferred to correct jurisdiction after 07/08/2012 and thereafter, notice under section 143(2) was issued on 30/08/2012.

3.9 In view of the above facts and circumstances, it is evident that notice under section 143(2) dated 1/09/2011 issued by the DCIT, Circle -37(1) was not valid being issued by Assessing Officer not having jurisdiction over the assessee. The notice under section 143(2) by the correct jurisdiction Assessing Officer has been issued on 30/08/2012, whereas the limitation for issue of the notice under section 143(2) of the Act expired on 30/09/2011 and therefore, this notice being beyond the period of limitation, it is not a valid notice.

3.10 The contention of the Revenue is that the assessee did not bring the fact of correct jurisdiction before the expiry of the limitation period and, therefore, this mistake is curable under section 292BB of the Act. We do not agree with the contention of the Revenue, because, the fault of mistake of issue notice on 01/09/2011 by the non-jurisdictional officer lied with the Department. There is no law, which requires the assessee to intimate the correct jurisdiction to the Income Tax Department and it is the responsibility of the Department to ensure that notice has been issued in accordance with the law. This responsibility cannot be shifted to the assessee although the assessee intimated as soon as the show cause notice was received at address at Gurgaon. As far as section 292BB is concerned, objection as to service of notice (not served upon the assessee, not served upon the assessee in time or served upon the assessee in improper manner) stands waved if the assessee has participated in the assessment proceeding. But in the instant case, as per the proviso to section 143(2) of the Act, no notice could have been served on the assessee after the expiry of the six month from the end of the financial year in which return is filed.

3.13 Thus, respectfully following the finding of the Hon'ble Delhi High Court, we hold that the notice dated 01/09/2011 issued by the CIT, Circle -37(1) was without jurisdiction and, thus, it was invalid and the notice dated 30/08/2012 issued by the ITO, Ward 38(2), New Delhi issued by the correct Jurisdiction Officer, was beyond the period of limitation and therefore, this was also invalid. Thus, assessment order passed without acquiring the correct jurisdiction for a scrutiny by way of notice under section 143(2) is void ab initio and thus we quash the same

16. **M/S Ananya Portfolio Pvt. Ltd. vs ITO (ITA Nos. 1483 & 1484/D/2019) (Dtd 20.02.2020)**

SECTION 143(2) NOTICE ISSUED U/S 143(2) LIABLE TO BE QUASHED IF AO SERVED NOTICE U/S 143(2) TO ASSESSEE OR ITS AUTHORISED REPRESENTATIVE BY HAND WITH OUT EXAMINATION OF RETURN OF INCOME FILED BY THE ASSESSEE ON THE SAME DAY WHEN NOTICE WAS ISSUED.

9. I have gone through the contention raised by the assessee in its written submissions, legal additional ground no.1 raised by the assesse which is legal in nature challenging the notice u/s. 143(2) of the Act issued on 21.6.2016 i.e. on the same date when the assesee appeared before the AO and filed a letter dated 21.6.2016 stating therein that the return filed u/s. 139(1) of the Act may be treated as return filed in response to the notice u/s. 148 of the Act. After thoroughly gone the orders passed by the Hon'ble Delhi High Court in the case of Director of Income Tax vs. Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del.) (Supra) and orders of the ITAT, Delhi Bench which the assessee has filed in the shape of paper book as well as one decision in the case of Micron Enterprises Pvt. Ltd. (Supra) which I have reproduced above, I am of the considered view that issue involved in the additional ground no. 1 which is legal in nature raised by the assessee is similar to the facts and circumstances of the aforesaid cases. I am of the view that the notice dated 21.6.2016 u/s. 143(2) of the Act is invalid and resultantly the assessment is not sustainable in the eyes of law, hence, I quash the same by setting aside the orders of the authorities below and deleted the addition in dispute by accepting the appeal of the assessee.

Keeping in view of above, there is no need to decide other contention raised by the assessee in the grounds of appeal which have now become academic. No contrary order has been produced by the Ld. DR of the higher authorities to controvert the arguments of the ld. counsel for the assessee on the legal issue.

17. Improvement Co. (P) Ltd. vs ITO Urban (ITA No. 7496/Del/2019) (AY 2015-16) (Dtd07.02.2020)

SECTION 143(2) – LIMITED SCRUTINY UNDER CASS - FOR WIDENING THE SCOPE OF LIMITED SCRUITNY ASSESSING OFFICER HAS TO SEEK PRIOR APPROVAL OF PCIT/CIT CONCERN. IN THE ABSENCE OF SUCH APPROVAL ASSESSMENT FRAMED ARE LIABLE TO BE QUASHED

Reliance is also being placed in the order of the Co-ordinate Benchof ITAT in the case of CBS International Projects Pvt. Ltd. Vs ACIT, NewDelhi in ITA No. 144/Del/2019 and order of the Hon'ble Jurisdictional HighCourt in the case of Best Plastics Pvt. Ltd. 295 ITR 256 wherein it was heldthat the assessment order passed by the Assessing Officer disregardingthe instructions of the CBDT are liable to the set aside and no substantialof law arises. The said judgment relied upon the decision of Hon'bleSupreme Court in the case of Commissioner of Customs Vs Indian OilCorporation and also the judgment of Hon'ble Supreme Court in the caseof UCO Bank Vs CIT: 237 ITR 889. Hence, we hold that the AssessingOfficer can widen the scope of scrutiny even the case is selected forlimited scrutiny under CASS, however, the condition precedent for suchwidening of the scope is that the Assessing Officer has to seek priorapproval of the authorities mentioned. Such prior approval and thepermission of the PCIT is lacking in the instant case. There was nosatisfaction about the merits of the issue which necessitated completescrutiny in the instant case. Hence, the assessment framed by theassessee on the issues which are not inconsonance of the instruction ofCBDT are liable to be quashed. The addition u/s 43CA, since beyond thescope of the limited scrutiny is hereby ordered to be deleted.

18. North Shore Technologies Pvt. Ltd. vs ITO(ITA No.6380/Del/2015) (AY 2011-12)

SECTION 144C: AO ISSUED A DRAFT ASSESSMENT ORDER DATED 31.03.2014- THEREAFTER AO ISSUED A CORRIGENDUM ON 05.05.2014 TO TREAT DRAFT ASSESSMENT ORDER AS FINAL ASSESSMENT ORDER- HELD, DRAFT ASSESSMENT ORDER DATED 31.03.2014 CANNOT BE TREATED AS FINAL ASSESSMENT ORDER SIMPLY BY WAY OF ISSUING CORRIGENDUM ON 05.05.2014

11. Such a corrigendum cannot validate the draft assessment order passed by the Assessing Officer, where he had clearly mentioned that, order passed u/s.143(3)/144C, is a draft assessment order and even his forwarding letter further clarifies the same and the intention of the Assessing Officer. It is an undisputed fact that limitation for passing the assessment order, if it was not draft assessment order was 31.03.2014. However, as noted above, the Assessing Officer has passed the draft assessment order and has forwarded thesame to the assessee stating that if the assessee does not agree with the transfer pricing adjustment, then he can file objection before the DRP within 30 days of the said order. It is only when assessee intimates to the Assessing Officer that he has accepted the variation order he has no objection within 30 days then Assessing Officer has to complete the assessment order on the basis of draft assessment order. Here in this case, there was international transaction anddeviation arises out of transfer pricing adjustments though

without referring to TPO in terms of Section 92CA, the Assessing Officer was obliged to follow the procedure u/s.144C, which he has not.

12. Thus, draft assessment order dated 31.03.2014 cannot be treated as final assessment order simply by way of issuing corrigendum on 05.05.2014 and since no final assessment order has been passed as on 31.03.2014 and only draft assessment order has been passed, therefore, the said draft order has no consequence and is null and void. Accordingly, on this ground, appeal of the assessee is allowed

19. DCIT V. M/s Varun Beverages Ltd. (ITA No. 5258/D/15)(26/02/2020)

SECTION 145 – REJECTION OF BOOKS OF ACCOUNTS – THE ASSESSEE SURRENDERED INCOME DURING SEARCH PROCEEDINGS AND DISCLOSED THE SURRENDERED INCOME IN PROFIT & LOSS ACCOUNT – THE ASSESSING OFFICER REJECTED THE BOOKS OF ACCOUNT AFTER REDUCING THE SURRENDERED INCOME FROM PROFIT AND MADE ADDITION OF NET PROFIT ON THE BASIS OF ESTIMATION – THE SURRENDERED INCOME WAS TAXED SEPARATELY - WHERE THERE IS NO FINDING OR MATERIAL TO DISPUTE THE CORRECTNESS OF BOOKS OF ACCOUNTS, THE INVOCATION OF PROVISIONS OF SECITON 145 AND CONSEQUENTIAL ESTIMATION WAS HELD TO BE BAD IN LAW – THE SURRENDERED INCOME BEING OUT OF BUSINESS ACTIVITY OF THE ASSESSEE IS ELIGIBLE TO TREATED AS PART OF PROFIT AND LOSS A/C.

Held, 6. We have considered the rival submissions and do not find any justification to interfere with the Order of the Ld. CIT(A) in deleting the addition. The assessee has specifically taken a stand that at the original assessment stage the A.O. never asked for production of the books of account. Even in the statement of Director recorded, the A.O. never asked for production of the books of account and never asked for taking proposed action for estimating the income by applying higher profit rate. This fact is confirmed by the A.O. in the remand report. The assessee produced the complete books of account supported by bills and vouchers at remand proceedings. The A.O. verified the books of account of the same and do not find any defect thereon. Thus the books of account of the assessee did not contain any discrepancy and the book results were acceptable. The assessee further explained that A.O. never asked for any question regarding any infirmity in the maintenance of the books of account. The A.O. at the remand proceedings was satisfied with the book results. The assessee further explained that fall in N.P. rate was on account of increase in the financial costs as well as increase in the price of raw material. The Ld. CIT(A) specifically dealt with the issue in the appellate order and found the contention of assessee to be correct. No material have been produced by the Revenue before us to rebut the findings of fact recorded by the Ld. CIT(A). Since no specific defects have been pointed-out in the books of account of the assessee, therefore, there was no reason to apply higher N.P. rate

against the assessee. The Revenue to some extent may be justified in contending that since assessee made surrender of additional income based on Annexure-A1 found during the course of search which assessee failed to explain may be the reason for rejection of the books of account, but, whether such reason would be justified in making further addition by applying the higher N.P. rate against the assessee. The Hon'ble Rajasthan High Court in the case of CIT vs., Gotan Lime Khanij Udyog [2002] 256 ITR 247 (Raj.) held that "mere rejection of the books of account does not mean addition is to be necessarily made."

The Hon'ble Punjab & Haryana High Court in the case of K.S. Bhatia 269 ITR 577 held that "low profit is no ground to reject the books of account under section 145(1) of the I.T. Act".

6.1. Considering the above, it is clear that even if on technical reasons books of account may be rejected because assessee surrendered additional income, but, there were no justification to apply higher N.P. rate for making further addition against the assessee. Whatever material was found during the course of search was considered in detail by the A.O. and assessee made surrender accordingly which is accepted by the A.O. Thus, there was no reason to make further addition against the assessee which was based on no material on record. The A.O. in the remand report accepted that no direction was given to assessee to produce the books of account and no explanation of assessee was called, for any discrepancy in the books of account during the statement recorded of the Director. The A.O, however, asked for production of the books of account by the assessee at the remand proceedings which have been verified and no defect whatsoever have been noted. It would clearly prove it is a case of violation of principles of natural justice because the A.O. without giving opportunity to the assessee and without any justification made the addition by enhancing the net profit rate. Therefore, on this reason alone the Departmental Appeal is liable to be dismissed.

6.2. There is no requirement under the Law that the trading result should be constant or should keep going–up always even if there justification for the same to vary. The Ld. CIT(A) at the appellate stage forwarded all the documents to the A.O. for examining and filing remand report. The A.O. examined the same and found the contention of assessee to be correct. Thus, assessee produced the books of account when called for by the A.O. and explanation of assessee was found to be correct for fall in N.P. rate which was on account of increase in financial cost and increase in cost of raw material consumed. Since no discrepancy was found in the maintenance of the books of account, therefore, the Ld. CIT(A) correctly deleted the addition. The decisions noted above clearly apply to the facts and circumstances of the case.

6.3. As regards the additional income of Rs.34.50 crores declared by the assessee, the A.O. has specifically noted in the assessment order that assessee made declaration of additional income which is based upon Annexure-A1 seized during the course of search. It is connected with the business activity of the assessee. Whatever discrepancy was explained by assessee have been accepted and whatever discrepancy assessee could not explain as per seized paper, assessee offered the same for taxation. Therefore, it is clearly business income in nature and assessee has rightly taken it into P & L A/c. The A.O. has not brought any material on record if assessee

doing any other business so as to link the surrender to any other income earned by the assessee. Therefore, there is no infirmity in the Order of the Ld. CIT(A) in deciding this issue in favour of the assessee. Considering the totality of the facts and circumstances of the case, we are of the view that there was no justification to make the addition by enhancing the N.P. rate. The Ld. CIT(A) on correct reasoning has correctly deleted the addition. The Departmental Appeal fails and is accordingly dismissed.

20. Sh. Ram Kishore Rathore v. ITO (ITA No. 308/D/19)(03/02/2020)

SECTION 147 – REASSESSMENT PROCEEDINGS U/S 147 CANNOT BE INITIATED WHERE THE ISSUE IN DISPUTE IS SUBJECT MATTER OF PENDING PROCEEDINGS U/S 154 - NOTICE U/S 148 WAS HELD TO BE BAD IN LAW

Held, Keeping in view the facts of the present case and the order dated 20.02.2018 by the ITAT Jaipur Benches as reproduced above, I am of the view that the Assessing Officer has reopened the case of the assessee when the proceedings under section 154 of the I.T. Act, 1961 were pending on the same issue. The ITAT Jaipur Benches has decided this issue in favour of the assessee and set aside initiation of proceeding u/s 147/148 of the Act and consequential reassessment order, as a result thereof the grounds on merits have become infructuous. [Para 6]

7. Keeping in view the facts and circumstances of the present case, I am of the view that the issue in dispute has already been adjudicated and decided in favour of the assessee by the ITAT Jaipur Benches (supra). Therefore, I have no other alternative except to respectfully following the above said order and cancel the proceedings initiated u/s 147/148 and consequential reassessment order. Since I have cancelled the proceeding initiated u/s 147/148 and consequential reassessment order, the grounds raised on merit becomes infructuous.

21. AKG Securities and Consulting Ltd. v. ITO (ITA NO. 4395/D/19)(27/02/2020)

SECTION 147 – CLIENT CODE MODIFICATION – MERE INFORMATION FROM INVESTIGATION WING THAT THERE HAS BEEN CLIENT CODE MODIFICATION BY BROKER CANNOT BE THE BASIS FOR ASSUMING JURISDICTION U/S 147 – THE ASSESSING OFFICER FAILED TO CONDUCT ANY INDEPENDENT ENQUIRY – THE APPROVAL BY PR.CIT U/S 151 IS ALSO IMPROPER AND WITHOUT APPLICATION OF MIND – THE REOPENING U/S 147 WAS HELD TO BE INVALID

Held, After perusing the aforesaid reasons recorded, we find that it is a case where action for reopening is taken mechanically on the information from the Asstt. Director of Income Tax (Investigation), (Unit)1(3), Ahmedabad through CD wherein it was informed that some companies have indulged in tax evasion practices by claiming fictitious profit / losses by using

Client Code Modification (CCM) facility in F&O segment on NSE. On the basis of this information, the reassessment proceedings were initiated u/s. 147 of the Act after taking approval of the Pr. CIT, Delhi-1, New Delhi and notice u/s. 148 of the Act was issued upon the assessee on 28.3.2017. In response to the same, the AR of the Assessee filed a letter dated 15.6.2017 stating therein that the return filed vide acknowledgement no. 164874331300910 dated 30.9.2010 should be considered as original in response to notice u/s. 148 of the Income Tax Act, 1961 also requested to provide copy of reasons recorded for issuing the notice u/s. 148 of the Act, which was provided by the AO to him. AO has blindly relied upon the Investigation Wing which itself is not based on any material against the assessee. The mere recording of reasons on the basis of information from Investigation Wing and issuing notice for initiation of reassessment proceedings does not constitute application of mind much less independent application of mind. Therefore, the proceeding is without jurisdiction. It is noted that AO has not investigated the matter himself and has not made any enquiry to corroborate the Information of the Investigation Wing on which basis the case of the assessee has been reopened, meaning thereby the AO has not applied his mind and only issued notice u/s. 148 of the Act. Thus, the AO has acted mechanically and without any independent application of mind. It is further noted that initiation of proceedings is based on non application of mind much less independent application of mind but is a case of borrowed satisfaction. Nothing is independently examined or considered by the AO which can demonstrate application of mind by him. [Para 5.1]

5.1.1 We further find that the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. (Supra) has held that mere client code modification by broker does not mean that any income has escaped assessment.

5.2 We have heard rival contentions and perused the orders of the revenue authorities, case laws relied by the ld. Counsel for the assessee, we are of the considered view that the jurisdictional issue has already been adjudicated and decided in favour of the Assessee by the various decisions of the Hon'ble Supreme Court and the Hon'ble High Courts, in the cases discussed above, which have been respectfully followed by the Tribunal. Therefore, we have no other alternative except to respectfully follow the same case laws, because no contrary decision has been brought to my knowledge by the Ld. DR under the similar facts and circumstances of the case.

5.3 Keeping in view of the facts and circumstances of the case as explained above and respectfully following the precedents, as aforesaid, the proceedings initiated by invoking the provisions of section 147 of the Act by the AO and upheld by the Ld. CIT(A) are nonest in law and without jurisdiction and needs to be quashed.

5.4 Further, after perusing the aforesaid reasons recorded and its approval, as reproduced above, wherein the ITO has recorded the reasons undated and Ld. Pr. CIT, Delhi-1 has granted the approval by mentioning that "I am satisfied", which shows that Ld. Pr. CIT-1, New Delhi has not recorded proper satisfaction and without application of mind gave the approval in a mechanical manner. Keeping in view of the facts and circumstances of the present case and the case laws

applicable in the case of the assessee, we are of the considered view that the reopening in the case of the assessee for the asstt. year in dispute is bad in law and deserves to be quashed.

22. M/S N.G. CONSTRUCTIONS vs ACIT (ITA No. 1668/DEL/2016) (AY 2006-07) (Dtd 11.02.2020)

SECTION 147- REOPENING OF ASSESSMENT IS INVALID AS REOPENING WAS MADE ON THE BASIS OF REPORT OF THE INVESTIGATIONWING OF THE DEPARTMENT WHICH IS IN MECHANICAL MANNER WITHOUT APPLICATION OF MIND APPROVING AUTHORITY HAS GIVEN APPROVAL TO THE REOPENING OF ASSESSMENT BY MENTIONING ONLY THAT "I AM SATISFIED WITH THE REASONS RECORDED BY THE AO FOR REOPENING THE AY 2006-07 U/S. 147",- WHETHER THE REASON GIVEN IS SUFFICIENT TO INITIATE PROCEEDING U/S 147- HELD NO, SINCE APPROVAL/SANCTION GIVEN BY THE AUTHORITY IS WITHOUT RECORDINGSATISFACTION. SO REOPENING IS NOT SUSTAINABLE

7. We have considered the rival arguments made by boththe parties and perused the orders of the authorities below.We have also considered the various decisions cited before us.We find that AO, on the basis of Report of the InvestigationWing of the Department, reopened the assessment and madethe addition of Rs. 8,50,000/- as unexplained income of theassessee which has been upheld by the Ld. CIT(A). It is thesubmission of the Ld. Counsel for the assessee that reopeningwas made in the mechanical manner without application ofmind by the Assessing Officer and on borrowed satisfaction.Further the approving authorities have also given the approvalin a mechanical manner.

7.1 On perusal of page no. 6-7 of the Paper Book, which is acopy of proforma for approval to issue of notice u/s. 148, copyof which is placed at page no. 7 of the paper book shows thatthe Ld. CIT while giving approval simply mentioned *"I amsatisfied with the reasons recorded by the AO for reopening theAY 2006-07 u/s. 147."* Similarly, as per column no. 12 atpage no. 6 of the Paper Book, the ACIT, Circle 88(1), NewDelhi has simply mentioned *"For the reasons recorded by theAO, I am satisfied that it is a fit case for issue of notice u/s.148 of the I.T. Act, 1961."*

7.2 The Hon'ble Supreme Court of India in the case of CIT vs.S. Goyanka Lime & Chemical Ltd. reported in (2015) 64taxmann.com 313 (SC) arising out of order of Hon'ble HighCourt of Madhya Pradesh in CIT vs. S. Goyanka Lime &Chemicals Ltd. (2015) 56 taxmann.com 390 (MP) has held asunder:-

"Section 151, read with section 148 of Income TaxAct, 1961 – Income escaping assessment – Sanctionfor issue of notice (Recording of satisfaction) – HighCourt by impugned order held that where JointCommissioner recorded satisfaction in mechanical manner and without application of mind to accordsanction for issuing notice under section 148,reopening of assessment was invalid – WhetherSpecial Leave Petition filed against impugned orderwas to be dismissed – Held, Yes (in favour of theAssessee)."

7.3 The Hon'ble High Court of Delhi in the case of PCIT vs.NC Cables (Supra) has held as under:-

"11. Section 151 of the Act clearly stipulates that theCIT(A), who is the competent authority to authorizethe reassessment notice, has to apply his mind andform an opinion. The mere appending of theexpression 'approved' says nothing. It is not as if the CIT(A) has to record elaborate reasons for agreeingwith the noting put up. At the same time, satisfactionhas to be recorded if the given case which can bereflected in the briefest possible manner. In thepresent case, the exercise appears to have beenritualistic and formal rather than meaningful, which isthe rationale for the safeguard of an approval by ahigher ranking officer. For these reasons, the Court issatisfied that the findings by the ITAT cannot bedisturbed."

7.4 Since in the instant case also both the approvingauthorities have given the approval in a mechanical manner,therefore, in light of the ratios as laid down by the Hon'ble Supreme Court of India and the Hon'ble Delhi High Court in thedecisions cited above and the other decisions filed in the shapeof Paper Book at page no. 1-36, the reassessment proceedingsin our opinion are not in accordance with law. Therefore, thesame is liable to be quashed. We, therefore, quash thereassessment proceedings. Since the assessee succeeds on this legal ground challenging the validity of reassessmentproceedings, the addition on merit is not being adjudicatedbeing academic in nature. The appeal filed by the assessee is accordingly allowed.
In the result, the appeal filed by the assessee stands allowed.

23. Rupinder Singh Kohli (HUF) v. ITO (ITA No.2765/Del/2019)(21/02/2020)

SECTION 147 – REASONS FOR REOPENING WAS RECORDED ON THE GROUND THAT CAPITAL GAIN ON TRANSACTION UNDERTAKEN NMCE PLATFORM HAS ESCAPED ASSESSMENT – HOWEVER, THE ASSESSMENT WAS COMPLETED AFTER MAKING ADDITION ON ACCOUNT OF PROFIT EARNED ON COMMODITY TRADING – THE ADDITION IN DISPUTE WAS NOTWITHSTANDING THE REASONS WHICH WERE RECORDED IN RESPECT OF CAPITAL GAIN – THE ADDITION WAS HELD TO BE WITHOUT JURISDICTION AND BAD IN LAW AS NO ADDITION OF CAPITAL GAIN WAS MADE

Held, On the perusal of record and after hearing both the authorized representatives, the jurisdictional issue raised by the assessee is against the exercise of jurisdiction u/s 147/148 of the Act. The Ld.AR for the assessee initially raised objections against the violation of provision of section 151 of the Act. However, during the course of hearing itself, he raised an alternate plea that as against the reasons recorded for the re-opening of assessment i.e. non-declaration of capital gains in the return of income; finally addition has been made u/s 69A of the Act and also for violation of provision of section 115AA of the Act. In other words, the addition made in the hands of the assessee is on a ground other than the ground on which reasons were recorded for re-opening the assessment u/s 147 of the Act. [Para 9]

The Hon'ble Bombay High Court in CIT vs Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bom.) have laid down the principle that in case no addition is made on account of the reasons recorded for re-opening the assessment then the addition made on any other account is not sustainable.

In the facts of the present case admittedly the Assessing Officer had recorded reasons for re-opening the assessment, copy of which is placed at page 25 of the Paper Book and he noted as under:-

"On perusal of ITD it has been found that assessee has filed ITR on 25.03.2011 for the A.Y. 2010-11 declaring income of Rs.3,00,466/-. The declared income for the year under consideration consists of only "Other sources" income to the tune of Rs.3,00,466/-. It has been further seen that the assessee has not declared the capital gains of Rs.1,51,500/- booked by the assessee through the transactions entered with NMCE."

The satisfaction thus was on account of escapement of income from assessment of capital gains of Rs.1,51,500/-. The addition under the said head of income has not been in the case of the assessee. The Assessing Officer in final analysis vide para 11 observed as under:-

11. "In view of above narrated facts and the information available on records, the income of Rs.1,51,500/- (alleged profit earned from commodity trading) is added back to the income of assessee u/s 69A of the Income tax Act for the A.Y. 2010-11. The income amounting to Rs.1,51,500/- is taxed @ 30% by invoking provisions of 115BBE of the Act. Further, I am of the view that the assessee has furnished inaccurate particulars of his income for the A.Y. 2010-11, penalty proceedings u/s 271(1)(c) are being initiated separately."

In other words, the addition was made u/s 69A of the Act and the income was taxed at the rate of 30% by invoking section 115BBE of the Act. In the absence of any addition being made on account of the reasons recorded for re-opening the assessment, other addition made in the hands of the assessee cannot be sustained. Accordingly, the same is deleted.

24. M/s Bull Riders Financial Services (P) Ltdv.ITO(ITA No.1871/D/17) (Dated 10/02/2020)

SECTION 148 V. SECTION 68 (S.K. GUPTA) - REOPENING OF ASSESSMENT UNDER SECTION 147 ON THE BASIS OF INFORMATION FROM INVESTIGATION WING – THE RELEVANT RECORD WAS NOT AVAILABLE WITH THE ASSESSING OFFICER AT THE TIME OF ISSUING 148 NOTICE – PROCEEDINGS INITIATED AT DICTATES, WITHOUT INDEPENDENT APPLICATION OF MIND – THE REASONS RECORDED ALSO SUFFERED FROM VARIOUS FACTUAL INACCURACIES - CIT ACCORDED APPROVAL UNDER SECTION 151 IN A MECANICAL MANNER WITHOUT INDEPENDENT APPLICATION OF MIND – RE-ASSESSMENT PROCEEDINGS WERE QUASHED

Held, It is a fax message received by the A.O. on 28.03.2012 at 3:30 PM having Phone No.020756306. The Ld. D.R. produced the assessment record which we have perused and find that the reasons recorded above are fax message received by the A.O. from some other Officer, on which, the A.O. has signed in original. The Ld. D.R. also did not dispute this fact. It would show that A.O. received the recorded reasons for reopening of the assessment on fax message on which she (A.O.) has merely signed. The letters referred to by the Learned Counsel for the Assessee which are correspondence between the A.O. and the Income Tax Officers, DCIT, CC-22 etc., New Delhi would show that A.O. was not having list of the beneficiaries and statement of Shri S.K. Gupta even in January/February 2013. The A.O. has been consistently seeking information from the concerned authorities at New Delhi to provide list of beneficiaries and statement of Shri S.K.Gupta after signing the recorded reasons on 28.03.2012. These correspondence, thus, clearly support the fact that A.O. was not having any list of beneficiaries of accommodation entries and statement of Shri S.K. Gupta at the time of signing the recorded Fax message for reopening of the assessment on 28.03.2012. The A.O. ultimately on 27.03.2012 (PB-344) through letter Dated 27.03.2012 from ITO, Ward-3(1), New Delhi, came to know that assessee is beneficiary of accommodation entry provided by M/s. Vasudeva Champ Finvest, Shri Suresh Gupta, Rs.10 lakhs and M/s. Vasudeva Farms Rs.3,50,000/- on 18.03.2005. The A.O. however did not make any addition of Rs.13,50,000/- from these parties in the re-assessment order. The party at Sl.No.4 M/s. Vasudeva Farms Pvt. Ltd., though is mentioned in reassessment order, but, against it, an amount of Rs.20 lakhs have been mentioned by the A.O. in the assessment order which fact is incorrect in the reasons recorded for reopening of the assessment. Thus, the assessee has not received any amount from M/s. Vasudeva Champ Finvest, Shri Suresh Gupta and M/s. Vasudeva Farms of Rs.13,50,000/-….The crux of the above Judgments would be that,in case, incorrect, wrong and non-existing reasons are recorded by the A.O. for reopening of the assessment and that A.O. failed to verify the information received from Investigation Wing, the reopening of the assessment would be unjustified, bad in law and is liable to be quashed. The facts of the case would show that A.O. merely singed on the fax message which is reasons recorded for reopening of the assessment. The A.O. acted at the dictate of some other Officer of the Department and did not make any enquiry before signing the recorded reasons. It appears that since A.O. was not having relevant material with her, therefore, she never wanted to record reasons for reopening of the assessment and in some compelling circumstances, the A.O. has

signed the fax recorded reasons. Thus, there is total non-application of mind on the part of the A.O. for reopening of the assessment. We rely upon Judgment in the case of Pr. Commissioner of Income Tax vs., RMG Polyvinyl (I) Ltd., 396 ITR 5 (Del.), Pr. Commissioner of Income Tax vs., Meenakshi Overseas (P) Ltd., 395 ITR 677 (Del.) and Pr. CIT vs., G And G Pharma India Ltd., [2016] 384 ITR 147 (Del.) and Sarthak Securities Co. (P) Ltd., 329 ITR 110 (Del.)…. The above discussion would make it clear that the A.O. herself has not recorded any reasons for reopening of the assessment. No details or evidence of receiving accommodation entries were available to the A.O. on the day of issue of notice under section 148 on 29.03.2012. The A.O. recorded wrong, incorrect and non-existing reasons and merely signed the fax message which was already recorded for reopening of the assessment. The A.O. did not apply her mind and the objections of the assessee have not been disposed of. Therefore, the reopening of the assessment is illegal, bad in law and void abinitio…. In the present case, the original assessment was completed under section 143(3) on 27.09.2007. The A.O. on the basis of the facts recorded by the assessee in the books of account came to know that assessee has received share application money/share premium of Rs.2,23,50,000/-. This fact was already available to the A.O. at the time of passing of the original assessment order as the original return was filed on 31.03.2006 and was subjected to scrutiny assessment under section 143(3) of the I.T. Act, 1961. The A.O. in the reasons did not record if there was any failure on the part of the assessee to disclose truly and correctly all material facts necessary for assessment. The A.O. has not even mentioned names of the parties from whom assessee has received accommodation entry in the reasons. Thus, the First proviso to Section 147 of the I.T. Act would apply in favour of the assessee and A.O. cannot take any action against the assessee for reopening of the assessment….The assessee filed copy of the sanction granted by Competent Authority to the reasons recorded for reopening of the assessment. Copy of the same is filed at page-349 of the PB in which Addl. Commissioner of Income Tax has mentioned "Yes, I am satisfied". The Commissioner of Income Tax, Ghaziabad noted "Yes I am satisfied. It is a fit case to issue notice under section 148." Such an approval is not valid in Law because it would show that approval have been granted without application of mind. The Hon'ble Delhi High court in the case of United Electrical Co. Pvt. Ltd., vs. Commissioner of Income Tax 258 ITR 317 in which approval by Addl. Commissioner of Income Tax under section 151 was given in the following terms "Yes, I am satisfied that it is a fit case for issue of notice under section 148 of the I.T. Act". The Hon'ble Delhi High Court considering the similarly worded approval did not approve the same and held that "In the present case, there has been no application of mind by Addl. CIT before granting approval." The Hon'ble Supreme Court in the case of CIT vs., S. Goyanka Lime & Chemical Ltd., [2015] 64 taxmann.com 313 (SC) approving the Judgment of Hon'ble Madhya Pradesh High Court in the case of CIT, Jabalpur vs., S. Goyanka Lime & Chemical Ltd., [2015] 56 taxmann.com 390 (M.P.) in which the Departmental SLP has been dismissed on the same reason because the Joint Commissioner of Income Tax recorded satisfaction in a mechanical manner and without application of mind. The Hon'ble Madhya Pradesh High Court in the case of Arjun Singh vs., ADIT [2000] 246 ITR 363 (M.P.) in which also similarly worded sanction under section 148 was not found valid. Therefore, we are of the view that reopening of the assessment is bad in Law and that

sanction/approval granted by the Competent Authority is also invalid. Considering the totality of the facts and circumstances of the case, we are of the view that reopening of the assessment is illegal, bad in Law and void abinitio. Therefore, the reopening of the assessment cannot besustained in Law. In view of the above, we set aside theOrders of the authorities below and quash the reopening ofthe assessment under section 147/148 of the I.T. Act, 1961.Resultantly, all additions stand deleted. Appeal of the Assessee is allowed.…In the result, appeal of the Assessee allowed.**[Paras 5.1, 5.6, 5.7, 5.8, 5.9, 6]**

25. M/s. Frontier Commercial Co. Ltd. vs DCIT (ITA No. 2205/D/2017) (AY: 2009-10 Dtd14.02.2020)

SECTION 153C ASSESSMENT ORDER PASSED U/S. 153C IS QUASHED IF THERE IS NO JUSTIFICATION EITHER FOR REOPENING OF THE CONCLUDED ASSESSMENT OR MAKINGANY ADDITION WITHOUT ANY REFERENCE OR NEXUS TO THE MATERIAL THAT WAS SEIZED DURING THE SEARCH

6. We have gone through the record in the light of submissions made on either side.There is no dispute as to the dates submitted on behalf ofthe assessee. As could be seen from page 152 of the paper book, theoriginal return of income for the assessment year 2009-10 was filed bythe assessee on 29.09.2009 and six months' period from the end of thefinancial year in which such return was furnished, to issue notice u/s.143(2) expired on 30.09.2010. It is, therefore, clear that by 09.05.2012itself, such an assessment stood concluded.

7. It is not the case of Revenue that the additions made in this matterhad any reference to any particular document or material that wasunearthed during the search so as to justify the reopening of assessmentand the additions. It is settled principle of law that in terms of decision ofHon'ble jurisdictional High Court in the case of Kabul Chawla (supra),Chintels India Ltd vs. DCIT, 397 ITR 416 (Del), PCIT vs. Best Infrastructure(India) Ltd., 397 ITR 82 (Del), PCIT Vs. MeetaGutgutia, 395 ITR 526 (Del),Ld. PCIT vs. MsLata Jain, 384 ITR 543 (Del), the assessments andreassessments pending on the date of the search shall abate and thetotal income for such assessment years will have to be computed by theAssessing Officers as a fresh exercise; and that although Section 153A ofthe Act does not say that additions should be strictly made on the basisof evidence found in the course of the search, or other post-searchmaterial or information available with the AO which can be related to theevidence found, it does not mean that the assessment can be arbitrary ormade without any relevance or nexus with the seized material.Obviously, an assessment has to be made under this Section only on thebasis of seized material. Thus, in the cases of concluded assessment, noaddition/disallowance could be made in the absence of any incriminatingmaterial found during the course of search.

8. In view of the settled principle of law, we do not find anyjustification either for reopening of the concluded assessment or makingany addition without any reference or nexus to the material that wasseized during the search and the same cannot be sustained. Therefore,the impugned assessment order passed u/s. 153C is quashed.

26. DCIT vs M/s. Suncity Projects Pvt. Ltd. (ITA No.2737/D/2016) (Dtd 17.02.2020)

SECTION 153C – NO ADDITION ON THE BASIS OF SEIZED DOCUMENT - WHERE THE NAME OF THE ASSESSEE IS NOT MENTIONED IN THE SEIZED DOCUMENT - SECONDLY, THERE IS NO CORROBORATIVE EVIDENCE OR ANY STATEMENT THAT THE PAYMENT HAS BEEN RECEIVED BY THE ASSESSEE OTHER THAN CHEQUE AMOUNT AS ENTERED IN THE SALE AGREEMENT - WHERE EXACTLY SAME ADDITION HAS BEEN MADE BASED ON SAME SEIZED DOCUMENTS IN THE HANDS OF PERSON NAMED THEREIN

6. We have considered the relevant finding given in the impugned orders as well as material referred to before us. Here, in this case, the entire addition of Rs.1642,68,522/- is
based on some computer generated loose sheets which was seized and found from the computer of Mr. Lalit Modi who has categorically denied of any such transaction. It is also an admitted fact that name of the assessee nowhere appeared in the said document albeit the name of Smt. Vineeta Chaurasia that she has entered into an agreement for sale of commercial property in Vasant Square Mall has been mentioned. Apart from that, the aforesaid finding of the Ld. CIT(A) that this addition cannot be made in the hands of the assessee for the reason that, *firstly*, the name of the assessee is not mentioned in the seized document; *secondly*, there is no corroborative evidence or any statement that the payment has been received by the assessee other than cheque amount as entered in the sale agreement; and *lastly*, on the bare perusal of the document it cannot be inferred or concluded that seized document belongs to or has any nexus with the assessee. Here, in this case, as pointed out by the ld. counsel similar matter had come for consideration before Tribunal in the case of Mrs. Vineeta Chaurasia where exactly same addition has been made based on same seized documents that the amount of Rs.16,42,68,522/- is an unexplained investment. The Tribunal in a very detailed order has deleted the said addition on merits. Now Hon'ble Delhi High Court in the appeal filed by the Revenue has dealt with exactly the same seized document in the case of **PCIT vs. Mrs. Vineeta Chaurasia in ITA No.1104 and 1105/Del/2015**……
7. Apart from that, it has also been brought on record that SLP filed by the Revenue against the said order has been dismissed. Once on exactly same seized document the Hon'ble High Court has decided this issue that this document does not belong to Mrs. Vineet Chaurasia nor any adverse inference can be drawn, therefore, in the case of the assessee whose name is not even

was mentioned in the seized documents, no addition can be made. Accordingly, the said addition is deleted and the order of the Ld. CIT(A) is confirmed.
8. In the result, the appeal of the Revenue is dismissed.

27. ACIT vs M/s Advantage Housing Pvt. Ltd. (ITA No.1451/D/2015) (Dtd 27.02.2020)

SECTION 153C NOTICE ISSUED U/S 153C LIABLE TO BE QUASHED WHEN THE DOCUMENTS SEIZED ARE ONLY PHOTOCOPIES AND THE ORIGINALS OF WHICH ARE ALREADY IN THE POSSESSION OF THE ASSESSEE - AO HAS NOT RECORDED HIS SATISFACTION IN THE CASE OF THE SEARCHED PERSON THAT THE DOCUMENTS SO FOUND AND SEIZED FROM THE PREMISES OF THE SEARCHED PERSON DO NOT BELONG TO THE SEARCHED PERSON BUT BELONG TO SOME OTHER PERSON.

10. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer on the basis of certain documents found and seized from the premises of Shri K.S. Dhingra & G.
S. Dhingra and other group of cases during the course of search and seizure operation on 16/09/2011 issued noticed under section 153C of the Act to the assessee after recording his satisfaction note in the case of the assessee that the said sized documents were belonging to the assessee. We find the Ld. CIT(A) quashed the proceedings initiated under section 153C of the Act, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that the documents so seized from the premises of Shri K.S. Dhingra & G. S. Dhingra during the course of search under section 132 of the Act on 16/09/2011 are nothing but Xerox copy of the sale deed, agreement to sale and possession letter, etc and the original documents are still available with the assessee. It is also his submissions that no satisfaction note has been recorded in the case of the searched person that these documents do not belong to the searched person but belong to some other person i.e. the assessee in the instant case.
We find that the Ld. CIT(A) while adjudicating the issue has gone through the documents which are mentioned in the satisfaction note and found that the documents so found or seized are photocopy of the sale deed, agreement of sale along with indemnity bond, possession letter, etc in respect of Sunder Nagar Property purchased by the assessee from M/s Atma Ram Properties Ltd. These documents do not give any indication that the assessee had paid Rs.3.5 Crores in cash over and above of Rs.33 Crores as recorded in the sale deed. We find the Ld. CIT(A) while adjudicating the issue has followed the decision of the Hon'ble Delhi High Court in the case of Pepsico India Holding Pvt. Ltd. (supra) and M/s Pepsi Foods Pvt. Ltd. (supra). The Ld. DR could not controvert the factual findings given by the Ld. CIT(A) in his order on this issue. We further find that there is no satisfaction note recorded in the case of the searched person which is a

condition precedent for issue of notice under section 153C of the Act although the Assessing Officer of the searched person and the other person is the same. In view of the above discussion and detailed reasoning given by the Ld. CIT(A) on this issue, we find no infirmity in his order in quashing the proceedings initiated under section 153C of the Act by the Assessing Officer. The various decisions relied upon by the Ld. DR are distinguishable and are not applicable to the facts of the present case especially when the documents seized are only photocopies, the originals of which are already in the possession of the assessee and the Assessing Officer has not recorded his satisfaction in the case of the searched person that the documents so found and seized from the premises of the searched person do not belong to the searched person but belong to some other person. The grounds raised by the Revenue are accordingly dismissed.

28. ACIT v. N.S. Software (ITA No. 3161/D/16)(05/02/2020)

SECTION 153C – THE SIXTH YEAR AS PER PROVISION OF SECTION 153C IS TO CALCULATED FROM THE DATE OF RECORDING OF SATISFACTION AND NOT THE DATE OF SEARCH - THE ASSESSMENT OF SIXTH YEAR UNDER SECTION 143(3) WITHOUT SATISFYING JURISDICTIONAL REQUIREMENTS OF SECTION 153C IS INVALID AND BAD IN LAW.

Held, Considering the issue involved in the present appeal and in the light of above decisions, the A.O. was required to record satisfaction under section 153C of the I.T. Act, 1961 because the A.Y. 2010-2011 is covered by Section 153C of the I.T. Act, 1961 as satisfaction note was recorded on 23.07.2010. Therefore, there was no justification for the A.O. to pass Order under section 143(3) of the I.T. Act, 1961. Since mandatory conditions of Section 153C of the I.T. Act, 1961 are not satisfied in the present case, therefore, the Ld. CIT(A) was justified in quashing the assessment order under section 143(3) of the I.T. Act, 1961. We, therefore, do not find substance in the submissions of the Ld. D.R. Appeal of the Revenue is dismissed. [Para 6.1]

29. Shri Ajay Sharma vs The DCIT (ITA.No.3554/Del./2015)(AY 2010-11)

SECTION 153D- ORDER OF ASSESSMENT UNDER SECTION 153A COULD BE PASSED BY THE A.O. BELOW THE RANK OF JCIT EXCEPT WITH THE PRIOR APPROVAL OF THE JOINT COMMISSIONER-SINCE IN THE PRESENT CASE NO PRIOR APPROVAL TAKEN, THEREFORE ASSESSMENT ORDER UNDER SECTION 153A IS NULL AND VOID

8.4. According to this Section, no order of assessment under section 153A could be passed by the A.O. below the Rank of JCIT except with the prior approval of the Joint Commissioner. In the present case, the assessment order have been passed by the DCIT, CC, Ghaziabad. Thus, the

A.O. is below the Rank of JCIT, therefore, before passing the order under section 153A of the I.T. Act under appeal, the A.O. shall have to obtain prior approval of the JCIT. It is the condition precedent before passing the assessment order under section 153A of the I.T. Act. Learned Counsel for the Assessee filed copy of the order sheet of the A.O. which does not mention if A.O. has sent any proposal to the JCIT/Addl. CIT for obtaining prior approval before passing the impugned assessment order. Learned Counsel for the Assessee filed several letters obtained under RTI and others which clearly prove that the approval under section 153D of the I.T. Act is not available to the A.O. or the Officer who has provided information under RTI Act. Even no such approval was found in the assessment record. The ITO, Ward-1(5), Ghaziabad, also intimated the Ld. CIT-D.R. that such approval of Addl. CIT Dated 28.03.2019 under section 153D could not be traced-out from the record of the assessee available presently with this Office and assessee has also intimated the same fact under RTI Act. The Ld. CIT-D.R. during the course of arguments has also admitted that approval under section 153D of the I.T. Act Dated 28.03.2013 is not available for inspection of the Bench. These facts, therefore, clearly prove that no prior approval under section 153D by JCIT/Addl. CIT before passing the impugned assessment order have been obtained. Therefore, A.O. was not competent to pass the assessment order under section 153A of the I.T. Act, 1961. The assumption of jurisdiction of the DCIT, CC, Ghaziabad to pass the impugned appellate order is thus vitiated. The entire assessment order under section 153A is null and void and is liable to be quashed. In view of the above discussion, we set aside and quash the entire impugned appellate orders. Resultantly, all the additions stand deleted. Additional ground of appeal of assessee is allowed. In view of the above findings on the additional ground, we do not propose to decide the other grounds on merits which are left with academic discussion only. Appeal of the Assessee is allowed.

30. BPTP Ltd. vs DCIT (ITA No. 4539/D/2016) (Dtd 18.02.2020)

SECTION 201(1A) NO INTEREST IS LEVIED U/S 201(1A) IF TDS DEPOSITED ON DUE DATE AND ALSO MONEY HAS FLOWN FROM BANK A/C BUT REFLECTED AS DEPOSITED AFTER DUE DATE

7. In our considered opinion, when the payments have been electronically made on 07.01.2011, which is the due date and the money has flown from the bank account of the assessee, it should not make any difference when the same was shown as credited on OLTAS. On these facts, we are of the view that the assessee has deposited tax on or before the due date. Therefore, the Assessing Officer is directed to delete the addition of Rs. 3,39,413/-

31. M/s Sunray Cotspin (P) Ltd. Vs Pr. CIT (ITA no. 5239/Del/2019)(AY 2014-15)

SECTION 263- PROVISIONS OF SECTION 263 CAN BE INVOKED ONLY WHEN THE ASSESSMENT ORDER IS ERRONEOUS AND PREJUDICIAL TO THE INTEREST OF THE REVENUE- HELD YES-THEREFORE, MERELY BECAUSE THE PCIT DOES NOT AGREE WITH THE OPINION OF THE ASSESSING OFFICER, HE CANNOT INVOKE THE PROVISIONS OF SECTION 263 OF THE ACT TO SUBSTITUTE HIS OWN OPINION-HELD YES

22. Considering the facts of the case in the light of judicial decisions discussed hereinabove and on perusal of the facts, we have no hesitation in holding that the assessment framed u/s 143(3) of the Act was after detailed enquiries and verification and merely because the assessment order is silent, the same cannot be considered as erroneous and prejudicial to the interest of the revenue, as held by the Hon'ble High Court of Bombay in the case of Gabriel India Ltd [supra].

23. In the instant case, the Assessing Officer, after considering the various submissions made by the assessee, has taken a possible view. Therefore, merely because the PCIT does not agree with the opinion of the Assessing Officer, he cannot invoke the provisions of section 263 of the Act to substitute his own opinion. It has been further held in several decisions that when the Assessing Officer has made enquiry to his satisfaction and it is not a case of no enquiry and the PCIT wants that the case should have been investigated/probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act.

24. In view of the above discussion, we set aside the order of the PCIT and restore that of the Assessing Officer dated 18.08.2016 framed u/s 143(3) of the Act

32. Chunnu International vs ACIT (ITA No.:- 6422/D/2017) (dated 20.02.2020).

SECTION 271(1)(c) PENALTY U/S 271(1)(C) NOT LEVIABLE IF ASSESSEE MADE FULL DISCLOSURES OF MATERIAL FACTS AND CIRCUMSTANCES AND DISPUTABLE ISSUE OF QUANTUM ADDITION, ON WHICH TWO DIFFERENT VIEWS WERE LEGITIMATELY POSSIBLE.

5. We have heard both sides patiently. We have perused the materials on record carefully. We have also considered the judicial precedents referred in the records or brought to our attention at the time of hearing before us. It is not in dispute that the issues on which the aforesaid additions totaling Rs. 12,12,046/- were made by the AO are highly disputable issues on which two different views were legitimately possible. It is further not in dispute that there was full disclosure of materials facts and circumstances by the assessee in the Return of income and during assessment proceedings. It is not the case of Revenue that any relevant information or fact was withheld by the assessee from the Revenue authorities in return of income or during

assessment proceedings or during appellate proceedings before Ld. CIT(A). When there was full disclosure of materials facts and circumstances by the assessee in the Return of Income and during assessment proceedings; then, on the disputable issues of quantum addition, on which two different views are legitimately possible, of which the one favorable to the assessee has been adopted by the assessee; eventually, the Assessee may or may not succeed in the quantum Proceedings and the disputable issue, on which two different views were possible, may eventually be decided against the Assessee in quantum proceedings. However, the assessee cannot be burdened with penalty u/s 271(1)(c) of I.T. Act, if on a disputable issue of quantum addition, on which two different views were legitimately possible, the Assesssee decided to adopt the view which was favourable to the assessee; in a case in which all necessary details were filed by the Assessee in support of the claim and when no material inaccuracies were found in these details, and when the assessee is not guilty of suppression of any material facts. In quantum proceedings, when two different views are legitimately possible on a disputable claim made by the assessee; one of which is favourable to the assessee, the multiplicity of legitimate views and disputability of the claim has the effect of excluding the scope of penalty u/s 271(1)(c) of I.T. Act in respect of such disputable claim, even if the disputable claim is decided against the assessee in quantum proceedings; because in such a case the disputable claim made by the assessee neither amounts to 'concealment of particulars of income' nor to 'furnishing of inaccurate particulars of income'. In view of the foregoing, we are of the view that this is not a fit case for penalty under section 271(1) (c) of the I.T. Act and we decline to interfere with the impugned appellate order dated 01.12.2016 of the Ld. CIT(A). For this view taken by us, we take support from Reliance Petroproducts (P) Ltd. 322 ITR 158 (SC); Devsons (P) Ltd. Vs. CIT 329 ITR 483 (Del.); Hindustan Coca Cola Marketing Company Pvt. Ltd. vs. DCIT (2019) 198 TTJ 0513 (Del.) and M/s. Padmini Infrastructure Developers India Ltd. vs. DCIT (2019) 55 CCH 0420 DelTrib. Moreover, as far as penalty levied on disallowance of assesse's claim u/s 80HHC of I.T. Act is concerned, the issue is also squarely covered in favour of the assessee by order of Hon'ble Delhi High Court in the case of CIT vs. Madhushree Gupta (2013) 33 taxmann.com 286 (Delhi) wherein Hon'ble Delhi High Court held that where Assessing Officer in course of quantum proceedings, disallowed a part of deduction claimed under section 80HHC, it could not serve as a valid ground for imposing penalty under section 271(1)(c). Further, as far as penalty levied in respect of aforesaid Rs. 38,380/- is concerned, the issue in dispute in this appeal is squarely covered in favour of the assessee by the ratio of the order of coordinate bench of ITAT Delhi in the case of ACIT vs. Cellcap Invofin India (P.) Ltd. (2016) 68 taxmann.com 395 (Delhi – Trib.) in which it was held that where there was difference of opinion between assessee and department on applicability of rule 8D, penalty under section 271(1)(c) was not leviable. In view of the foregoing and respectfully following the aforesaid precedents, we are of the view that this is not a fit for levying of penalty u/s 271(1)(c) of the Income Tax Act. Accordingly, we set aside the impugned appellate order dated 27.7.2017 of the Ld. CIT(A) and cancel the penalty amounting to Rs. 4,35,181/- levied by Assessing Officer u/s 271(1)(c) of the Income Tax Act. The AO is directed to delete the aforesaid penalty amounting to Rs.4,35,181/-.

33. Addl. CIT v. ONGC Videsh Ltd (ITA No.1552/D/17) (Dated 18/02/2020)

SECTION 271(1)(C) – WHERE THE ASSESSING OFFICER MADE MULTIPLE ADDITIONS AND RECORDED SATISFACTION ONLY ON SOME ISSUES AND NOT ON OTHERS – PENALTY CAN NOT BE IMPOSED SUBSEQUENTLY ON ISSUES ON WHICH SATISFACTION WAS NOT RECORDED.

Held,When the AO specifically initiates penalty proceedings inrespect of certain additions in the assessment order, but does not recordinitiation of penalty proceeding in respect of the other additions; it has to beinferred that the additions in respect of which penalty proceedings were notinitiated, were not intended to be considered for subsequent order imposingpenalty U/s 271(1)(c) of IT Act. When certain things are specificallyincluded and remaining things are not included therein, it has to be inferredthat what was not specifically included was not intended to be included atall. Scope of penalty proceedings U/s 271(1)(c) of IT Act cannot be widenedlater to include within its scope such additions which were not sought to becovered within the scope of penalty U/s 271(1)(c) of IT Act, at the timewhen penalty proceedings were initiated and assessment order was passed.The retrospective widening of the scope of penalty, to include those itemsfor levy of penalty U/s 271(1)(c) of IT Act which were not included for thispurpose at the time when penalty proceedings U/s 271(1)(c) of IT Act wereinitiated and assessment order was passed; amounts to review and changeof opinion by the AO, to the detriment of the Assessee; which has noauthority of law. Initiation of penalty proceedings by the AO is valid only ifthe AO is satisfied in the course of any proceedings, that the Assessee hasconcealed the particulars of income or furnished inaccurate particulars ofincome. When this satisfaction for initiation of penalty proceedings U/s271(1)(c) of IT Act is recorded by the AO in assessment order in respect of certain additions during the assessment proceedings; and not recorded in respect of certain other additions; it acts as a bar against levy of penalty U/s 271(1)(c) of IT Act in respect of those additions in respect of which such satisfaction was not recorded in the assessment order or during the assessment proceedings. **[Para21]**