1. Sh. Anoop Jain v. ACIT (ITA No. 6703/D/19)(10/01/2020)

SECTION 10(38) – LONG TERM CAPITAL ON PENNY STOCK - THE ASSESSING OFFICER REJECTED THE CLAIM OF EXEMPTION AND MADE ADDITION U/S 68 ON THE BASIS OF ALLEGATION THAT LONG TERM GAIN ON SALE OF SHARES OF M/S. ARIHANT MULTI COMMERCIAL LTD. IS BOGUS - THE ASSESSEE IS A HABITUAL INVESTOR IN STOCK MARKET AND FURNISHED ALL THE RELEVANT DOCUMENTS IN SUPPORT OF CLAIM OF LONG TERM CAPITAL GAIN – THE COMPANY M/S. ARIHANT MULTI COMMERCIAL LTD. IS NOT A PAPER COMPANY AND WAS FOUND TO BE HAVING STRONG FINANCIALS – ORDER OF SEBI IMPOSING SUSPENSION OF SHARES OF M/S. ARIHANT MULTI COMMERCIAL LTD. WAS NOT OPERATIVE IN THE YEAR IN WHICH SHARES WERE SOLD AND SAME IS NOT RELEVANT – NEITHER ASSESSEE NOR ITS BROKER WAS NAMED AS BENEFICIARY OF ACCOMMODATION ENTRY BY ANY BROKER, INVESTIGATION WING OR SEBI – THERE IS NO MATERIAL ON RECORD TO DISPUTE THE GENUINENESS OF CAPITAL GAIN EARNED BY THE ASSESSEE – ADDITION U/S 68 WAS DELETED

Held, In the instant case, in justification of his return of income, the assessee furnished all the necessary documentary evidences to discharge the initial burden cast upon him. The Assessing Officer simply rubbished all the documentary evidences by referring to the general observations and modus operandi of the entry operators and further supporting his observations by report of the Investigation Wing. [Para 22]

23. It would not be out of place to mention here that LDPL, now known as Arihant Multi Commercial Ltd, is not a paper company nor a shell company. In F.Y. 2013-14, the Revenue from operations were at Rs. 40,85,02,313/- and total assets were at Rs. 32,79,07,684/- which included investment, trade receivables, cash and cash equivalent, short term loans and advances and tangible assets. The share capital and reserves and surplus were at Rs. 3,62,40,000/- and Rs.10,17,65,16,912/- respectively. Trade payables were at Rs. 10,80,74,165/-.

24. These financials go to show that LDPL is not a shell company. SEBI has suspended trading in shares of LDPL w.e.f 28.08.2015 whereas the assessee has sold shares from May 2014 to December 2014, many months before suspension of the scrip. It is not the case of the Assessing Officer, nor there is any evidence on record to show that SEBI has declared all transactions done in scrip of LDPL prior to the suspension as null and void. It is a matter of fact that SEBI looks into irregular movements in share prices and warns investors against any such unusual increase in share price. No such warning was issued by SEBI. The Assessing Officer has failed to produce any material/evidence to dislodge or controvert the genuineness of conclusive documentary evidences produced by the assessee in support of his claim considering the fact that he is a genuine investor and is from past many years, as explained elsewhere.

25. Surprisingly, neither the assessee nor his brokers are named as illegitimate beneficiaries to bogus long term capital gain in any of the alleged statements of the operators/broker or reports/orders of the SEBI or the Investigation Wing. In our considered view, additions made by the Assessing Officer and confirmed by the ld. CIT(A) are heavily guided by surmises, conjectures and presumptions and, therefore, have no legs to stand on.

29. In his written submissions, the ld. DR has referred to various judgments and heavily relied upon the decision of the Hon'ble High Court of Delhi in the case of Suman Poddar ITA No. 841/2019 and in the case of Udit Kalra ITA No. 220/2019 and several other decisions of the coordinate bench.

30. We have given thoughtful consideration to the orders of the authorities below and have carefully perused the judicial decisions relied upon by the ld. DR. We find that in all those cases, either the assessee entered into solitary transaction resulting into long term capital gain or prior to the solitary transaction, the assessee was neither engaged in the purchase and sale of shares nor subsequent to earning of long term capital gain, the assessee was found to be engaged in the purchase and sale of shares. These facts are clearly distinguishable from the facts of the case in hand. As mentioned elsewhere, the assessee is a habitual investor having portfolio of investment in shares in crores and is still holding investment in shares in several crores and is constantly engaged in investing in shares of various companies.

31. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act and as mentioned elsewhere, such discharge is purely a question of fact. We, accordingly, direct the Assessing Officer to accept the long term capital gain of Rs.5,70,91,750/- declared as such.

2. IRCON International Limited vs DCIT (ITA No. 977/DEL/2010 [A.Y 2004-05])(ITA No. 2220/DEL/2011 [A.Y 2005-06])&DCIT vs IRCON International Limited (ITA No. 1491/DEL/2010 [A.Y 2004-05]ITA No. 2449/DEL/2011 [A.Y 2005-06]

SECTION 37(1) - REVENUE VS CAPITAL EXPENDITURE: WHETHER MACHINERY SPARES USED BY THE ASSESSEE WILL BE TREATED AS REVENUE OR CAPITAL EXPENDITURE- HELD, MACHINERY SPARES WHICH HAVE BEEN CONSUMED IN REPAIR OF FIXED ASSET, SATISFIES THE REQUIREMENT OF SECTION 37(1) OF THE ACT AND ACCORDINGLY ALLOWED-

8. We have given thoughtful consideration to the orders of the authorities below. We find that a similar issue was considered by the co-ordinate bench in assessee's own case in ITA No. 1825/DEL/2005, 705/DEL/2006 and 3804/DEL/2008 for Assessment Years 2001-02 to 2003-04. The relevant findings of the co-ordinate bench read as under:

"11.9 Before us, the assessee has failed to demonstrate whether the spare parts which are used when a machine malfunctions, has brought into existence a new asset or given enduring benefit to the assessee. In absence of satisfying the requirement for constituting a machinery spare as capital expenditure as laid down in the above decisions of the Hon'ble Supreme Court, expenditure incurred on machinery repairs can not be allowed as capital expenditure and consequent depreciation claimed also cannot be allowed. Thus the ground number 1(a) of the appeal is dismissed.

11.10 The 2nd issue raised is can the depreciation be allowed on machinery in ready to use condition, though actually not put to use.

11.11 On this issue, the Ld. Counsel has referred to the decisions in the case of National Thermal Power Corporation limited versus CIT (supra) and CIT vs Yamaha motor India Private Limited(supra) to support the contention that depreciation is allowable on the asset kept ready for use but not actually used. But in the instant case as we have already held that machinery spares does not constitute capital expenditures and thus the issue of whether the same were ready for use or actually used is not relevant in the facts of the case. This ground of the appeal no 1(b), is accordingly dismissed.

11.12 The 3rd issue which has been raised by the assessee is that in the event deduction towards depreciation on machinery spare is not allowed, deduction may be allowed onthe basis of the actual consumption of the Spares. It hasbeen mentioned by the assessee that in assessment year2002-03 also the assessee has been allowed deduction on thebasis of the actual consumption of the machinery spares. Inour opinion, this prayer of the assessee is justified as themachinery spares which have been consumed in repair of fixedasset, satisfies the requirement of section 37(1) of the Actand accordingly, ground No.1(c) of the appeal of the assesseeis allowed.".

9. As mentioned elsewhere, during the year under consideration,the Assessing Officer himself has allowed the claim in respect ofmachinery spares consumed during the year. Therefore, we do notfind any reason to interfere with the findings of the ld. CIT(A). GroundNo. 1 with its sub ground is, accordingly, dismissed.

SECTION 244A -WHETHER INTEREST ON REFUND UNDER SECTION 244A(1) GRANTED TO ASSESSEE IN PROCEEDINGS UNDER SECTION 143(1)(A) WOULD BE ASSESSABLE IN YEAR IN WHICH IT IS GRANTED AND NOT IN YEAR IN WHICH PROCEEDINGS UNDER SECTION 143(1)(A) ATTAIN FINALITY - HELD, YES

18.7 In view of the above finding of the Tribunal (supra), we restore the issue in dispute to the file of the Ld. Assessing Officer for verifying that the interest granted under section 143 (1) in relation to assessment year 2000-01 in the previous year corresponding to assessment year under consideration, but same has been subsequently withdrawn under section 143(3) of the Act passed in financial year 2003-04 and decide the issue in accordance with law after providing adequate

opportunity of being heard to the assessee. In the result, the ground No. 8 of the appeal is allowed for statistical purposes

SECTION 90: ASSESSEE EXCLUDED DTAA INCOME EARNED FROM ITS PROJECT IN BANGLADESH, MALAYSIA AND UNITED KINGDOM ON THE GROUND THAT THE DTAA INCOME IS NOT TAXABLE IN INDIA AND CONSEQUENTLY, THE COMPANY IS NOT OBLIGED TO PAY TAX UNDER MAT ON THE SAID INCOME- THE ASSESSING OFFICER WAS OF THE FIRM BELIEF THAT THE ADJUSTMENT REQUIRED TO BE DONE ARE SPECIFIED IN THE PROVISIONS OF SECTION 115J OF THE ACT AND THERE IS NO PROVISION UNDER THE SAID CLAUSES TO REDUCE BOOK PROFIT FROM DTAA- WHETHER THE BASIC TAX LAWS IN FORCE IN THE COUNTRY (115JA) WILL GET ATTRACTED SINCE THERE IS NO SPECIFIC PROVISION IN THE DTAA AS REGARDS THE COMPUTATION OF 'BOOK PROFIT' FOR THE PURPOSE OF LEVY OF MINIMUM ALTERNATIVE TAX (MAT)- HELD YES

26. We have given thoughtful consideration to the orders of the authorities below. There is no dispute in so far as the facts are concerned, which are mentioned hereinabove. The relevant findings of the ld. CIT(A) read as under:

> "14.3 I have carefully the facts of the case. I find that the appellant has reduced the income of Rs. 21,94,13,814/- earned in Malaysia as per the DTAA while computing its book profit u/s 115JA. I am not convinced by the contention of the appellant that since the income earned in Malaysia is not taxable in India by virtue of the DTAA between India and Malaysia, it is not required to pay tax even under MAT on such income. The provisions of Section 115JA override all other provisions of the Act, since sub-section (1) thereof begins with the non-obstante clause stating as 'notwithstanding anything contained in any other provisions of this Act ' The reliance by the appellant on the decision of the Hon'ble Madras High Court in the case of CIT Vs. VRSRM Firm and others (1994) 208 ITR 400 (Mad) is rather misplaced; the Hon'ble Court was examining the legal status of the DTAA when it held that Tax treaties have to be considered to be mini legislations containing in themselves all the relevant aspects or features which are at variance with the general taxation laws of the respective countries. The observations of the Hon'ble Court are in relation to the computation of 'total income' under the provisions of the Income Tax Act, taking into consideration the provisions of the relevant DTAA. None of the DTAAs provide for computation of 'Book Profit' under the provisions of Section 115JA of the Act. For this reason alone, as held by the Hon'ble court, the basic tax laws in force in the country (115JA) will get attracted since there is no specific provision in the DTAA as regards the computation of 'Book Profit' for the purpose of levy of Minimum Alternative Tax (MAT). Therefore, there is no merit in the claim of the appellant since section 115JA imposes tax on the Book Profit, which is computed for the purpose of companies Act. The plain reading of Section 115JA of the Act makes it obvious that none of the clauses (i) to (ix) of the Explanation thereto provide for reduction in respect of the income which may be exempt by virtue of the application of the DTAA. The Hon'bleSupreme Court in the case of Apollo Tyres Limited Vs. CIT (255 ITR 273) have held that the Book Profit as computed from the books of accounts maintained in accordance with the Companies Act is sacrosanct and it can be adjusted only

for making increases and reductions as specifically provided in the Explanation to the said section. It has been categorically heldthat apart from the adjustment as provided in the Explanation, no adjustments can be made to the book profit as per the Companies Act. The exclusion of income under the DTAA is nowhere provided in the said Explanation. If it were the intention of the legislature to provide reduction in respect of the income under the DTAA, it would have been specifically provj^le/j.7b,y-yvay of another clause below the said Explanation to the sectional 115JA. I, therefore, find merit in the view of the AO that the appellant is not entitled to claim reduction in respect of the income covered by DTAA (Rs. 34,55,50,226/-) order of the AO on this ground is accordingly upheld'."

27. On a careful perusal of the findings of the first appellate authority [supra], we do not find any error or infirmity which calls for our interference. Accordingly, Ground No. 4 is dismissed.

3. ACIT vs Vishnu Apartments Pvt. Ltd. (ITA No.5828/Del/2014)(AY 2010-11)

SECTION 37(1) - ASSESSEE COMPANY HAS DEVELOPED A COMMERCIAL SHOPPING COMPLEX-CUM-HOTEL COMPLEX AT JAIPUR-OUT OF THE TOTAL SALE PROCEEDS OF RS.95 CR, 60% i.e., AN AMOUNT OF RS.57 CRORE WAS TRANSFERRED TO ANOTHER ASSOCIATED CONCERN M/S MGF DEVELOPMENT LTD. (MGFD) ON THE BASIS OF A COLLABORATION AGREEMENT- AO MADE ADDITION OF RS.47,07,37,143/- ON ACCOUNT OF 'SHAM TRANSACTION OF REVENUE SHARING.'- HELD, SINCE THE ASSESSEE HAS PROVED THE COMMERCIAL EXPEDIENCY IN INCURRING THE EXPENDITURE- ORDER OF CIT(A) UPHELD

17. We find considerable force in the arguments advanced by the ld. Counsel for the assessee. It is an admitted fact that the AO in the order itself has allowed an amount of Rs.5,87,72,012/- being the utilization of funds provided by M/s MGF Development Ltd. Similarly, he has also allowed an amount of Rs.4,04,90,845/- towards brand fee as a fair compensation payable to M/s MGFD. Thus, the AO, in the instant case, has admitted the brand value of MGFD and the finance provided by the MGFD to the assessee. It is also an admitted fact that in the order passed u/s 143(3) in the case of MGFD, the amount of Rs.57 crores has been accepted by the AO as the share of revenue @ 60% of the hotel project at Jaipur. We, therefore, find merit in the submission of the ld. Counsel for the assessee that when the AO is not discarding the contribution of MGFD towards the completion of the project which is for the financing, implementation, providing brand name and other technical assistance for completion of the project, therefore, there is a commercial expediency in incurring the expenditure and the AO has no power to sit in the arm chair of the businessman and decide as to what would be the reasonable expenditure which is required to be incurred.

23. Since, in the instant case, the AO has accepted the contribution of MGF Development Ltd., towards the completion of the project by providing financing and technical expertise, providing brand name and other technical assistance for

the completion of the project and when the assessee has proved the commercial expediency in incurring the expenditure, therefore, in view of the decisions cited (supra) and the detailed reasoning given by the ld.CIT(A) against each allegation raised by the AO, which has been reproduced in the preceding paragraphs, we are of the considered opinion that the order of the CIT(A) does not suffer from any infirmity. Accordingly, the same is upheld and the grounds raised by the Revenue are dismissed.

24. In the result, the appeal filed by the Revenue is dismissed

4. M/s. Clearview Healthcare Pvt. Ltd.v.ITO (ITA No.2222/D/19) (Dated 03/01/2020)

SECTION 56(2)(viib) – SHARES ISSUED TO THE SHAREHOLDERS AT PREMIUM – PRICE AT WHICH SHARES WERE ISSUED AT PREMIUM WERE ALSO CHARGED FROM NON-RESIDENT SHAREHOLDERS WHICH IS OUTSIDE THE AMBIT OF SECTION 56(2)(viib), WHEN THE SHARES ARE ISSUED TO NON-RESIDENT SHAREHOLDERS, THE SHARES ISSUED AT PREMIUM CANNOT BE SAID TO BE CONVERSION OF UNACCOUNTED MONEY – LEGISLATIVE INTENT TO SECTION 56(2)(viib) WAS ALWAYS TO TAX UNACCOUNTED MONEY RECEIVED IN GARB OF SHARE PREMIUM – ACCORDINGLY ADDITION DELETED.

Held,I have heard both the parties and perused the relevant recordsespecially the orders of the revenue authorities and the case law cited by Ld.Counsel for the assessee. I find that assessee has continuously impressed onone significant basic factual aspect to establish the correctness of share premium obtained u/s 56(2)(viib) of the Act by stating that on 01/12/2014(during AY 2015-2016) share of Clearview Healthcare Pvt Ltd (assesseeherein) were sold to Medipass SRL Italy @ 380.53 per share (which in turnvalued shares of Clearmedi Healthcare Private Limited @ 615 per share) andfor which necessary copy of Resolution dated 20/12/2013 duly attested byNotary public of Italy were submitted to AO during assessment itself and itwas categorically stated in reply that the said transaction has actually takenplaced at agreed rate of Rs 380.53 per share of Clearview Healthcare Pvt Ltd(Rs 615 per share of Clearmedi Healthcare Private Limited) (refer assessee's paper book pages 143- 144 letter dated 23.12.2016 addressed to AO inassessment proceedings, same reply in letter to AO Dated 19.12.2016 paperbook pages 153) clearly justifies instant share premium of Rs 150 per shareand AO wrongly added Rs 16 per share as alleged excessive premium (whichamounted to Rs 919,632 in aggregate) within the meaning of provisions ofsection 56(2)(viib) of the Act (explanation to section 56(2)(viib) clause (ii)thereof where judicious satisfaction of AO is talked about). This plea ofassessee has considerable cogency. The second plea is that whenultimately shares are bought by foreign buyer on basis of detailed duediligence which is reflected from share purchase resolution and sharepurchase agreement already placed on records and money paid for sharepurchase by foreign buyer is beyond shadow of doubt it cannot be said thatsubsequent money which is paid by foreign buyer to share holders sellers in India who have subscribed share at premium in subject period is not a cleanmoney which defense of assessee also has

considerable cogency. Further,plea of assessee that once assessee has given approved valuer (CA) reportjustifying share premium raised which is based on valid and prescribedmethod being DCF and said report is in accordance with ICAI norms and nowhere AO has countered said report by substitute valuation from alternateexpert on basis of chosen DCF method and assessee's valuation is justifiedby subsequent sale/purchase and there is no unaccounted money involvedeven remotely, I find that the same is not tenable and the addition made byAO u/s 56(2)(viib) read with rule 11UA is held to be unlawful. Further plea ofassessee that assessee does not come within mischief of stated provision asmanifest from cursory look to explanatory memorandum to Finance Act,2012 by which stated provision was brought into the law and stated sharepremium is a clean money and so is not covered within provisions of section 56(2)(viib) of the Act (legislative intent is to apply said provision wheremoney received is not clean and is unaccounted money received in garb ofshare premium where asno where it is case of revenue that stated money isnot clean money. For the sake of convenience, I am reproducing thelegislative intent behind section 56(2)(viib) inserted by Finance Act 2012 as under:…"As per memorandum explaining provisions to Finance Bill2012:"….Share premium in excess of the fair market value to betreated as income Section 56(2) provides for the specificcategory of incomes that shall be chargeable to income-taxunder the head "Income from other sources". It is proposed to insert a new clause in section 56(2). The new clause willapply where a company, not being a company in which thepublic are substantially interested, receives, in any previousyear, from any person being a resident, any consideration forissue of shares. In such a case if the consideration receivedfor issue of shares exceeds the face value of such shares, theaggregate consideration received for such shares as exceedsthe fair market value of the shares shall be chargeable toincometax under the head "Income from other sources.However, this provision shall not apply where theconsideration for issue of shares is received by a venturecapital undertaking from a venture capital company or aventure capital fund. Further, it is also proposed to providethe company an opportunity to substantiate its claimregarding the fair market value. Accordingly, it is proposedthat the fair market value of the shares shall be the higher ofthe value— (i) as may be determined in accordance with themethod as may be prescribed; or (ii) as may be substantiatedby the company to the satisfaction of the Assessing Officer,based on the value of its assets, including intangible assets,being goodwill, know-how, patents, copyrights, trademarks,licences, franchises or any other business or commercialrights of similar nature. This amendment will take effect from1st April, 2013 and will, accordingly, apply in relation to theassessment year 2013- 14 and subsequent assessmentyears…"… I further find that the issue in dispute is squarely covered by thedecision of the ITAT 'A' Chennai Bench decided in ITA Nos.663, 664 &665/Chny/2019 in case of M/s Lalithaa Jewellery Mart Pvt. Ltd decided on14.06.2019 wherein, it was held that.**[Para5, 5.1]**

5. **Ipsita Naik v. ITO (ITA No.678/D/19) (Dated 21/01/2020)**

SECTION 68 – APPLICABILITY OF SECTION 68 ON OUTSTANDING TRADE CREDITS IN THE BOOKS OF ACCOUNTS – WHERE THE AO DID NOT DOUBT PURCHASE, SALE, TRADING RESULT OF THE ASSESSEE, MERELY BECAUSE CREDITORS AGAINST PURCHASES WERE OUTSTANDING IN THE

BOOKS OF ACCOUNTS, SUCH OUTSTANDING LIABILITY CANNOT BE DEEMED AS CASH CREDIT UNDER SECTION 68 OF THE ACT.

Held,The reason for making the addition was that the assessee did not furnish anybills, confirmations from the aforesaid parties, subsequent bank statementsreflecting the payments and also failed to discharge the onus of proving that thematerial/stock has been received and put to use and was reflected either in sales orin closing stock with supporting evidence. We find the ld.CIT(A), after calling fora remand report from the AO and rejoinder of the assessee to such remand report,sustained the addition. While doing so, he observed that the assessee could notsubstantiate the genuineness of the transaction with the aforementioned threeparties and the claim of genuineness of the creditors cannot be allowed simply onthe basis of the fact that only confirmations, bank statements, copies of bills, auditreport have been filed whereas the Inspector's report shows that the parties are notdoing any regular business. It is the submission of the ld. Counsel for the assesseethat since the AO has accepted the purchase, sales and the trading results and hasnot rejected the book results, therefore, the provisions of section 68 of the IT Actcannot be attracted to such outstanding sundry creditors..... We find some force in the above arguments of the ld. Counsel. It is anadmitted fact that the AO has not doubted the purchase, sales and the tradingresults and the books of account have not been rejected. The assessee has alsosubstantiated with evidence that the payments have been made in subsequent yearsto the said parties and the assessee is also making regular purchases from the saidparties in the subsequent years and the Revenue has not taken any step to reopenthe assessment..... We find the Hon'ble Delhi High Court in the case of CIT vs. Ritu AnuragAggarwal (supra), while deciding an identical issue has dismissed the appeal filedby the Revenue as under..... We find the Hon'ble Punjab & Haryana High Court in the case of PCIT vs.Kulwinder Singh (supra), while holding that the provisions of section 68 are notattracted to the amounts representing purchases made on credit, has observed asunder... We find the Hon'ble Allahabad High Court in the case of CIT vs. PanchamDass Jain (supra), while holding that the provisions of section 68 would not beattracted to purchases made on credit, has observed as under....Since the assessee in the instant case, has filed the various details giving thestatement of account, confirmation, etc., and has substantiated that the said sundrycreditors were paid in the subsequent year through banking channels and that theassessee has had regular transactions with the same parties in the subsequent yearswhich were not doubted by the Revenue and considering the fact that the tradingresults shown by the assessee for the impugned year have not been disturbed by theAO, therefore, in the light of the above discussion and relying on the decisionscited (supra), we hold that the addition made by the AO u/s 68 of the Act in respectof the three sundry creditors which has been sustained by the CIT(A) is notjustified. We accordingly set aside the order of the CIT(A) and direct the AO todelete the addition. The grounds raised by the assessee are allowed.... In the result, the appeal filed by the assessees is allowed.**[Paras 16, 17, 18, 19, 20, 22, 23]**

6. GBT India P. Ltd. v. ACIT (ITA No. 8965/D/19)(31/01/2020)

I. SECTION 92C- TRANSFER PRICING – CHOICE OF METHOD- THE TPO SINGLED OUT ONE TRANSACTION AND APPLIED CUP METHOD WITHOUT DISPUTING THE APPLICABILITY OF TNMM IN RESPECT OF ALL OTHER

INTERNATIONAL TRANSACTIONS – THE ASSESSEE OBJECTED TO APPLICATION OF CUP – HELD, WHEN INTRA GROUP SERVICES ARE LINKED TO MAIN BUSINESS ACTIVITY, THEY SHOULD BE BENCHMARKED TOGETHER ON THE BASIS OF ONE METHOD – THE TPO WAS HELD TO BE NOT JUSTIFIED IN APPLYING DIFFERENT METHOD FOR BENCHMARKING SINGLE TRANSACTION

II. TPO CANNOT QUESTION THE NEED AND BENEFIT DERIVED FROM PAYMENT TO AE – ONCE THE ALP OF TRANSACTION IS NOT IN DISPUTE AND SERVICES HAVE BEEN RENDERED, THE TPO CANNOT MAKE DISALLOWANCE OF ENTIRE EXPENSE.

III. SECTION 32 – DEPRECIATION OF GOODWILL – THE AMOUNT PAID OVER AND ABOVE NET ASSET VALUE OF COMPANY SO ACQUIRED AS REPRESENTED BY GOODWILL IS ELIGIBLE FOR DEPRECIATION – MERELY BECAUSE VALUATION REPORT DOES NOT SPECIFY THE QUANTUM OF GOODWILL SEPARATELY WOULD NOT AFFECT THE VALIDITY OF THE CLAIM – GOODWILL ACQUIRED DURING AMALGAMATION IS ELIGIBLE FOR DEPRECIATION U/S 32.

Held,

I. We have given thoughtful consideration to the orders of the authorities below and the rival contentions. There is no dispute that TNMM has been accepted as the most appropriate method. It is equally true that the TPO has singled out one transaction and applied CUP as most appropriate method. [Para 15]

16. The Hon'ble High Court of Delhi in the case of Magneti Marelli Powertrain India Pvt Ltd 389 ITR 469 has held that when intra group services are linked to the main business activity of the company, they should be bench marked by adopting TNMM.

II. In our considered opinion, the lower authorities erred in questioning the need and benefit arrived by the assessee from payment in respect of availing of services from its AE. All that is required to be seen is as to whether there was actual rendition of services or not. We have carefully gone through the emails and invoices placed in the paper book vis a vis TSA Agreement. In our considered opinion, these documentary evidences clearly show the rendition of services by the AE to the appellant company. Moreover, the TPO himself has accepted the fees received by the assessee from rendering these services. We fail to understand why the payments have been subjected to different treatments. [Para 17]

18. The Hon'ble High Court of Delhi in the case of EKL Appliances 345 ITR 241 has held that the TPO does not have power to adjudicate the allowance/disallowance of expenditure incurred by the assessee thereby demolishing the need and benefit derived by the assessee.

III. We have given thoughtful consideration to the orders of the authorities below and have carefully gone through the valuation reports mentioned elsewhere, which are part of the paper book filed before us. It is true that in none of the valuation reports, goodwill has been separately valued. But it is equally true that the assessee

has paid consideration over and above the fair value of the assets of Amex. In our considered opinion, differential amount represents payment towards goodwill. [Para 28]

29. We do not concur with the observations of the DRP that the assessee, with the motive of reducing profits in form of depreciation, had entered into this transaction. In our considered view, no prudent business man would pay a sum of Rs. 45.48 crores to claim depreciation of Rs. 10.93 crores over a period of five years, not to mention that the Amex have confirmed that they have paid capital gain tax on the consideration paid by the assessee to acquire Corporate Travel Division.

30. Further, we find that the Assessing Officer has confused himself with the valuation report of the independent valuer with another report wherein the value of the transferred business had been determined at negative value of Rs. 1.9 million. We find that this valuation report was prepared only for FEMA purposes to justify the determination of price of shares issued by the assessee to its share holders.

31. In so far as the depreciation of good will is concerned, this issue is by now well settled by the decision of the Hon'ble Supreme Court in the case of Smifs Securities Ltd 348 ITR 203 wherein the Hon'ble Apex Court has held that good will acquired on amalgamation [being the difference between cost of assets and consideration paid] is a capital right and thus eligible for depreciation u/s 32 of the Act.

32. Considering the facts of the case in totality, in the light of decision of the Hon'ble Supreme Court [supra], we direct the Assessing Officer to allow claim of depreciation. This ground is, accordingly, allowed.

7. ACIT v. Swatch Group India P. Ltd. (ITA No. 2264/D/2009)(30/01/2020)

SECTION 92C- TRANSFER PRICING ADJUSTMENT – THE CIT(A) MADE ADJUSTMENT WITH REGARD TO CUSTOM DUTY WHILE COMPUTING PROFIT OF THE ASSESSEE COMPANY FOR THE PURPOSE OF BENCHMARKING – SINCE THE CUSTOM DUTY BORNE BY THE APPELLANT WAS SUBSTANTIALLY HIGHER THAN THAT OF COMPARABLE COMPANIES, THE REASONABLE ADJUSTMENT IN THE RATE OF CUSTOM DUTY WAS MADE SO AS TO MAKE PROPER COMPARISON – RULE 10B(3)(II) ALLOWS MAKING OF REASONABLE ADJUSTMENTS FOR ELIMINATING MATERIAL DIFFERENCES BETWEEN COMPARABLES - THE ACTION OF CIT(A) WAS HELD TO BE PROPER.

SECTION 37(1) –EXPENDITURE OF ADVERTISEMENT AND PROMOTION – THE ASSESSING OFFICER TREATED THE EXPENDITURE AS OF CAPITAL NATURE AND CAPITALIZED 2/3RD OF THE SAME – THE EXPENDITURE INCURRED ON BRAND PROMOTION CANNOT BE HELD TO BE OF CAPITAL NATURE – DISALLOWANCE DELETED

Held, We have given thoughtful consideration to the orders of the authorities below. There is no dispute in so far as the application of the most appropriate method is concerned. The assessee has used Resale Price Method as the most appropriate method in bench marking its international transactions and the TPO has accepted the same. In our considered view, the entire quarrel revolves around the adjustment

of custom duty given by the ld. CIT(A) in the hands of the appellant. Reliability and accuracy of adjustment would largely depend upon the availability of reliable and accurate data. [Para 27]

28. In our considered opinion, for certain types of adjustments, relevant data for comparables may either not be available in public domain or may not be reliably determinable based on information available in public domain, whereas, it may be possible to make equally reliable and accurate adjustments on the tested party whose data would generally be easily accessible.

29. Rule 10B(3)(ii) provides for making "reasonably accurate adjustments" for eliminating any material differences between the two transactions being compared. It is an undisputed fact that import of watches carry heavy customs duty which may not be there in so far as Italian companies are concerned. The purpose or intent of the comparability analysis is to examine as to whether or not, the values stated for the international transactions are at ALP. We are of the view that the regulations do not restrict or provide that adjustments cannot be made on the results of the tested party. We are also of the view that net profit margin of the tested party drawn from its financial accounts can be suitably adjusted to facilitate its comparison with other uncontrolled entities/transactions as per sub-clause (i) of Rule 10B(1)(e) of the Rules. There is no specific provision in Rule 10B(1)(e)(iii) of the Rules, which would impede the adjustment of the profit margin of the tested party.

30. As far as rate of custom duty is concerned, it can be easily taken from the official website of the European Union and we find that the rate at the relevant point of time was 4.5% whereas the custom duty paid by the assessee accounts for more than 75% of the purchase value and 50% of the total cost of goods sold. In our considered opinion, such difference on account of custom duty paid by the assessee and that existing in the location where comparable companies operate, cannot be ignored. Considering all these facts in totality, we decline to interfere with the findings of the ld. CIT(A). Ground No. 1 is,accordingly, dismissed.

8. M/s Saurashtra Color Tones Pvt. Ltd.v.ITO(ITA No.6276/D/18) (Dated 22/01/2020)

SECTION 147 V. SECTION 153C (S.K. JAIN GROUP CASES) – RE-ASSESSMENT PROCEEDINGS INITIATED UNDER SECTION 147 ONLY IN THE HANDS OF ASSESSEE ON THE BASIS OF SEARCH CONDUCTED IN THE HANDS OF S.K. JAIN GROUP WAS NOT VALID, SINCE PROCEEDINGS ON THE BASIS OF SEARCH SHOULD HAVE BEEN INITIATED UNDER SECTION 153C OF THE ACT.

Held, Considering the facts of the case in the light ofabove decisions and provisions contained under section153C of the I.T. Act, it is clear that the A.O. should considerthe issue of share capital and share premium based on thedocumentary evidences seized from Jain Brothers, copies ofthe seized documents are attached with the assessmentorder particularly as Annexures B and D. It would,therefore, show that incriminating material was foundduring the course of search in the case of

search operationcarried out in the case of Shri S.K. Jain Group of cases. Thesame seized documents were relied upon by the A.O. whileframing the assessment in the case of the assessee andinitiating the re-assessment proceedings. It is well settledLaw that validity of the re-assessment proceedings is to bedetermined with reference to the reasons recorded forreopening of the assessment. The Counsel for Assessee hasfiled copy of the reasons recorded for reopening of theassessment at pages 44 and 45 of the PB….The above reasons for reopening of theassessment shows that during the course of searchincriminating material pertaining to assessee-company werefound and seized and that M/s. Blue Bell Finance Ltd., hasmade investment in assessee-company. The A.O. hasspecifically referred to the seized documents during thecourse of search as Annexures B & D and also attachedvarious other documents found during the course of searchto the assessment order. The Ld. D.R. also admitted that theaforesaid Annexures were found during the course of searchin the case of Jain Group. Therefore, when incriminatingdocuments were found during the course of search, thesame have been used in the case of the assessee-company.The proper course the A.O. should have adopted is toproceed against the assessee-company under section 153Cof the I.T. Act instead of recording reasons for reopening ofthe assessment under section 147/148 of the I.T. Act. Theissues involved in the additional grounds are, therefore,covered by the Orders of the Division Bench of the ITAT,Delhi A-Bench in the cases of Shri Meer Hassan & Shri AliHassan, Dehradun (supra) and in the case of Shri AdarshAgarwal, Delhi vs., ITO, Ward-61(1), New Delhi (supra). Inview of the above, we are of the view that A.O. was notjustified in initiating the re-assessment proceedings undersection 147 of the I.T. Act, 1961. The A.O. should haveproceeded against the assessee under section 153C of theI.T. Act. The Ld. D.R. however submitted that the issue iscovered in favour of the Revenue by Order of ITAT E-Benchin the case of Mannat Hospitality P Limited vs., ITO Dated07.06.2019 (supra), the gist of which is reproduced in thesubmissions of the Ld. D.R, in which, it is specifically notedby the Tribunal that “no material belonging to assessee waseither found from the residence of Shri S.K. Jain or handedover to the A.O. of the assessee by the A.O. of the searchedperson”. Therefore, the said decision would not support thecase of the Revenue. Considering the totality of the factsand circumstances of the case, A.O. was not justified ininitiating the re-assessment proceedings against theassessee under section 147/148 of the I.T. Act. The A.O. didnot apply his mind to the facts and circumstances of thecase and material on record. Therefore, we set aside theOrders of the authorities below and quash the reopening ofthe assessment in the matter. In the result, additionalgrounds of appeal of assessee challenging the reopening ofthe assessment are allowed and resultantly, all additionsstand deleted. I may also briefly note here that in thepresent case the Investor Company M/s. Blue Bell FinancePvt. Ltd., has directly filed confirmation to the A.O. in replyto notice under section 133(6) of the I.T. Act, 1961,supported by copy of the bank statements, copy of thebalance-sheet and others. The same have not been doubtedby the authorities below. The Investor Company hassufficient funds to make investment in assessee-company asnoted above. No cash was found deposited in the account ofthe Investor Company. Therefore, even on merits, it may notbe a case of making addition under section 68 of the I.T.Act. In view of the above, I allow the appeal of assessee.**[Paras 9.2, 9.3]**

9. Aparna Ashram, Vs. DDIT (ITA No. 3153/D/2014) Dated 06.01.2020

SECTION 148 - ON ACCOUNT OF FAILURE BY THE AO TO FURNISH REASONS FOR REOPENING OF THE ASSESSMENT UNDER S. 148 OF THE ACT - THE REASSESSMENT PROCEEDINGS STOOD VITIATED IN LAW - HON'BLE DELHI HIGH COURT IN THE CASE OF Pr. CIT VS. JAGAT TALKIES DISTRIBUTORS DECIDED IN ITA No. 916, 990, 1000, 1001, 1003 & 21030 of 2015 Dated 29.8.2017 REPORTED IN (2017) 398 ITR 13 (DEL.) FOLLOWED

4. I have heard both the parties and perused the orders of the authorities below including the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Jagat Talkies Distributors decided in ITA No. 916, 990, 1000, 1001, 1003 & 21030 of 2015 dated 29.8.2017 reported in (2017) 398 ITR 13 (Del.). I find that the main issue in the present appeal is relating to non supply of reasons recorded to the assessee in spite of the repeated requests made by the assessee before issue of notice u/s. 148 of the Income Tax Act, 1961 and found that AO has not supplied the copy of the reasons recorded before issue of notice u/s. 148 of the Act to the Assessee, therefore, the issue argued before me is squarely covered by the aforesaid precedent of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Jagat Talkies Distributors decided in ITA No. 916, 990, 1000, 1001, 1003 & 21030 of 2015 dated 29.8.2017 reported in (2017) 398 ITR 13 (Del.) wherein following conclusion has been drawn by the Hon'ble Delhi High Court:-

"On account of failure by the AO to furnish reasons for reopening of the assessment under s. 148 of the Act to the Assessee, the reassessment proceedings stood vitiated in law."

4.1 Keeping in view of facts and circumstances of the present case as explained above and by respectfully following the aforesaid precedent, the reassessment made is quashed and accordingly, the appeal filed by the assessee is allowed. Since I have already quashed the reassessment order, there is no need to adjudicate the other grounds on merits being academic.

10. Dinesh Kumar Pundir v.ITO (ITA No.4075/D/18) (Dated 23/01/2020)

SECTION 147 V. SECTION 151 – PROCEEDINGS UNDER SECTION 147 INITIATED ON THE BASIS OF APPROVAL ACCORDED UNDER SECTION 151 EVEN PRIOR TO RECORDING OF REASONS BY THE AO WAS VOID AB-INITIO.

Held, I have heard both the parties and perused the orders of the revenueauthorities and perused the Paper Book especially the page no. 9 which is acopy of the reasons recorded. I find that in this case the approval u/s. 151 wasgranted on 28.03.2016 without recording the reasons and that too prior torecording the reasons, which is against the provisions of section 151 of the Act.Because the approval of the concerned authority as per section 151 of the Actshould be after the reasons recorded by the AO whereas in the instant casethe approval u/s. 151 of the Act has been taken prior to the reasons recordedwhich is illegal, against the law and without jurisdiction and shows thatapproving authority has not applied his mind and given the approval in anarbitrary manner on non-existence of the reasons, which is not permissible u/s.151 of the I.T. Act, 1961. Even otherwise, the notice issued u/s. 148

of the Actwas not in accordance with law and the same deserve to be dismissed.**[Para4]**

11. M/s. Modi Industries Ltd. v. ACIT (ITA No. 3858/D/16)(07/02/2020)

SECTION 147 – VALIDITY OF NOTICE U/S 148 – THE ASSESSING OFFICER ISSUED NOTICE U/S 148 ON THE BASIS OF REAPPRAISAL OF MATERIAL ALREADY ON RECORD – ORIGINAL ASSESSMENT WAS COMPLETED U/S 143(3) – REOPENING TO DISALLOW CLAIM OF EXPENSES U/S 37 – THE REOPENING WAS MERELY ON THE BASIS OF SUSPICION AND WAS NOT BASED ON ANY FRESH TANGIBLE MATERIAL – THE NOTICE U/S 148 HELD TO BE BAD IN LAW

Held, We find that assessment in the case of the assessee was completed under section 143(3) of the Act and thereafter, the Assessing Officer has issued notice under section 148 of the Act for reopening of the assessment. The Assessing Officer in the reasons recorded has mentioned that subsequently, it came to his notice that the assessee has made payment of Rs.11 lakh to M/s. JK Lakshmi Cement Ltd. for hiring services of non-scheduled flight (chartered flights) and claimed this expenses as business expenditure. While forming the reason to believe that income has escaped the Assessing Officer mentioned that it appeared to him that expenses were not allowable under section 37 of the Act and besides inquiries in respect of other similar booking of chartered flights might also required to be made. [Para 6.1]

6.2 In view of the reasons recorded, it is undisputed that there was no fresh tangible material before the Assessing Officer on the basis of which he formed his belief that income escaped in the case of the assessee. The only reason which has been recorded by the Assessing Officer is that it appeared to him that those expenses were not allowable under section 37 of the Act. In our opinion, this is mere change of opinion based on the suspicion without any tangible information that said expenditure was not allowable under section 37 of the Act. The Assessing Officer was not sure whether the said expenditure was not allowable under section 37 of the Act. We find that Hon'ble Gujarat High Court in the case of Nitin P Shah Vs DCIT, 146 Taxman 536 (Guj.) quashed the reopening of the assessment, where the Assessing Officer only stated that note attached to return of income indicated "possible escapement of income" and was not sure about it.

6.3 Respectfully, following the above decision, we are of the opinion that the notice issued for reopening of the assessment under section 148 of the Act was not validly issued by the Assessing Officer and it was based merely on suspicion without any tangible material and accordingly, we quash the reassessment proceeding in the case of the assessee. The grounds of the assessee challenging the reassessment proceedings are accordingly allowed.

12. S.N. Sapra v. ITO (ITA No. 4251&4252/D/18)(30/01/2020)

SECTION 147 – REASSESSMENT PROCEEDINGS - THE ASSESSING OFFICER RECORDED INCORRECT FACTS IN THE REASONS – THE QUANTUM OF ALLEGED CASH DEPOSIT WAS FOUND TO BE INCORRECT DESPITE

SPECIFIC DIRECTIONS BY INVESTIGATION WING TO GO THROUGH THE BANK STATEMENT- THE REASONS WERE MERELY ON THE BASIS OF INFORMATION FROM INVESTIGATION WING WITHOUT ANY INDEPENDENT APPLICATION OF MIND – THE NOTICE U/S1 148 WAS HELD TO BE BAD IN LAW

Held, The A.O. in the reasons recorded that "Investigation Wing has reported that there are unaccounted cash deposit in the bank account of the assessee in a sum of Rs.2,82,70,090/-." Admittedly the bank pass books are available at the assessment record which fact is also mentioned by the A.O. in the assessment order. However, the Annexure-C supplied by the Investigation Wing to the A.O, copy of which is filed at page-6 of the PB, reveals that in fact there is a cash deposit in the bank account of the assessee was of Rs.2,05,54,090/-. The Investigation Wing has advised the A.O. to go through the bank statements and other documents before arriving at the conclusion that there is escapement of income under section 148 of the I.T. Act. The assessee, on the other hand, has prepared a chart based on bank statements of various bank accounts to show that there is actual cash deposit of Rs.1,23,45,200/- only. Thus, there is a huge difference between the cash deposited in the bank accounts of the assessee. In these circumstances, it was the duty of the A.O. to verify the facts before coming to the conclusion that there is escapement of income on account of cash deposited in the bank account of the assessee. The A.O. even did not verify the information received from Investigation Wing and did not even obey the directions of the Investigation Wing. It is well settled Law that mere cash deposited in the bank account of the assessee per se would not disclose escapement of the income as is held by the ITAT in the case of Shri Tejendra Kumar Ghai, New Delhi vs., ITO – 1(5), Rudrapur (supra) and Shri Abrar Ahmad Qasimi, New Dekhi vs., ITO, Ward- 46(5), New Delhi in ITA.No.3177/Del./2017, Dated 01.06.2018. The assessee further explained that there is no unaccounted investment in the properties because the deal of Rs.48 lakhs pertain to sale of the property by assessee which is supported by the Sale Deed and such property was purchased by the assessee way back in 1996. Thus, the sale could not be an unexplained investment in the case of the assessee. In respect of other property, assessee has made Collaboration Agreement with Shri Nilambar Rudrapal and paid Rs.46 lakhs, the source of which itself is explained in the receipt. Thus, the A.O. has recorded incorrect and wrong reasons for reopening of the assessment and did not apply his mind to the facts of the case before recording reasons for reopening of the assessment. The A.O. has also failed to verify the information received from the Investigation Wing before recording the reasons for reopening of the assessment. Even the sanctioning authority has not applied its mind to the conclusion drawn by the A.O. based on specific material on record which clearly revealed that reasons recorded by the A.O. are wrong, incorrect and based on no evidence. It is, therefore, clear case of non-application of mind by the A.O. before recording reasons for reopening of the assessment. [Para 9.6]

13. ITO vs M/s S. Motors Pvt. Ltd.(ITA No. 3189/Del/2016)(AY 2007-08)

SECTION 147: THE ASSESSING OFFICER RECEIVED MATERIAL/INFORMATION FROM THE OFFICE OF THE DIRECTOR OF INCOME TAX (INV.)- AO WITHOUT APPLICATION OF MIND ON THE INFORMATION RECEIVED AND WITHOUT RECORDING REASON TO BELIEVE THAT INCOME

HAS ESCAPED ASSESSMENT SOUGHT NECESSARY APPROVAL U/S 151(2) OF THE ACT TO ISSUE NOTICE UNDER SECTION 148 OF THE ACT- HELD, THAT IN ABSENCE OF REASON TO BELIEF THAT THE INCOME HAS ESCAPED ASSESSMENT, THE REQUIREMENTS OF S. 147 ARE NOT SATISFIED. ACCORDINGLY IT IS HELD THAT THE ASSESSING OFFICER HAS NO JURISDICTION TO ISSUE A NOTICE UNDER S. 148 OF THE ACT AND HENCE THE REOPENING IN THIS CASE IS BAD IN LAW

9. We have carefully considered the fact of the case, provisions of the Act finding of the Assessing Officer and submission of both the parties. Plain readings of the reasons recorded reveal that the A.O. has not applied his mind to the material/information received from the office of the Director of Income Tax (Inv.). It fact there was neither any application of mind nor reason of belief that the income has escaped assessment as per the provision of the Act. The Assessing Officer even without forming a prima facie opinion, on the basis of such material, and without even recording reasons that he has reason to believe that income has escaped assessment sought approval necessary approval u/s 151(2) of the Act to issue notice under section 148 of the Act.

13. In the case under consideration the Assessing Officer has not properly assumed jurisdiction of this case, in view of the fact that the reasons recorded for reopening are without independent application of mind. We find that in the form for recording the reasons at column no. 11, the reasons for the belief were mentioned “as per Annexure A”. We have given opportunity to the revenue to file the satisfaction recorded- “as per Annexure A” if any on their records. The revenue could not file any Annexure inspite of sufficient opportunity.

14.Hence, we decline to interfere in the reasoned order of the ld. CIT (A). The operative part is reproduced as under for the sake of conveyance:

> “*Under the circumstances and respectfully applying the ratio of the judgments rendered by the Jurisdictional High Court in CIT vs Atul Jain 299 ITR 383 (Delhi), United Electrical Company (P) Ltd vs. CIT &Ors. 258 ITR 317 (Delhi), CIT vs. SFIL Stock Broking Ltd. 325 ITR 285 (Delhi), Sarthak Securities Co. (P) Ltd. vs. ITO 329 ITR 110 (Delhi) and Signature Hotels (P) Ltd. vs. ITO &Anr. 338 ITR 51 (Delhi), and the decision in the case of Principal Commissioner of Income Tax vs. G & G Pharma India Ltd. in ITA no. 545/2015 order dt. 8.10.2015, it is held that in absence of reason to belief that the income has escaped assessment, the requirements of S. 147 are not satisfied. Accordingly it is held that the Assessing Officer has no jurisdiction to issue a notice under S. 148 of the Act and hence the reopening in this case is bad in law. Accordingly, I hold the reassessment order as invalid for the year under appeal”*

15. In the result, the appeal of the revenue is dismissed.

14. Inter Globe Aviation Ltd. vs ACIT (ITA No.5347/Del/2012) (AY 2010-11)(ITA No.4449/Del/2013) (AY 2011-12)&ACIT vs Inter Globe Aviation Ltd. (ITA No.223 & 5114/Del/2013)(AY 2010-11 & 2011-12)

SECTION 194J: WHETHER PASSENGER SERVICE FEE CHARGED BY AIRPORT OPERATORS FALL WITHIN THE PROVISIONS OF TECHNICAL SERVICES AND HENCE TDS IS LIABLE TO BE DEDUCTED U/S 194J- HELD NO

10. We have carefully considered the rival contentions and perused the orders of the lower authorities. Assessee is engaged in the business of transport of passengers by Aircraft and uses airport. It collects from passengers on behalf of the airport operator a passenger service fees. It has two components, Security components and facilitation components. On the security service charges, assessee did not deduct tax at source taking shelter u/s 196 of the act. However, on facility component assessee has deducted tax with respect to certain licensees and with respect to the other licensee no tax is deducted. According to the ld AO tax should have been deducted on both the above components u/s 194J of the Act. The ld CIT(A) held that tax should have been deducted u/s 194C of the Act. Undoubtedly, the services provided to the assessee are not any specialized services but only standard facilities, which are available to all the airlines. The Hon'ble Supreme Court held that where there was nothing special, exclusive or customized services rendered to the assessee, it fails to satisfy the test of specialized, exclusive and individual requirement of the user, hence, same does not fall within the provisions of technical services as provided u/s 194 J of the act. Naturally, there is a complete absence of any distinguishing feature or service which is provided to the assesseeespicially, It is available to all the airlines. In view of this, there cannot be any technical services fees payable by assessee, covered u/s 194J of the Act. Certainly, the same principle applies to professional services. In view of this, we do not find any infirmity in the order of the ld CIT (A) holding that the provisions of above services do not fall u/s 194J of the Act. Some of decision relied up on by the ld AR also supports that view, i.e. in ACIT Vs. Spice Jet Ltd 6103/Del/2015 coordinate bench has held that on PSF tax is not required to be deducted u/s 194J of the Act.

SECTION 194I: WHETHER PASSENGER SERVICE FEE CHARGED BY AIRPORT OPERATORS FALL WITHIN THE PROVISIONS OF RENT AND HENCE TDS IS LIABLE TO BE DEDUCTED U/S 194I- HELD NO

11. Further several decision relied up on by ld AR also supports a view that PSF is not „Rent" and hence not covered u/s 194 I of the act. In case of Jet Airways India Ltd [158 TTJ 289] the issue was whether the facilitation components and security fees falls under the provisions of section 194I of the Act or not. Coordinate bench held that it is not a rent which was upheld by the Hon"ble High Court. Further in case of Go Airlines Ltd the issue was also whether the tax on PSF are covered by the provisions of section 194I of the Act or not. Similarly, in Singapore Airlines [314/Mum/2014] the issue was whether the provisions of section 194I apply on these payments or not. Therefore, all these decisions relied upon by the assessee clearly deals with the issue that PSF charges are not „rent" and no tax is required to be deducted thereon u/s 194I of the Act. There is no quarrel on this issue.

SECTION 194C: WHETHER PASSENGER SERVICE FEE CHARGED BY AIRPORT OPERATORS FALL WITHIN THE PROVISIONS OF CONTRACTWORK AND HENCE TDS IS LIABLE TO BE DEDUCTED U/S 194C- HELD YES

12. However, the issue before us is whether on PSF charges, tax is deductible u/s 194C of the act as held by the ld CIT(A). The provisions of section 194C provides that any persons responsible for paying any sum for carrying out any work‟ in pursuance of a contract the tax is required to be deducted. In the present case where the sample bills are provided before us the service tax has been charged by Airport Authority of India on the total security component as well as facility component. For example bill dated 22.06.2010 of Airport Authority of India on the assessee shows that Rs. 207 is the composite rate per passenger of PSF charges on which the service tax is leviable. In the bill itself, the airport authority of India quote Service Tax Registration No. as well PAN. As per In terms of Rule 88 of the Indian Aircraft Rules the Airport Operator is entitled to collect PSF which provides as under:-

> "the licensee is entitled to collect fees to be called as Passengers Services Fees (PSF) from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for **providing the security services**."

13. Therefore the Security services are to be provided by the Airport Owners and operators, who will in turn obtain it from any government agency specified by Central Government. Further, the facility charges are undeniably, service provided by the Airport operators to the passengers of the Airline assessee. Therefore, it is apparent that these parties are providing to the assessee „services‟. Thus, we do not find any reason to hold that the provisions of section 194C do not apply to the passenger service fee payments. It is also relevant to note that several private companies and joint ventures owned and operate the airports in the country. For the facility and security of the passengers the airlines are collecting such fees. Only for the security reasons CISF, as designated by central government, is deployed at those airports. The airline for this reason passenger service fees is collected in their bills by the Airline assessee. Against this the passengers who availed the services of the assessee are provided facility and security. Therefore, the payment by the assessee to the owner of the airport is for the purpose of work which is covered u/s 194C of the Act. Thus, we hold that assessee should have deducted tax at source u/s 194C of the Act. Thus, we uphold the order of the ld CIT (A) to that extent.

WHETHER TDS IS REQUIRED TO BE DEDUCTED ON PROVISION OF EXPENSE MADE BY THE APPLICANT

19. We have carefully considered the rival contentions and perused the orders of the lower authorities. Assessee has made provision for Airport expenses of Rs 32314535/-, Airport Handling expenses Rs. 14115000/-, Crew Accommodation expense Rs 694000/-, IT Communication charges Rs 7021580/- and provision for other expenses Rs 74335080/-. Admittedly assessee has not deducted tax and source on the above sum stating that it is year and provision and the peas are not identified. It is not the case of the assessee that these are we are on ascertained liabilities. According to the provisions of the income tax act the tax is required to be

deducted as and when assessee becomes responsible for payment of above sum to other parties. The claim of the assessee is that it is maintaining its books of account on accrual basis of accounting and therefore the amount is required to be provided for. When the expenditure incurred by the assessee, the corresponding liability definitely arises for payment of such expenditure. The amount of expenditure incurred can be determined only if, there is a recipient identified of the sum, there is a methodology available for working out the amount payable by the assessee to the recipient, there is a corresponding liability arising out of the existing contract or customs by the assessee with the recipient. If generally these ingredients are not satisfied assessee cannot be said to have incurred the expenditure. In absence of one of one of these criteria, if provision is made, it is not an ascertained liability but an unascertained liability, which does not satisfied the concept of accrual of expenditure. There may be reasons for receiving the bills by the service providers after certain time lag but that does not absolve the assessee from the liability of deduction of tax at source. In the present case the provision is made under the specified head, provision is also made to on certain basis thereby ascertaining the amount. It is not the case of the assessee that it has made an ad hoc provision. Thus it cannot be said that the payee is not identified. Therefore, according to us, the tax is required to be deducted on the year-end provisions made by the assessee which are ascertained liabilities. No doubt, the learned CIT(A) has given the benefit of the assessee if tax is deducted by the assessee subsequently. Therefore we do not find any infirmity in the order of the learned CIT(A) in holding that assessee has failed to deducted tax at source on year-end provisions. Thus the order of the learned CIT(A) is upheld to that extent.

15. ACIT vs M/s. FCI Asia Pte. Ltd. (ITA No. 2588 & 2589/D/2015) Dated 06.01.2020

SECTION 195 - WHETHER THE PAYMENT TOWARDS CENTRALIZED IT SUPPORT SERVICES ARE NOT TAXABLE AS ROYALTY? HELD YES

7. …the assessee is the IT Support services and not imparted with any services involving royalty aspect keeping in view the beneficial provisions of the Indian-Singapore DTAA. The agreement entered by the assessee, reveals that the nature of services under the IT agreement relate to the centralized data centre, WAN bandwidth management, disaster recovery management, backup and offsite storage management and security management. From the perusal of the agreement and the nature of services provided by the assessee-company it can be seen that assessee was granting merely a facility and the consideration for the same cannot be construed as payment for ‘Royalties’.

WHETHER THE PAYMENT TOWARDS BUSINESS SUPPORT SERVICES CONTRIBUTION ARE NOT TAXABLE AS FEES FOR TECHNICAL SERVICES? HELD YES

8. ….the support services and consultancy agreement, the services include common services towards purchasing, communications and international relationship matters, legal and insurance support, support on tax matters, internal audit, quality, financial and treasury matters, human resources, strategy and development services. The said services do not enable the service recipient to make use of the said technical or

managerial services independently. There is no training involved under the agreement. Thus it is not a fee for technical services.

16. Anjali Promoters & Developers P. Ltd. v. DCIT (ITA No. 4476/D/16)(10/01/2020)

SECTION 201(1A) – DATE OF DEPOSIT OF TDS – THE DATE OF ELECTRONIC PAYMENT WHEN MONEY FLOWS FROM THE ACCOUNT OF TAX PAYER SHALL BE CONSIDERED AS DATE OF PAYMENT AND NOT THE DATE ON WHICH IT IS REFLECTED ON OLTAS – LEVY OF INTEREST DELETED.

Held, 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. 13.098/-. [Para 7]

17. M/s Klaxon Trading (P.) Ltd. vs PCIT (ITA No. 7265/D/2017) Dtd 27.01.2020

S. 263 - REVISIONARY POWER U/S 263 OF THE ACT CANNOT BE INVOKED ON ACCOUNT OF 'DIFFERENT VIEW' – NO MATERIAL BROUGHT BY THE Pr. CIT STATING THEREIN THAT THE ASSESSMENT ORDER IS PASSED WITHOUT INQUIRING INTO THE CLAIM OF THE ASSESSEE - THEREFORE, THE COMMISSIONER DOES NOT HAVE ANY LOCUS STANDI TO MAKE FURTHER INQUIRY.

8. We have heard both the parties and perused all the relevant materials available on record. From the perusal of the Assessment Order, it can be seen that cash deposited was enquired by the Assessing Officer specifically vide his questionnaire to which the detailed explanation with evidences was submitted before the Assessing Officer by the assessee. After going through the evidences and submissions the Assessing Officer passed the Assessment Order. While invoking Section 263 (1) of the Income Tax Act, 1961, the Pr. CIT has not made out the case that the Assessment Order is passed without making inquiries or verification which should have been made. There was no material brought by the Pr. CIT stating therein that the Assessment Order is passed allowing any relief without inquiring into the claim of the assessee. Thus, the Pr. CIT has only expressed the different view which is not permissible under Section 263 of the Act. Revisionary power u/s 263 of the Act is conferred by the Act on the Commissioner when an order is passed by the Authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but which are passed after inquiry/investigation on the question/issue are not per se are normally treated as erroneous and prejudicial to the interest of the Revenue. Because, the Revisionary Authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken, the same cannot be initiated without following the proper provisions u/s

263 of the Act. In the present case the Assessing Officer has made all the inquiries and after verifying the documents/ material on record passed a reasoned Assessment Order. Therefore, the Commissioner does not have any locus standi to make further inquiry. The decision of the Hon'ble Supreme Court in case of CIT vs. Max India Ltd 295 ITR 282, Malabar Industrial Co. Ltd. vs. CIT 243 ITR 83 are aptly applicable in the present case as the Hon'ble Apex Court wherein it is held that Section 263 has to be read in conjunction with the expression "erroneous" order passed by the assessing officer. Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law. The case laws relied by the Revenue in respect of Section 263 also reiterates the said ratio as well. Some of the decisions relied by the Revenue are not at all applicable in the present case as distinguishing facts involved in those cases. Therefore, order u/s 263 of the Act in present appeal is not justified and is set aside herewith. Therefore, the order u/s 263 is passed by the Principal Commissioner of Income Tax is set aside.

18. M/s. Time Bound Contracts Ltd. v. ITO (ITA No. 5909/D/16)(07/01/2020)

SECTION 271(1)(b) – WHERE ASSESSMENT IS COMPLETED U/S 143(3), NO PENALTY IS IMPOSABLE U/S 271(1)(b) – PENALTY DELETED.

Held, We have heard the rival submissions of the parties and perused the relevant material on record. The fact that the assessment has been competed under Section 143(3) of the Act is not in dispute. The Tribunal in the case of Logicladder Tech Pvt. Ltd. (supra) has cancelled the penalty under section 271(1)(b) of the Act on the ground that the assessment was completed under Section 143(3) of the Act. [Para 5]

5.1 Further, in the case of Globus Infocom Ltd. (supra) also, the penalty laid u/s 271(1)(b) of the Act has been deleted, where assessment is completed under Section 143(3) of the Act.

5.2 In view of identical facts and circumstances in the instant case, respectfully following the finding of the orders of the Tribunal (supra), we cancel the penalty levied of Rs.10,000/- under Section 271(1)(b) of the Act.

19. M/s. Vitee Fine Foods Ltd. v. ITO (TDS) (ITA No. 4941/D/15)(09/01/2020)

SECTION 272B – PENALTY FOR FAILURE TO QUOTE PAN IN QUARTERLY TDS STATEMENT – THE PENALTY IS IMPOSABLE ON DEDUCTOR FOR DEFAULT AND NOT AS PER NUMBER OF DEFAULTS

Held, We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that CBDT had clarified that penalty u/s 272B is linked to the person i.e. the deductor, and not to the number of defaults regarding the PAN quoted in the form. Further, the Hon'ble Delhi High Court in case of DHTC Logistic Limited (supra) categorically made it clear that intention of the legislation is to impose the penalty on the deductor and should not take into account the number of deductees. The ratio is squarely applicable in the present case. Hence, the penalty under Section 272 B should be Rs. 10,000/- only. Therefore, we direct the Assessing Officer to imposed penalty of Rs. 10,000/- only. Thus, appeal of the assessee is partly allowed . [Para 9]

20. DCIT v. National Association of Software and Service Companies (NASSCOM) (ITA No. 3237/D/16)(09/01/2020)

PRINCIPLE OF MUTUALITY – CONTRIBUTION RECEIVED BY TRADE ASSOCIATION FROM ITS MEMBERS IS NOT TAXABLE AS PER PRINCIPLE OF MUTUALITY – CLAUSE REGARDING UTILIZATION OF CORPUS IN A SPECIFIED MANNER INSTEAD OF DISTRIBUTION AMONGST MEMBER WOULD NOT AFFECT THE CHARACTER OF CONTRIBUTION – THE CLAIM OF EXEMPTION WAS UPHELD.

[C] Aggrieved, the assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 14.03.2016, the Ld. CIT(A), following the order of the Ld. CIT(A) for the assessment Year (A.Y. 2009-10) allowed the assessee's appeal holding that: "… the membership fees received by the assessee from its own members comes within the meaning of principle of mutuality and as such the net income of the assessee from its own member is exempt from tax."

[D] We have heard both sides. We have perused the materials available on record. We find that the Ld. CIT(A) has followed the decision of her predecessor in Assessment Year 2009-10. For Assessment Year 2009-10, Co-ordinate Bench of ITAT, Delhi has already taken a view in aforesaid order dated 20.09.2019 in ITA No. 6521/Del/2013 in favour of the assessee.

[D.2] It is not in dispute that the facts and circumstances for this year are identical to facts and circumstances for Assessment Years 2009-10 to 2012-13 for which vide aforesaid orders dated 20.09.2019 and 05.11.2019, Co-ordinate Bench of ITAT, Delhi has already decided the issue in favour of the assessee. Respectfully following the aforesaid orders dated 20.09.2019 and 05.11.2019 of Co-ordinate Bench of ITAT, Delhi in assessee's own case, for Assessment Years 2009-10 and 2012-13; we also decide the issue in dispute before us in favour of the assessee. Accordingly, we decline to interfere with the aforesaid impugned appellate order dated 14.03.2016 of Ld. CIT(A).