THE

ITR'S TRIBUNAL TAX REPORTS

VOLUME 70 — 2019

(JOURNAL)

Notes and Comments

S. Rajaratnam[1]

Income

(i) Deemed dividend under section 2(22)(e)

Where a transaction between two group companies was in the nature of advance by one to the other to tide over short-term financial deficiency, such amount is not a loan or advance, so that even where the beneficiary was a substantial shareholder, the amount advanced to the extent of Rs. 69,998 was not found assessable as deemed divided in *Amit Jindal* v. *Dy. CIT* [2019] 70 ITR (Trib) 545 (Chandigarh).

(ii) Real income theory

A receipt, which is not lawful is not chargeable to tax, as was found in a case of guarantee commission, which was payable to non-resident, so that liability was limited only for sum approved for remittance to non-resident by the Reserve Bank of India.—*Piaggio and C.S.P.A.* v. *DIT(IT)* [2019] 70 ITR (Trib) (S. N.) 1 (Pune). In the same case, it was held that the rate of tax applicable was the rate prevailing for royalty in the year of agreement, which was 2008, since the earlier agreement in 1998 was altogether different.

(iii) Cash credits under section 68

The assessee had explained the cash credits by the depositions admitting the loans to the assessee by way of confirmation and further supporting the creditworthiness of the lenders by affidavits, bank statements, balance sheets, acknowledgements for having filed income-tax returns, permanent account number, details of loan creditors and their final accounts. It was a case where both the identity and creditworthiness have been proved, so that the addition by the Assessing Officer affirmed in first appeal was held unjustified in *ITO* v. *Smt. Jyoti Saraf* [2019] 70 ITR (Trib) 52 (Kol). It was

1. Retd. Member, I. T. A. T.

also found that the fact of the assessee drawing Rs. 12 lakhs from her proprietory concern by itself does not discredit the genuineness of the loans. It was further found that opening cash balance could not have been disbelieved, when it was the same amount shown as closing balance for the preceding year as disclosed in the books, which was accepted in the assessment for that year. It was for these reasons, it was found that the objections against acceptance in first appeal was held unjustified after review of some precedents on the subject.

In another case, the assessee had accounted cash gifts of Rs. 8.6 lakhs. His income was estimated at eight per cent. of the turnover on presumptive basis under section 44AD, so that the assessee was exempt from duty to maintain accounts under section 44AA(2)(iv). When no accounts were kept, the question of taxing the unexplained credit could not have arisen, so that section 68 had no application. Apart from the same, the assessee has given explanation for the gifts received by way of confirmation from the donors to the extent of Rs. 8,68,000 of which a gift from mother-in-law was to an extent of Rs. 1,32,000 was found to be acceptable. It was so decided in *Indrani Devi* v. *ITO* [2019] 70 ITR (Trib) 42 (Patna) following *Yadwinder Singh* v. *ITO* [2016] 48 ITR (Trib) 328 (Amritsar) and *ITO* v. *Kamal Kumar Mishra* [2013] 33 taxmann.com 610 (Lucknow).

The assessee in the business of trading and export of buffalo meat had borrowed from 8 creditors, none of whom complied with the summons issued on them nor were there confirmations produced by the assessee. Opportunity to the assessee also failed to evoke any evidence except in the case of one creditor, who appeared before the Assessing Officer, but he too did not confirm the transactions in his name and there was no documentary evidence to support the genuineness of the loan. It is under these circumstances, the assessee was held to have not discharged the burden of proof on him. The request for remand was denied and the additions were confirmed in *Ankit Kapoor* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 31 (Delhi).

In another case, five assessees identically claimed exemption under section 10(38) for long-term capital gains from sale of shares, the Assessing Officer treating the entries for credits of capital gains of about Rs. 9 lakhs each on sale of shares in the same company, M/s. Unno Industries Ltd., all the credits in the five persons were treated as unexplained cash credits under section 68 in *Smt. Sangita Jhunjhunwala* v. *ITO* [2019] 70 ITR (Trib) 247 (Kol). Considering the astronomical size of the number of shares handled and lack of human probabilities and conduct in picking up shares in the same company of 32,000 shares at Rs. 5.50 per share and selling them through brokers after short interval at Rs. 486.55 and Rs. 85.65 per share, the net worth of such share being only Rs. 7.87 per share, there was no suggestion of any insider information to suggest truth in abnormal profits. The story was disbelieved by the Assessing Officer and affirmed in first appeal.

The Tribunal, after brief narration of precedents cited by both sides, came to the conclusion that perusal of the order of the Assessing Officer demonstrates that the addition was made merely on "suspicion" in a routine and mechanical manner relying upon the assessee's submission that shares were actually subscribed and that the shares were held for more than a year and not sold immediately as understood in the assessment order. The transactions are supported by brokers' note and the adverse statements recorded during departmental enquiries were not put to the assessees for cross-examination. According to the Tribunal, the modus operandi generalization and preponderance of human probabilities cannot by themselves be a basis for rejecting the claim of the assessees. The assessments, according to the Tribunal, could have only been remanded but the Tribunal took upon itself to find whether there were sufficient materials on record to prove the transaction. The decision of the Tribunal rests more on citations in favour of taxpayers, where additions were based on suspicion and the citations on behalf of the Revenue were dismissed as based on fact, so that they cannot favour the revenue. The Tribunal records that it had put a specific question to the departmental representative as to whether the alleged entry operators, who have allegedly supplied the entries have ever recorded the assessee's name and that the reply was in the negative. It was inferred therefrom that the Revenue's case should fail. It is also surprising that such weighty issues with heavy stakes were left to be decided by a single member. It is difficult to understand how this single fact could lead to a conclusion either way to justify the deletion of the impugned additions of Rs. 93,19,895 (credits) and Rs. 4,65,995 (on disallowance of expenses), so that it would appear to necessitate a more convincing conclusion.

Where the assessee had shown an amount of Rs. 65 lakhs on share contributions with huge share premium and also had unsecured loans, the Assessing Officer examined their sources besides an amount received from one RGG, a non-banking financial company with explanation for the source of investment in the assessee to the extent of Rs. 10 lakhs, that the amount was received on redemption on HDFC Mutual Fund with similar explanations indicating sufficient cash balance, so that both identity and creditworthiness had been established, the deletion of the addition of Rs. 65 lakhs in first appeal was upheld in *Dy. CIT* v. *HSM Steels P. Ltd.* [2019] 70 ITR (Trib) (S. N.) 47 (Hyd).

The assessee had received share application monies with each of the receipt falling below Rs. 50,000 from a large number of subscribers all of whom except for three of them were examined on oath. The investments had been admitted by them with all of them having income ranging from Rs. 80,000 to Rs. 90,000 a year. But the incomes were found to be unacceptable without offer of cross-examination to the assessee. There was absolutely no evidence that monies emanated from assessee, so that addition of Rs. 29.32 lakhs which was made by the Assessing Officer and confirmed in first appeal was deleted by the Tribunal in *Woodcraft Export Co. P. Ltd.* v. *ITO* [2019] 70 ITR (Trib) 436 (Delhi) following *CIT* v. *Bharat Engineering and Construction Co.* [1972] 83 ITR 187 (SC).

In the same case, there was an addition of Rs. 2.7 lakhs on account of difference between books of the assessee and a creditor. Since enquiry with the creditor elicited from him that there was no outstanding balance, the balance shown in assessee's books justified the inference that addition was rightly made and, therefore, upheld.

As for the addition of Rs. 7.46 lakhs on inference of lack of creditworthiness of the creditor, the addition was confirmed in first appeal because the creditor, a director of the company, had furnished an explanation that Rs. 5.22 lakhs was out of moneys received from his customers and sundry creditors and the balance from his capital with sufficient documentary evidence to prove the genuineness of transaction, so that there cannot be further proof as to the source of the source as contended by the assessee. Since the creditor was connected with the assessee, the matter was remanded for further enquiry.

In another case, where additional evidence was offered during proceedings in first appeal explaining cash receipts, but not considered, the matter was remanded in *Amit Jindal* v. *Dy. CIT* [2019] 70 ITR (Trib) 545 (Chandigarh). In the result, penalty was deleted, while other issues were restored back to the Assessing Officer following the Tribunal's earlier order in I. T. A. No. 45/Chd/2014.

(iv) Unexplained investments–Section 69

The assessee had credited cash receipts from different persons to the extent of Rs. 37 lakhs besides Rs. 31.20 lakhs in Bank of India savings account. He explained the source of deposits as gifts received from his uncle, brother-in-law and father-in-law out of their agricultural income. Apart from the same, regarding other cash receipts for the source of which he is not able to remember the exact dates, the Assessing Officer did not accept the explanations for amounts of Rs. 37.20 lakhs and Rs. 25 lakhs explained as amounts received from the assessee's sisters. The Assessing Officer found that the agricultural income of these persons did not match the large amounts advanced. All the amounts were added, but an amount of Rs. 30 lakhs out of addition was accepted in first appeal because a part of it of Rs. 10 lakhs was made by demand draft. The Tribunal found that out of such additions, two amounts of Rs. 8.3 lakhs and Rs. 8.70 lakhs were not sustainable, so that there was further relief to this extent. As regards the amounts received from two sisters, it was found that they had large holdings of agricultural lands and had evidence of agricultural income with reference to the sale of pulses and onions, so that the addition of Rs. 25 lakhs was also deleted in this case in *Pratap Ramrao Shinde* v. *Tax Recovery Officer and Assessing Officer* [2019] 70 ITR (Trib) (S. N.) 25 (Pune).

(v) Bogus purchases – Section 69

The assessee in jewellery business had made purchases from three group concerns, which were benami concerns of the assessee run in the name of employees and only provided accommodation entries of unsecured loans through intermediaries, who were not produced for enquiry before the Assessing Officer. In absence of any proof of genuineness of purchases even where the payment was shown to have been made by account-payee cheques, such payments could not be accepted as sacrosanct. The addition for bogus purchases was, therefore, confirmed by the Tribunal after deduction of commission paid for the entries, in *VBC Jewellery* v. *Dy. CIT* [2019] 70 ITR (Trib) 481 (Chennai).

(vi) Unexplained investments – Section 69A

An amount of Rs. 9.25 lakhs was found in the locker in the name of assessee and his wife during a search. As the source was not satisfactorily explained, it was added. But it was found by the Tribunal that assessee's explanation was rejected by authorities below without proper enquiry overlooking the fact that the assessee's wife had admitted the cash and returned the same in her return of income. This cash was explained to be part of cash for transactions for the assessee's business kept in cash to meet the expenses of his daughter's marriage. Merely because monies are kept in locker and the assessee was losing interest, which he would have otherwise earned, if kept in bank, does not make the cash found unexplained as decided in *Dinesh Goswami* v. *Dy. CIT* [2019] 70 ITR (Trib) 580 (Indore) following *CIT* v. *B. Rajashekharan Nair* [2010] 329 ITR 123 (Ker) and *Rajendra Prasad Subhash Chand* v. *Union of India* [2012] 344 ITR 533 (Raj).

Schedular System of Taxation

—Business or capital gains?

Where the assessee had acquired a piece of land showing it as part of fixed assets in its books and thereafter sold the property, which was acquired in 2005 and sold during the previous year 2011-12, the surplus on sale of the land to a builder was offered as capital gains, but treated as business income by the Assessing Officer and confirmed in first appeal.

The Tribunal in *Onkareshwar Properties P. Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 12 (Delhi) held that the surplus was treated as capital gains on similar facts on the same issue by the Tribunal for an earlier year and that such decision was also upheld by the High Court, so that a different view could not have been taken.

It was also found that another issue relating to disallowance of payments for failure to deduct tax at source from bank commission and guarantee fee confirmed in first appeal, was deleted by the Tribunal in the light of Board Circular No. 56 of 2012 dated December 31, 2012 clarifying that no tax deduction at source is required on bank guarantee commission, etc., and that the notification "requiring tax deduction at source" was applicable only from January 1, 2013 and should not have, therefore, been applied for the assessment year 2011-12. The Circular being benevolent should have been followed, so that there could have been no disallowance. It was further decided in the same case in absence of exempt income, there could have been no disallowance under section 14A following *Cheminvest Ltd.* v. *CIT* [2015] 378 ITR 33 (Delhi).

The assessee running a medical shop on his own and also a partner in some other medical shops, had undertaken buying and selling of five landed properties in last seven years. Purchases were claimed to be made as long-term investments and not for resale, but had to be sold due to unforeseen financial problems. The surplus was offered as capital gains, but the Assessing Officer took the view that the surplus was taxable as business income when there was no evidence that the property was ever converted into stock-in-trade. The assessee's claim was, therefore, accepted in first appeal in the view that there was no such continuous activity or any organization to suggest business. There was no material for the inference that it was adventure in the nature of trade. The mere fact that substantial profit was made does not render it a business transaction. The decision in first appeal that the income is assessable as capital gains was upheld by the Tribunal in *Asst. CIT* v. *Arun Majeed* [2019] 70 ITR (Trib) (S. N.) 45 (Cochin) following *Pr. CIT* v. *John Poomkudy* [2018] 409 ITR 149 (Ker).

International Taxation

—Fees for technical services

The assessee was engaged in providing services in connection with construction of highways to National Highways Authority of India (NHAI). The fees related to consultancy and engineering services for which the assessee received Rs. 3.21 crores against which it claimed Rs. 2.85 crores as expenditure. Receipts from NHAI itself was about Rs. 1.47 crores. The services were in implementation of project, review and approval of materials and its designed results, apart from recommending special tests, wherever required for materials suggesting substitutes for them and to judge adequacy of materials and labour besides supervising and checking different activities relating to the project and ensuring the quality expected of the project. The amount received for these services was understood as fees for technical services falling under section 9(1)(vii) and analogous fees for included services as understood in U. S. A. Since the assessee had a permanent establishment in India, the Assessing Officer concluded that the income could be assessable in India even under article 12(6) of Double Taxation Avoidance Agreements between India and U. S. A. with income computed under the provisions of Indian law, so that the rate of tax would be 20 per cent. under section 44D read with section 115A. As against the expenses claimed at Rs. 2.85 crores, the Assessing Officer felt only expenses to the extent of Rs. 1.52 crores would be admissible. Since income is computed on presumptive basis, Commissioner (Appeals) felt that the whole concept of determination of expenditure was inapplicable, where income is computed under section 44D. Article 12(6) under the Double Taxation Avoidance Agreement provides for two methods, one where the service is provided by a permanent establishment and the other where income has to be computed in regular course after allowing expenditure from gross receipts. It should be the latter method, which should be applied and not under section 44D read with section 115A. Since the assessment has to be made under normal provisions in the context of the inference that receipts were not taxable as fees for technical services, but as business income, the assessment was upheld by the Tribunal in *Dy. CIT (IT)* v. *MSV International Inc.* [2019] 70 ITR (Trib) (S. N.) 43 (Delhi) following the decision in the same case in *MSV International Inc. v. Addl. CIT* (I. T. A. No. 2842/Delhi/2014 dated April 27, 2016).

Transfer Pricing

(i) Determination of arm's length price

The assessee was engaged in manufacture and export of hand-knotted carpets including export to associated enterprises, which were given interest-free credit. Transfer pricing rules required application. Comparable uncontrolled price (CUP) method was found to be most appropriate resulting in an addition of Rs. 97 lakhs. Interest at 17.26 per cent. on outstanding amount was reckoned for delay in payment beyond 60 days. The addition on this account being Rs. 1.64 crores leading to a total addition of Rs. 2.61 crores, which was found to be in order, but the addition being within the tolerance limit of five per cent., it had to be deleted in first appeal, but the Tribunal on departmental appeal found that the application of comparable uncontrolled price method by comparison of average price computed in terms of arithmetical mean of all transactions with that of carpet sold to non-associated enterprise did not give a correct basis for arriving at the arm's length price, unless weighted average of price rate of transactions with both associated enterprise and non-associated enterprise had been worked out. Since the export was of many varieties of carpets, designs and patterns, average price in terms of arithmetic mean of all transactions did not make proper sense. Since comparable uncontrolled price method was followed giving more than one benefit under second proviso to section 92C(2), the provision for tolerance had no application, a matter which was not appreciated by Commissioner (Appeals). There was also difference on account of different currencies, so that adjustment by adoption of LIBOR rate should have been done but it was not taken into consideration. The effect of exchange gain or loss had to be taken into consideration. The credit period without interest adopted in this case was also longer than what is usually given to independent customers. The credit period without interest should have been limited to 60 days, so that where a longer credit period was given, it was not justified. It was under these circumstances, the matter of adjustments on account of transfer pricing rules was remitted to the Assessing Officer for computation of arm's length price afresh as decided in *Dy. CIT* v. *Jaipur Rugs Company P. Ltd.* [2019] 70 ITR (Trib) 1 (Jaipur).

(ii) Comparables

Where the information relating to the two comparables relied upon for the profit-level indicator was not available in the public domain or power data pages, but the annual reports of these entities prima facie satisfied rule 10B(4), they could be accepted as comparables, but fresh adjudication was required since the Tribunal had not expressed any opinion on the merits of the issue for which the matter was remanded in *Asst. CIT* v. *Lexmark International (India) P. Ltd.* [2019] 70 ITR (Trib) (S. N.) 56 (Kol).

Exemption

—Section 10(38)

Where the assessee's claim for exemption on profits from sale of listed shares under section 10(38) was denied on the basis of statements made against the assessee, the assessee should have been given an opportunity to cross-examine them before acting on them. Where it was not done, the Tribunal set aside the order for a decision afresh for enabling cross-examination of these witnesses, who had made the statements against the assessee and to decide the matter afresh.– *Beekh Chand Chandak* v. *ITO* [2019] 70 ITR (Trib) 308 (Chennai) following *Vimalchand Gulabchand* v. *ITO, Praveen Chand* v. *ITO, Gatraj Jain and Sons (HUF)* v. *ITO and Mahendra Kumar Bhandari* v. *ITO* (I. T. A. Nos. 2003, 1721, 2293 and 2748/Chny/2017 dated April 6, 2018).

Charities

(i) Exemption

The assessee-trust was engaged in organizing seminars and alsoearned income from sponsorship to the extent of Rs. 3.58 crores, besides the amount received for meetings at Rs. 45.01 lakhs. It was found that there was no formal education with a student-teacher relationship. The programmes were "informal and interactive huddle sessions over morning breakfast". Evening sessions were also similar with evening snacks and tea. There were programmes for presenting holistic view for funding options for entrepreneurs. There was no systematic educational activity. It was essentially a networking organization of entrepreneurs. In view of all these facts, it was inferred that the assessee was not involved in education and its services against fee charged were in the nature of trade. Its activities could not fall within the meaning of "charitable purpose" of section 2(15) of the Act. It was on the basis of this conclusion that it was found that the assessee was not entitled to exemption in *Indus Entrepreneurs* v. *Dy. CIT (E)* [2019] 70 ITR (Trib) 19 (Mum). In coming to this conclusion, the Tribunal relied upon the Supreme Court decision in *Sole Trustee, Loka Shikshana Trust* v. *CIT* [1975] 101 ITR 234 (SC), wherein the Supreme Court has held that education cannot be inferred, unless there is scholastic instructions with teachers basing their instructions on authoritative texts to be followed by the students and cleared by the teachers. It also relied upon the decision of Patna High Court in *Bihar Institute of Mining and Mine Surveying* v. *CIT* [1994] 208 ITR 608 (Patna), wherein it was decided that mere huddle workshop course, etc., could not be treated as education in the sense understood in *Loka Shikshana Trust*'s case [1975] 101 ITR 234 (SC) and the law generally understood on the subject.

Where a charitable institution had advanced monies for purchase of land to employees, who were interested persons for acquiring land to construct a building for a school, there is no violation either under section 13(1)(c) or 13(2)(d), merely because there was delay in completing the sale deed. No benefit to the employee could be inferred, so as to deprive the institution of its right to exemption either under section 13(1)(c) or 13(1)(d) as decided in *ITO (OSD)* v. *Shrine Vailankanni Senior Secondary School* [2019] 70 ITR (Trib) 345 (Chennai) following *Dy. DIT (E)* v. *Vels Institute of Science, Technology and Advanced Studies* [2015] 11 TMI 857. It was also pointed out in this case that the amount advanced constituted application of income, so that even for this reason the provisions under section 13 had no application. The mere fact that the advance was made to employees need not be construed as a violation, since transactions of advancing interest-free funds for purchases motivate the employees. It was incidentally found that the assessee was entitled to depreciation on the cost of investments, notwithstanding the fact that the cost has been treated as amount applied for charitable purpose following *CIT* v. *Rajasthan and Gujarati Charitable Foundation* [2018] 402 ITR 441 (SC). The inference that there is double-deduction merely because it is treated as application and later claimed as depreciation was not correct. It was also incidentally decided in this case that the investment made by the assessee in M/s. VGP Golden Beach Resort P. Ltd. was in violation of section 11(5) read with section 13(1)(d), so that exemption is not available in respect of this investment.

(ii) Approval under section 80G

Where a charitable trust or institution was registered under section 12A and its objects were not religious, approval under section 80G(5) should necessarily follow. Where it was not approved, the Tribunal directed such approval in *Bharat Vikas Parishad Maharana Pratap Nyas* v. *CIT (E)* [2019] 70 ITR (Trib) (S. N.) 30 (Delhi) following *CIT (E)* v. *Sant Girdhar Anand Parmhans Sant Ashram* [2018] 408 ITR 79 (P&H), *Sonepat Hindu Educational and Charitable Society* v. *CIT* [2005] 278 ITR 262 (P&H) and *DIT* v. *Foundation of Ophthalmic and Optometry Research Education Centre* [2013] 355 ITR 361 (Delhi).

Depreciation

(i) Actual cost/rate of depreciation

For a consideration of Rs. 3.126 crores including VAT the assessee purchased from a sister concern LED panel with memory function capable of processing and performing logical action by synchronizing the inputs to the display. The assessee adopted the cost of the plant at Rs. 8,41,579 which was the written-down value of the sister concern with a view to possibly avoid the difference as short-term capital gains in the hands of sister concern. The managing partner of the firm, which sold the plant was the managing director of the assessee-company. In view of the functions of LED panel, which was equivalent to those of a computer, the rate of depreciation was 60 per cent. The cost in the hands of assessee should be the amount paid for it and not the written-down value of sister concern for purposes of depreciation. It is because *Explanation 3* to section 43(1) is applicable only under the limited circumstances expressed therein, which was not applicable to the facts of the assessee's case. It was so decided in *Dy. CIT* v. *Kumudam Publications P. Ltd.* [2019] 70 ITR (Trib) (S. N.) 41 (Chennai) following *Jogta Coal Co. Ltd* v. *CIT* [1959] 36 ITR 521 (SC).

(ii) Block of assets

Depreciation is allowed block-wise and not item-wise under each block. It is not necessary to prove that each item in the block was in use. Where the block itself is used, there can be no disallowance for any part of the block. It was this law, which was spelt out in *Bharat Mines and Minerals* v. *Asst. CIT* [2019] 70 ITR (Trib) 684 (Bang) following *Swati Synthetics Ltd.* v. *ITO* [2010] 38 SOT 208 (Mum-Trib.). It was pointed out that individual items of the block do figure only when it is sold, discarded, demolished or destroyed during the relevant previous year under section 32(1)(iii) and section 43(6)(c)(i)(b). It may also figure when an item is used for purposes other than business or profession as provided under section 38(2). The block itself does not cease to exist even where the sale proceeds of some items in the block exceed the written-down value in the block, unless and until all the items in the block, have been transferred during the previous year. The block will continue in such a case at nil written-down value.

Business expenditure

(i) R&D expenses

A deduction claimed at 100 per cent. of research and development expenditure was found to be not supported by any research carried on by the assessee, so that payment was treated as capital expenditure eligible only for depreciation at 15 per cent. as decided in *Thuse Electronics P. Ltd.* v. *Addl. CIT* [2019] 70 ITR (Trib) (S. N.) 3 (Pune).

(ii) Warranty claim

Warranty provision has to be supported by working of the amount on a scientific basis. In the assessee's case, provision was made at Rs. 20 lakhs and Rs. 15 lakhs, while actual expenditure incurred was only Rs. 4.6 lakhs and Rs. 3.19 lakhs. Part disallowance was to the extent of Rs. 13 lakhs out of provisions of Rs. 22 lakhs and Rs. 9 lakhs aggregating to Rs. 31 lakhs. Where amount to be received had actually dipped, provision was increased, so that it is inferable that the provision was obviously made only on ad hoc basis. The matter was, therefore, remitted for a decision afresh.—*Thuse Electronics P. Ltd.* v. *Addl. CIT* [2019] 70 ITR (Trib) (S. N.) 3 (Pune).

Where the assessee provided for a provision for warranty to the extent of Rs. 97.5 crores, Rs. 3.96 crores, the provision was disallowed as excessive on the ground that there was no need for a provision to this extent. The Assessing Officer had inferred that there was no policy or method in making the provision, an inference which was found not justified. The assessee had a policy, which was not found to be erroneous. In fact, the assessee had already incurred liability towards warranty to the extent of Rs. 81.72 crores out of total provision of Rs. 97.5 crores. A provision made consistently on the same basis from year to year could not have been faulted as was found in *Tata AutoComp Hendrickson Suspensions Pvt. Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) 712 (Pune).

(iii) Provision for leave encashment

Provision for leave encashment, being one for welfare, can be allowed only on actual payment in view of section 43B(f) as was decided in *Dy. CIT* v. *Tamil Nadu Civil Supplies Corporation Ltd.* [2019] 70 ITR (Trib) (S. N.) 5 (Chennai). Though clause (f) of section 43B was found to be unconstitutional in *Exide Industries Ltd.* v. *Union of India* [2007] 292 ITR 470 (Cal), this decision was stayed by the Supreme Court, so that the stayed decision of the High Court could not have been followed.

In another case on the same subject in *Nilambur Co-op.Urban Bank Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 11 (Cochin), it was held by the Commissioner acting under section 263 that there was failure on the part of the Assessing Officer in not disallowing the provision for leave salary pointing out that though on a similar issue of provision for leave encashment, the Calcutta High Court found that section 43B(f) itself was unconstitutional, but because it granted stay, the decision could not have been applied. The matter was, therefore, restored to Commissioner (Appeals) for a decision afresh consistent with the final decision of the Supreme Court in the case of *Exide Industries'* case (supra) following *Muthoot Vehicles and Asset Finance Ltd.* v. *Asst. CIT* (I. T. A. No. 623/Coch/2013 dated December 6, 2013).

(iv) Interest due to financial institutions

The benefit of rehabilitation scheme under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, which had not been given by the authorities below, was directed to be allowed in *Singhal Strips Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) (S. N.) 27 (Delhi). Such deduction even otherwise alternatively should have taken into consideration as an amount already written back and accounted under section 41(1), but such a claim not having been raised, the Tribunal felt helpless, a matter, which should have probably been remanded as there cannot be a double addition.

(v) Interest on borrowed capital

Interest payment on borrowing of Rs. 53,42,839, which was disallowed by the Assessing Officer, but similar payment had been found admissible by the Tribunal in the assessee's own case for three earlier years in a common order in I. T. A. Nos. 1728 to 1730/Mum/2015 for the assessment years 2002-2003 to 2004-2005, the amount was allowed following this decision in *Ashwin S. Mehta* v. *Asst. CIT* [2019] 70 ITR (Trib) 234 (Mum). In the same case, an addition made for estimated household expenses of Rs. 6 lakhs by the Assessing Officer was restricted to 50 per cent. of same at Rs. 3 lakhs.

(vi) Rent/miscellaneous expenses

When the assessee could not show the space for which the payment of rent was claimed, the claim cannot be allowed as eligible for deduction as wholly and exclusively for business. But miscellaneous expenses on various counts like printing, stationery, refreshments, mobile, labour and travelling charges and sundry expenses all being small should have been allowed as deductions as decided in *Shantilal B. Parekh* v. *ITO* [2019] 70 ITR (Trib) 193 (Mum).

In the same case, there were bogus purchases from hawala dealers to the extent of Rs. 2,00,678 owing to the assessee's participation in a racket of bogus accommodation entries, resulting in addition which was affirmed in first appeal. The Tribunal limited the addition to only 12.5 per cent. on account of possible inflation. Such a view would be reasonable, where the accounted sales could not have been made without these purchases.

It was also found by the Tribunal in this case, that Rs. 4,001 claimed as donations, were not supported by confirmatory details and also not shown to be connected with the assessee's business, so that the disallowance was confirmed.

(vii) Repairs

Where a claim for deduction on account of repairs to the extent of Rs. 39,81,198 was found to be too heavy, the assessee's explanation was that there had been major replacement in the machinery used for manufacture of tools and tubes. Depreciation, corresponding to the disallowance of repairs, was also denied. In first appeal, the expenditure was at any rate in the nature of capital expenditure as it involves replacement of parts amounting to a new part of the entire machinery. In the absence of the details of expenditure, it was found that it could not be decided whether the expenditure was in the nature of current repairs or capital expenditure, so that it was remanded in *Fine Blanking Pvt. Ltd.* v. *Jt. CIT* [2019] 70 ITR (Trib) 400 (Bang) following *Super Spinning Mills Ltd.* v. *Asst. CIT* [2013] 357 ITR 720 (Mad).

In the same case, there was a disallowance of about Rs. 72 lakhs for non-deduction of tax at source made to various transporters, a disallowance confirmed in first appeal. The Tribunal found that the assessee submitted permanent account numbers and addresses of transporters and to the extent it was so done, there was compliance with requirement of section 194C(6), so that section 40(a)(ia) could not have been applied to disallow the payment following *Soma Rani Ghosh* v. *Dy. CIT* [2016] 74 taxmann.com 90 (Kol).

(viii) Distribution of tickets for cricket match

Where the assessee had purchased 150 tickets for witnessing an Indian Premier League match at Hyderabad at a cost of Rs. 5.5 lakhs and distributed the same to longstanding customers as a measure of goodwill, the explanation was accepted to justify deduction. The claim cannot be treated as unproved, when the assessee had filed the list of customers to whom the tickets had been distributed. But since this list was an additional evidence, the matter of deduction was remanded for verification, whether they were actually distributed in *EPE Process Filters and Accumulators Pvt. Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) 586 (Hyd).

(ix) The following expenses claimed as business expenditure were the subject matter of decision of the Tribunal in *Asst. CIT* v. *Lexmark International (India) P. Ltd.* [2019] 70 ITR (Trib) (S. N.) 56 (Kol).

(i) The assessee claimed Rs. 1,86,000 as a deduction on account of gratuity provision, which was written back as no longer required. Since it was an amount out of provision, which was already taxed in an earlier year, the amount written back as no longer required, could not be taxed. The Commissioner (Appeals) had admitted additional evidence as proof of tax paid on such amount by way of the assessment record, from the assessee's letter offering the very sums for tax, being a clinching evidence unrebutted by the Revenue, and deleted the addition. The deletion was upheld by the Tribunal.

(ii) Obsolete stock, which was written off and allowed as a deduction in two earlier years, when brought back could not be subjected to tax. The argument of the Revenue that the assessee had not placed relevant details of obsolete stock could not be accepted as the assessee was giving particulars of the very amounts written back on which tax is paid, so that there was no case for the addition of the amount written back in the relevant previous year.

(iii) The assessee had claimed provision for warranty to the extent of Rs. 2,99,936 but was disallowed for lack of evidence. This being a provision based upon past liability adopting scientific estimation, it was held that it could not have been disallowed merely because it was not routed through the profit and loss account.

Capital Gains

(i) Scope of section 43B

Section 43B which allows an expenditure in respect of welfare dues only on payment was found to be inapplicable, where what was claimed was a provision for gratuity to retiring employees with actual payment being made out of such provision at the time of payment. Since the bar under section 40A(7) makes an exception in sub-clause (b) in respect of provision for payment for gratuity to retiring employees made during the previous year, it is eligible for deduction as was decided in *Thiruvalla East Co-operative Bank Ltd.* v. *ITO* [2019] 70 ITR (Trib) 486 (Cochin) following *U. B. Engineering Ltd.* v. *Dy. CIT* I. T. A. Nos. 1019 and 09/Pune/2009 dated November 30, 2010, *Jodhpur Central Co-operative Bank Ltd.* v. *Jt. CIT* 37 CCH 342 (Jodhpur) and *George Williamson (Assam) Ltd.* v. *CIT* [1997] 228 ITR 343 (Gauhati).

(ii) Sale consideration under section 50C

Section 50C requires the guideline value to be adopted, where it exceeds the consideration admitted by the assessee. But the consideration should be on prevailing guideline value on the date of memorandum of understanding and not on the date of registration. In the matter before the Tribunal in *Dy. CIT* v. *Zubeida Shahanshah* [2019] 70 ITR (Trib) (S. N.) 7 (Lucknow), it was found that apart from the requirement of adoption of the guideline value on the date of agreement, the consideration mentioned in the agreement was found to be subject to a refund of Rs. 10 lakhs, so that this amount cannot be taken as part of consideration. It was further found that the agreement was for a larger piece of land, so that the estimate of consideration should have been limited to the area actually transferred and not the entire area held by the assessee. In coming to the conclusion, the Tribunal incidentally found that the sale was not a distress sale.

(iii) Reinvestment benefit under section 54

Reinvestment benefit under section 54 was claimed in respect of investment in three flats purchased under separate agreements, but actually converted into one for use as one residential unit with only a single electricity bill for all the three flats. Relief under section 54 denied by the Assessing Officer was allowed for all the three flats in first appeal with Tribunal endorsing such allowance in *Asst. CIT* v. *Bipin N. Sagar* [2019] 70 ITR (Trib) (S. N.) 16 (Mum) following *CIT* v. *Devdas Naik* [2014] 366 ITR 12 (Bom).

Where the assessee had invested his long-term capital gains in a residential house property at Dubai, the question arose whether relief under section 54 will be available on such investments out of India. Since investment in India was stipulated only by the Finance (No. 2) Act, 2014 with effect from April 1, 2015 without any retrospective effect, the assessment in this case being for the assessment year 2014-15 prior to the amendment, relief under section 54 was held admissible by the Tribunal in *ITO* v. *Mahesh Gobind Dalamal* [2019] 70 ITR (Trib) 599 (Mum) following *Leena Jugalkishor Shah* v. *Asst. CIT* [2017] 392 ITR 18 (Guj) and *ITO* v. *Nishant Lalit Jadhav* (I. T. A. No. 6883/Mum/2014 dated April 26, 2017).

(iv) Long-term capital gains

The assessee had declared long-term capital gains of Rs. 3,07,339 on sale of shares. It had also claimed short-term capital loss of Rs. 3,30,578 on other shares. The shares purchased and sold were supported by contract notes with a share broker, a recognised member of Bombay Stock Exchange, all through bank account. The Assessing Officer was, however, of the opinion that the abnormal profit made in the transaction indicated a sale artificially inflated by pre-arrangement with companies, an inference sought to be supported by information from Investigation Wing and other agencies such as SEBI generally relating to such colourable transactions. Both the profit as well as loss in these transactions were, therefore, not accepted by the Assessing Officer and confirmed in first appeal. The Tribunal found that the transactions were supported by contract notes, holding of shares in dematerialized account and further supported by brokers' ledgers. There was nothing to suggest that assessee had availed of accommodation entries as alleged in the statement of the Investigation Wing. The information did not pertain to the assessee in particular. The business was done by the assessee in the on-line platform of the stock exchange along with other materials to support transactions. There is no material to suggest any stage-managed and pre-arranged activity to discredit the assessee's statements, so that there was no case for rejecting the income or the capital gains loss as decided in *Vivek Jhunjhunwala* v. *ITO* [2019] 70 ITR (Trib) (S. N) 34 (Kol) following *CIT* v. *Smt. Jamnadevi Agrawal* [2010] 328 ITR 656 (Bom), *CIT* v. *Anupam Kapoor* [2008] 299 ITR 179 (P&H) and *Smt. Sunita Jain* v. *ITO* (I. T. A. Nos. 501 and 502/Ahd/ 2016 dated March 9, 2017).

(v) Reinvestment benefit under section 54B

The assessee, along with five others, had sold agricultural lands for a consideration of Rs. 48.33 lakhs and the cost of acquisition therefor was adopted at Rs. 40.10 lakhs on the basis of report of approved valuer. A reference to departmental Valuation Officer for valuation as on April 1, 1981 was determined at a value, which necessitated addition, which was made and confirmed in first appeal in computation of long-term capital gains to the extent of Rs. 5.02 lakhs. The Tribunal found that the question of higher value would arise only if the value adopted by the assessee was less than the fair market value. But even this condition had no application as the amendment to section 55A authorising reference to Valuation Officer came into effect on July 1, 2012, so that it had no application to the assessee's case for the assessment year 2011-12.

The addition was, therefore, not justified. As for the reinvestment for which relief under section 54B was claimed, it was denied because lands had been originally purchased in the name of the assessee's sons and the reinvestment, for which exemption was claimed under section 54B, was made in the name of himself and his sons. Both the sale and purchase were of agricultural lands and the lands purchased was for agricultural purpose. Such purchase in the name of family member need not lose exemption under section 54B, so that the claim was found admissible in *Balu Vitthal Kharate* v. *Asst. CIT* [2019] 70 ITR (Trib) 315 (Pune).

(vi) Reinvestment under section 54F

The assessee had not deposited the unutilised capital gains under the capital gains scheme on or before the date on which his return was due for the year of sale, not satisfying the condition for relief under section 54F. The assessee was found ineligible for relief in *Sameer Vithalrao Ghanwat* v. *ITO* [2019] 70 ITR (Trib) 341 (Pune) following *Humayun Suleman Merchant* v. *Chief CIT* [2016] 387 ITR 421 (Bom).

(vii) Bogus purchases

Where the assessee had disclosed long-term capital gains to the extent of Rs. 1.04 crores, it was assumed to be bogus on the basis of information of the widespread accommodation sales prevailing in the Calcutta Stock Exchange, so that the capital gains offered was substituted by treating it as bogus and the amount of credit taken as income, a view confirmed in first appeal. However, it was found that purchase of shares had been accounted in the year of acquisition and shares themselves were reflected in dematerialized account statements. Brokerage charges and Securities Transaction Tax were shown to have been paid. The payments were by account-payee cheques and reflected in the books of account. Merely because of some reports from Investigation Wing, the evidence offered could not have been disbelieved in absence of any concrete materials brought on record by the Revenue for its inference.—*Smt. Ritika Sarogi* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 54 (Kol).

(viii) Loss due to foreign exchange fluctuation

Where the foreign exchange losses incurred in respect of advance given to a subsidiary in Mauritius for setting up a power plant was prompted by commercial expediency, such loss due to fluctuation in prevailing exchange rate has to be construed only as loss from business, so as to be allowable. It was so decided concurrently in first appeal and the Tribunal overruling the objection that it related to a business, which was started only during the year because it was found on fact that it was started even in the preceding year.—*Dy. CIT* v. *Albasta Wholesale Services Ltd.* [2019] 70 ITR (Trib) 504 (Delhi) following *CIT* v. *Dhoomketu Builders and Development P. Ltd.* [2014] 368 ITR 680 (Delhi) ; *CIT* v. *ESPN Software India (P.) Ltd.* [2008] 301 ITR 368 (Delhi) ; *CIT* v. *Modi Entertainment Ltd.* [2014] 89 CCH 14

(Delhi) ; *Hero Cycles P. Ltd.* v. *CIT* [2015] 379 ITR 347 (SC) and *S. A. Builders Ltd.* v. *CIT (Appeals)* [2007] 288 ITR 1 (SC).

Income from other sources

—Section 56(2)(viib)

Issue of shares at a premium in excess of its value attracts application of section 56(2)(viib). Where the company had only two shareholders, husband and wife each holding 5,000 shares, the daughter became shareholder in his place on the death of the husband. Company thereupon had mother S and daughter as shareholders. Company shares were held by the mother and daughter with 5,000 shares each. It proposed to acquire land for Rs. 23.09 crores. For meeting the cost of this investment, the mother had brought in Rs. 23.32 crores as share capital to whom 10,100 shares of face value of Rs. 10 at a share premium amounting to the extent of Rs. 23.31 crores were allotted. It was this amount, which was brought to tax under section 56(2)(viib). The company's working of net worth including the land value, which was agreed to be purchased, was found to be erroneous in the light of the fact that the two shareholders each had already 50 per cent. interest. The argument was that the benefit of premium went to the daughter. Such benefit cannot exceed 25 per cent. of the amount. If the mother had given direct gift, there would have been no liability to tax under section 56(2)(viib). This section was penal in nature, so as to serve the purpose of countering abuse by taking shelter of non-liability. In any event, it was found that the amount taxable under section 56(2)(viib) was to be determined with reference to value of shares after allotment of shares. The addition made by the Assessing Officer was confirmed in first appeal. Only the difference between amount brought in and value of shares post allotment is covered by section 56(2)(viib), according to the assessee. The Tribunal referred to the Finance Minister's speech as regards the purpose of the provision and the intent of section 56(2)(viib) to bring to tax "share premium in excess of fair market value to be treated as income". In the assessee's case, the company had only two shareholders mother and daughter. But the money brought in by the mother was for subscribing shares at Rs. 23,096 per share of face value of Rs. 10. Though the price paid was abnormal, it was not a ploy to pass unaccounted income. The benefit in this case was to a daughter from her mother. There is no other shareholder to avail the benefit. The Tribunal relied upon Crawford's *The Construction of Statutes* to hold "Hence, the court should, when it seeks the legislative intent, construe all the constituent parts of the statute together and seek to ascertain the legislative intention from the whole Act, considering every provision thereof in the light of the general purpose and object of the Act itself and endeavouring to make every part effective, harmonise and sensible". There was, therefore, no scope for application of the mischief rule. Section 56(2)(viib) should be understood as creating a deeming fiction, but legal fictions serve only a definite purpose within the framework of such purpose as was also decided in *M. D. Jindal* v. *CIT* [1987] 164 ITR 28 (Cal). It was in this view, the additions were deleted in *Vaani Estates Pvt. Ltd.* v. *ITO* [2019] 70 ITR (Trib) 643 (Chennai) also following *CIT* v. *Kay Arr Enterprises* [2008] 299 ITR 348 (Mad) and *CIT* v. *R. Nagaraja Rao* [2013] 352 ITR 565 (Karn).

Incentive deductions

(i) Section 80HHC/10A

It is not merely direct exports, which qualify for deduction under section 80HHC. Export made through export house, though indirect export, was found eligible for relief under section 80HHC on disclaimer certificate furnished by an export house. It was in this context, relief under section 80HHC claimed on account of sale to export house for export to the extent of Rs. 1.67 crores, which was the additional amount claimed by the export house, was found deductible in the assessee's case in *Asst. CIT* v. *Abad Exim Pvt. Ltd.* [2019] 70 ITR (Trib) 719 (Cochin).

In the same case, the assessee had also claimed deduction under section 10A for exports other than those covered by section 80HHC. But the High Court, in the first round, (*CIT* v. *Abad Exim (P.) Ltd.* [2018] 12 ITR-OL 284 (Ker), while remanding the matter that individual items do not come within the purview of section 10A. It had also to be ensured that there was no overlap as between deduction under section 80HHC and exemption under section 10A. It was to ensure compliance with this direction of the High Court that the matter was remanded to the Assessing Officer for a decision afresh.

(ii) Section 80-IA

A film producer's claim under section 80-IA was found to be admissible as each cinema film could be treated as a product of manufacturing or processing of goods. There can be no inference of reconstruction of pre-existing business, so that a producer of films is eligible for deduction under section 80-IA. The reasoning of the Assessing Officer to disallow the claim of deduction of Rs. 2.2 crores under section 80-IA is that the business was not new because the assessee had been a producer for past many years and had used hired machinery like camera and lenses and had deployed personnel like artistes, music directors, cinematographer, cameraman, associate cameraman, lyrics writer, art director and others, who were not employees, but engaged on contract basis, so that the condition of employment of 10 workers was not satisfied. The deduction was, however, allowed in first appeal and endorsed by the Tribunal because the business of production of a film was not formed by splitting up or reconstruction of an existing business. The department has not shown that there was any transfer of used machinery on his own but use of only hired machinery. The condition regarding the employees cannot be inferred as violated just because persons employed were not regular employees. All the conditions were held to be satisfied in the context of cinema film conceded as manufacture or processed goods in Circular No. 24 dated July 23, 1969 [1969] 73 ITR (St.) 23. It is under these circumstances, the relief allowed in first appeal was upheld in *Dy. CIT* v. *K. T. Kunjumon* [2019] 70 ITR (Trib) 445 (Chennai) following *CIT* v. *Jyoti Prakash Dutta* [2014] 367 ITR 568 (Bom).

(iii) Section 80-IC – what is manufacture?

The assessee was engaged in the business of sale of various products, some of which were manufactured by it. It was paying central excise indicating manufacture. He had engaged 13 to 15 labourers for making wooden crates with ready-made wooden planks, thermocol, fevicol and nails. The products being different from the materials used and being subject to Central Excise with the Sales Tax Department recognizing the crates as distinct products and District Industry Centre registering the assessee as a manufacturer with the place itself registered under Factories Act, it has to be inferred that the product had a different name, character and use integral structure as manufacture, which qualified for deduction under section 80-IC in *ITO* v. *Rudra Woodpack P. Ltd.* [2019] 70 ITR (Trib) 169 (Delhi) following *Aspinwall and Co. Ltd.* v. *CIT* [2001] 251 ITR 323 (SC), *CIT* v. *Oracle Software India Ltd.* [2010] 320 ITR 546 (SC) and *Mouat* v. *Betts Motors Ltd.* [1958] 3 All ER 402.

(iv) Section 80P

Deduction under section 80P claimed by a gramin bank acceptable as a regional bank vide Circular No. 6 of 2010 dated September 20, 2010 [2010] 328 ITR (St.) 63 was denied as it was available only for a regional rural bank from assessment year 2007-08. Besides this circular, there is another Circular No. 319 dated January 11, 1982 [1982] 134 ITR (St.) 165 deeming any regional rural bank to be a co-operative society, but it was withdrawn by Central Board of Direct Taxes with effect from assessment year 2007-08. With reference to these two circulars, the Assessing Officer inferred that the deduction under section 80P was inadmissible for the assessee, a finding confirmed in first appeal. An appeal to the Tribunal was filed along with declaration in Form 8 under section 158(1) to avoid repetitive appeals on the substantial question of law admitted by the High Court in the assessee's case for the assessment year 2007-08. The Tribunal accepted Form 8 and thereupon restored the issue to the Assessing Officer to follow the order of the High Court as and when received as decided in *Vidisha Bhopal Kshetriya Gramin Bank* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 36 (Indore). It was noticed that another issue relating to expenses of about Rs. 32 lakhs were fully detailed, but were disbelieved without any enquiry, so that the matter was remanded for a decision afresh.

(v) Section 80P(2)(d)

An assessee, which was a co-operative credit society had claimed deduction of interest under section 80P(2)(d) on an amount of Rs. 3,28,923 from National Bank for Agriculture, but such interest from them could not be deductible, because co-operative banks do not qualify as banks for the purposes of this relief. The alternate ground for exemption on the principle of mutuality was no longer available after insertion of section 2(24)(viia) by the Finance Act. 2006. The matter has, therefore, to be decided as to whether the interest received was from a co-operative bank or not on the first principles to the effect that such amount will not qualify for deduction under section 80P(2)(d) as decided in *Uttar Gujarat Uma Co-operative Credit Society Ltd.* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 49 (Ahd) following *CIT* v. *Sabarkantha District Co-operative Milk Producers Union Ltd.* I. T. A. No. 473 of 2014 (Guj) and *State Bank of India* v. *CIT* [2016] 389 ITR 578 (Guj). It is true that a co-operative bank could be treated as co-operative society within the meaning of section 2(19), but this being a matter to be examined by the Assessing Officer, so that for this purpose, the matter was remanded. At any rate, there could absolutely be no relief available in respect of interest received from private bank as also decided in this case.

(vi) Section 80P(4)

The assessee, being a bank and not a primary agricultural credit society or a co-operative bank, was held not entitled to exemption of section 80P(4) in *Kerala State Co-op. Agricultural and Rural Development Bank Ltd.* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 28 (Cochin) following the decision in the same case in *Kerala State Co-op. Agricultural and Rural Development Bank Ltd.* v. *CIT* [2016] 383 ITR 610 (Ker). In the same case, it was also held that, though the amount of withdrawals made by employees from unrecognized provident fund is deductible under section 37, this ground not having been raised before the authorities below was not entertained. Another issue related to commission paid under section 194H for mobilizing deposits disallowed for non-deduction of tax at source. Since such disallowance cannot stand, where the assessee is able to prove that the recipients had accounted for the same in their accounts and paid tax thereon, the matter was remitted to the Assessing Officer to enable the assessee to produce proof to escape liability.

Reassessment

(i) Valid

It was noticed after the assessment, that a debit of a provision for doubtful debts in the profit and loss account to the extent of Rs. 88.96 lakhs and a claim for set-off of unabsorbed depreciation, which had become time-barred, had been allowed. It was for these two reasons, reassessment notice was issued, since as much as Rs. 2.04 crores had been under-assessed. Merely because there was failure on the part of the Assessing Officer to consider the information with reference to the nexus with income, the inference of escapement of income in respect of these items in computation of book profits and statutory income cannot be ruled out. It is under these circumstances, reassessment jurisdiction was upheld in *Health and Glow Retailing P. Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) 163 (Chennai).

Where the Assessing Officer had initiated reassessment proceedings by issue of notice under section 148, but dropped further proceedings on objection from the assessee, but he resumed the same after recording reasons afresh, the recorded reasons supplied by the Assessing Officer was challenged on the ground that there was no income which escaped assessment. But the addition made and confirmed in appeal in the reassessment was upheld by the Tribunal in the view that the Assessing Officer had reason to believe that there has been escapement of income inferable from recorded reasons in *Cornerstone Property Investments Pvt. Ltd.* v. *ITO* [2019] 70 ITR (Trib) 693 (Bang).

In respect of another notice under section 148 in the same assessee's case for another year, original return was processed under section 143(1), so that even where first notice was dropped, second notice cannot be treated as illegal on the basis of change of opinion because there was no occasion to form an opinion at the time of acceptance of return under section 143(1). The Tribunal referred to the facts of the case and found that there was routing of funds through a chain of companies as conduit pipes not based upon proper valuation with some of the transactions done at high premium unsupported by financials and other such discrepancies involving a receipt of Rs. 49.50 crores, so as to treat the same as income from other sources with jurisdiction for reassessment therefor.

(ii) Not valid

The Assessing Officer received information from the Investigation Wing of the Department that the assessee had availed accommodation entries from entry operators to the extent of Rs. 5,00,545 on three occasions during the year. Since reassessment jurisdiction was invoked without any further enquiry on such information, it can only be assumed that there is total lack of application of mind, so that initiation of reassessment proceedings was felt to be unjustified in *Key Components P. Ltd.* v. *ITO* [2019] 70 ITR (Trib) 211 (Delhi) following *Pr. CIT* v. *G and G Pharma India Ltd.* [2016] 384 ITR 147 (Delhi), *Pr. CIT* v. *RMG Polyvinyl (I.) Ltd.* [2017] 396 ITR 5 (Delhi) and *MRY Auto Components Ltd.* v. *ITO* (I. T. A. No. 2418/Delhi/2014 dated September 15, 2017).

Where reassessment proceedings were initiated on information of receipt of Rs. 25 lakhs which was not disclosed in the accounts, but the transaction itself was disclosed on accounting an amount of Rs. 12.62 crores in the immediately preceding year, but since the deal fell through, the matter was settled by an award passed by the High Court. The amount of Rs. 25 lakhs was advance money to be kept in suspense to be used as per conditions of agreement, so that it did not have the character of sale proceeds or income for the assessee. The Assessing Officer, during the course of original assessment, recorded these facts and had accepted the assessee's explanation in the preceding assessment year. Hence, the assumption in the recorded reason that income had escaped assessment has no basis, so that the notice under section 148 was quashed in *Subash Sharma* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 61 (Delhi).

The Assessing Officer issued notice under section 148 for a year beyond the four-year limit on his inference that the expenses to the extent of Rs. 80,38,101 did not relate to the business but were meant for personal needs of the assessee. Reliance was placed on some reference in the audit report for the disallowance. The assessee succeeded in first appeal in resisting jurisdiction under section 147 because there was no failure to disclose all material facts fully and truly during the course of the original assessment. The assessee's objection was accepted in first appeal and approved by the Tribunal quashing the reassessment order on departmental appeal observing that there could be no inference of personal expenditure in advertisement expenditure and printing and stationery expenses. There had been no analysis of details of expenses to justify inference of personal expenses with reference to any particular expenditure. The fact that the proceedings were beyond the four-year time limit necessitating justification for the inference of non-disclosure of materials facts was also not satisfied in this case. There was nothing to suggest that the Assessing Officer had formed a prima facie belief as regards escapement of income on non-disclosure of facts as decided in *Dy. CIT* v. *Shekhar G. Patel* [2019] 70 ITR (Trib) 456 (Ahd).

Interest

(i) Section 234B/234C

Failure to deduct tax at source from the receipts taxable in the hands of the assessee would mean that such amount on which tax was failed to be deducted cannot be subjected to interest under sections 234B/234C. Apparently, the reason is that the deductor would be paying interest on the amount not deducted and deposited within time. Non-levy of interest on amount of tax which should have been deducted at source, but not deducted was upheld in *Ashwin S. Mehta* v. *Asst. CIT* [2019] 70 ITR (Trib) 234 (Mum) following the decision in the same case in *Ashwin S. Mehta* v. *Dy. CIT* (I. T. A. Nos. 1728 to 1730/Mum/2015 dated December 27, 2017).

(ii) Section 234E

Late fee for delay in furnishing statements required from the assessee attracts fee under section 234E irrespective of the period for which quarterly return pertains. The chargeable period is the delay starting from the due date for furnishing the information, which was June 1, 2015 in this case, the date from which the Assessing Officer could levy fees under section 234E, till the actual date of filing return of tax deduction at source, which in this case was July 22, 2015, so that levy of such fees from June 1, 2015 to July 22, 2015 was found to be in order in *Uttam Chand Gangwal* v. *Asst. CIT, (CPC) (TDS)* [2019] 70 ITR (Trib) 188 (Jaipur).

Post-search/block assessment

(i) Third-party jurisdiction

During search of the premises of a director of a company and the company, documents relating to a third party, who was the assessee in this case, were found and action under section 153C was initiated against it. But the materials that were found related to earlier years and not the year for which the assessment proceedings under section 153C was initiated, so that a mere general satisfaction without considering relevant materials for the assessment year under consideration would not confer jurisdiction over the assessee, who was a third party as decided in *Wisdom Realtors P. Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) 181 (Delhi).

In another case, there was discovery of materials relating to such third party during search leading to inference of undisclosed income, but there should also be satisfaction required of the Assessing Officer having jurisdiction over the searched party to this effect and conveyance of such satisfaction along with materials, in absence of which there can be no valid jurisdiction against the third party as decided in *Satkar Fincap Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) 294 (Delhi) following *Dy. CIT* v. *Sanchit Consultants P. Ltd.* (I. T. A. Nos. 6410 to 6415/Delhi/2013 dated January 29, 2018).

The assessee, a third party to a search, was subjected to proceedings under section 153C, where an amount of Rs. 5.99 crores was added as against nil income declared by it. In first appeal, Commissioner (Appeals) decided that the sole basis for the addition was the audited balance-sheet and financial statements relating to the assessee for the assessment year 2009-10, while the assessment reopened was for the assessment year 2010-11, so that the document relating to a different assessment year could not be the basis for jurisdiction under section 153C. The assessment was, therefore, quashed in *Asst. CIT* v. *Anush Finlease and Construction Pvt. Ltd.* [2019] 70 ITR (Trib) 336 (Delhi) following *Pr. CIT* v. *Index Securities P. Ltd.* (I. T. A. Nos. 566 to 571 of 2017 dated September 4, 2017 (Delhi)).

In another case, a sale deed relating to the assessment year 2011-12 was found from the assessee, who was a third party to a search during which a document evidencing purchase of property by the assessee for sale consideration of Rs. 1.69 crores as against guidelines value of Rs. 10.56 crores was noticed. Another sale deed for purchase of a property at Rs. 8.07 crores, while stamp value was Rs. 32.43 crores, was also noticed. The Assessing Officer made addition in respect of two properties at Rs. 8.87 crores and Rs. 24.25 crores, respectively, for the assessments under section 153C. The guideline-value based addition under section 50C was possible during the relevant years of assessment only for sale of property, while in this case, it was purchase, which became vulnerable under section 50C only after an amendment on insertion of clause (x) in sub-section (2) of section 56 with effect from April 1, 2017. Since the amendment was a substantive one relating to a substantive provision, it cannot be applied retrospectively in absence of any other material to justify the inference of unaccounted payment. The deletion made in first appeal was endorsed by the Tribunal in *Dy. CIT* v. *Sutlej Agro Products Ltd.* [2019] 70 ITR (Trib) (S. N.) 33 (Delhi).

(ii) Retracted statement recorded under section 132(4)

An assessee admitted Rs. three crores in his personal name in a statement, which was sought to be retracted on the ground that the statement according to him was prompted by mental pressure at a time when he was tired, to buy peace. The second statement was found acceptable because there was no corroboration for the assessee's initial statement. The Assessing Officer did not attempt to correlate the income admitted with materials gathered during search. There was no material for initiating penalty proceedings. In absence of any specific charge for proposal to levy penalty proceedings, it was found to be vitiated. In the result, the addition was deleted and penalty proceedings scorched in *Asst. CIT* v. *Sudeep Maheshwari* [2019] 70 ITR (Trib) (S. N.) 38 (Indore).

(iii) Undisclosed income

Where a search disclosed different sale considerations for the same transactions in the seized papers, no reliance can be placed upon them, so as to call for a thorough investigation for which the case was remanded in *Dhruv Madan* v. *Dy. CIT* [2019] 70 ITR (Trib) (S. N.) 52 (Delhi).

A search in the premises of an assessee dealing in milk revealed daily milk procurement sheets in the head office for two periods of four days and 11 days during the financial year relevant to the assessment year. It was inferred therefrom that there was suppression of sales of milk inferable from the procurement sheets on the basis of which addition was made for the entire year. It was found by Commissioner (Appeals), that not all the figures in the sheets related to milk, as they included purchase of husk and coal. It was further found that the amount worked out was Rs. 1 crore out of which Rs. 93 lakhs had already been offered to tax in the hands of the director of the assessee-company, so that an addition of Rs. 26.82 lakhs on account of sales inferred from the documents was deleted. The Tribunal, on analysis of the quantity of milk as per the documents and what has been accounted for, found they were fully covered in the director's case. That apart, it was found from the assessee-company's books and the director's accounts that there was no scope for inference of undisclosed purchases. The Assessing Officer had not extrapolated the seized documents for the entire period of six years for which documents were fully available, but were not fully considered. It was under these circumstances, the addition deleted in first appeal was upheld by the Tribunal by dismissing the departmental appeal in *Asst. CIT* v. *Creamy Foods Ltd.* [2019] 70 ITR (Trib) (S. N.) 59 (Delhi).

(iv) Penalty

The law that no addition in a block assessment can be made unless some incriminating materials were found during the course of search was reiterated in case of penalty for addition made in an assessment under section 153A in *Nitinbhai Tulsidas Chottani* v. *Dy. CIT* [2019] 70 ITR (Trib) 496 (Ahd). In the same case, it was also found that where there was a difference in the matter of cost of acquisition in computation of capital gains, this difference by itself, it was held, does not warrant penalty when there was nothing in the assessment order to indicate how the reduced cost of acquisition adopted by him had been determined.

Revision under section 263

(i) Justified

Where the Assessing Officer failed to make enquiry and had not actually applied his mind to the information regarding the suspicious nature of share transactions available with him, there was absolute lack of enquiry and not merely inadequate enquiry, so as to justify the Commissioner's revisional jurisdiction under 263. The Tribunal, in *Ramesh Kumar* v. *ITO* [2019] 70 ITR (Trib) (S. N.) 8 (Delhi), agreed with the Commissioner that it was a case of lack of enquiry and not merely inadequate enquiry, so that there was justification for jurisdiction on the part of Commissioner under section 263.

(ii) Not justified

The assessee, a Chartered Accountant, had filed a return declaring an income of Rs. 67,59,310. The assessment was taken up for scrutiny and various additions by way of disallowance of expenses and disallowance of payment for non-deduction of tax at source were made with computation of income at Rs. 71,39,230. Commissioner under section 263 found that the assessee had claimed substantial amounts towards legal and professional charges leading to a disallowance of Rs. 4.03 crores in the assessment order itself. Even so, the Commissioner was of the view that expenses on salary and administrative expenses should have been examined. No doubt, lack of prudence on the part of assessee by itself cannot justify additions, but the Assessing Officer was bound to call for details and subject the expenses to verification. Commissioner felt that there was lack of enquiry in this regard, but it was a matter of record that the Assessing Officer had raised a specific query for each and every item of expense getting details and vouchers. After such enquiry, he disallowed a substantial amount, so that it was not a case of lack of enquiry. The order of Commissioner nowhere pointed to lack of enquiry or any evidence of suppression in respect of accounts, which had been duly audited, so that the Commissioner's order under section 263 was set aside by the Tribunal in *Monika Gupta* v. *Pr. CIT* [2019] 70 ITR (Trib) (S. N.) 17 (Delhi).

A scrutiny assessment is expected to be made by the Assessing Officer after enquiries on what is disclosed before him. He is also expected to disallow claims, which are not genuine. He is generally expected to protect the interest of the Revenue and not wear blinkers and mechanically accept whatever is presented before him. These were the duties expected of the Assessing Officer in considering the possible application of revisional jurisdiction under section 263. An amount of Rs. 25 lakhs being the value of advance share investments and a further amount of expenditure of Rs. 12.36 lakhs incurred towards corporate social responsibility by way of free education made available to a girl child debited in other expenses were both allowed deduction in the assessment. *Explanation 2* to section 37(1) according to the Commissioner barred the latter deduction, while advance share investments could not be considered as shares, so as to permit deduction for diminution in their value, besides the law that any deduction in respect of such shares could not be allowed before they materialize, but all the same wrongly allowed and that too without making any enquiry as opined by the Commissioner.

As regards Rs. 25 lakhs, on which necessary enquiry was failed to be made in respect of an amount which was prima facie a capital expenditure, section 263 permitting revision would be applicable, so as to render the Commissioner's order under section 263 valid on this point.

As regards the amount of Rs. 12.36 lakhs for education of a girl child which was incidental to the assessee's business, the view taken by the Assessing Officer that it was incurred in the course of business is a possible view, so that it will not fall as expenditure relating to corporate social responsibility. It was also found that the payment was in compliance with a direction of Government of India. The Tribunal, therefore, found that there was no merit in the Commissioner's inference on this matter, so that his order on this point was vacated in *Kerala State Industrial Development Corporation Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 39 (Cochin).

TDS

(i) John Deere India P. Ltd.'s case

The Tribunal, in *John Deere India P. Ltd.* v. *Dy. DIT (IT)* [2019] 70 ITR (Trib) 73 (Pune), dealt with following issues :

Training : Where training offered by the assessee to its employees was by way of web-based services available on the internet with no technical knowledge imparted by the assessee, a service provider, there was no transfer of technology, so that there was no technical service as to require tax deduction at source, and so levy of interest and penalty for non-deduction of tax at source under section 201 was held to be unjustified following *ITO* v. *Veeda Clinical Research (P.) Ltd.* [2013] 35 taxmann.com 577 (Ahd-Trib.).

Salaries to deputed employees : The assessee had deducted tax at source on salaries paid to deputed employees, so that no default had occurred under section 201 as held following *DIT* v. *Marks and Spencer Reliance India P. Ltd.* (I. T. A. No. 893 of 2014 dated May 3, 2017). An elaborate review of case law has also been made for its conclusion.

Copyright : Where the assessee had acquired right over copyrighted software, it was not acquiring the copyright as it had no right of replicating the software acquired by the assessee. It could not, therefore, be treated as royalty within the meaning of *Explanation 2* to section 9(1)(vi). The payment was merely for right to use the copyright in the software as was decided in this case following *Tata Technologies Ltd.* v. *Dy. DIT (IT)* (I. T. A. No. 1433/Pune/2014 dated April 5, 2018). The law, at any rate, as decided on this point is so settled by the apex court in *Tata Consultancy Services* v. *State of Andhra Pradesh* [2004] 271 ITR 401 (SC).

Leased-line charges : The assessee paid internet charges of Rs. 27,09,701, line charges of Rs. 39,87,960 and service charges of Rs.

6,63,652, none of which could be treated as royalty. There was, therefore, no requirement for tax deduction at source following *Asia Satellite Telecommunications Co. Ltd.* v. *DIT* [2011] 332 ITR 340 (Delhi).

(ii) From unutilised leave salary

Assessee made a payment for unutilised salary at the time of retirement. It was under the bona fide belief that tax is deductible only where the total retirement benefits including leave salary was in excess of the minimum exemption limit of Rs. 3 lakhs. It was also believed that the payment itself was exempt because employees were State Government employees entitled to exemption under section 10(10AA)(i). The proceedings were initiated for non-deduction of tax for interest and penalty under section 201(1) and (1A). Liability of the payment of unutilised leave was only an estimate, while the intention was that it should be an approximation. Since the assessee had discharged its obligation on a bona fide estimate, it is not open to the Assessing Officer under his powers under section 132 or 147 to compute a different liability, so that his proceedings under section 201(1) and (1A) were both quashed in *Karnataka Power Transmission Corporation Ltd.* v. *ITO (OSD) (TDS), (LTU)* [2019] 70 ITR (Trib) 352 (Bang) following the decision in the same case [2018] 66 ITR (Trib) (S. N.) 12 (Bang).

(iii) Disallowance under section 40(a)(ia)

Where there was a delay in deduction and deposit of tax deducted, disallowance of payment is spared, if the tax is remitted before the last day of previous year vide amendment by the Finance Act, 2008 with retrospective effect from April 1, 2005. Since the deposit was made subsequent to the last date of the previous year, the disallowance under section 40(a)(ia) was made by the Assessing Officer but the Commissioner (Appeals) found that at any rate, it was paid before due date for filing return, so that disallowance was deleted by him. The Tribunal, in *Dy. CIT* v. *Janani Tours and Resorts P. Ltd.* [2019] 70 ITR (Trib) (S. N.) 51 (Bang), considering that the amendment by the Finance Act, 2010 was retrospective in operation, held that it could not be the basis for not following the decision of the High Court in *CIT* v. *Sri Santosh Kumar Shetty* (I. T. A. No. 590 of 2013 dated July, 2014 (Karn)).

In respect of brand charges paid by the assessee, tax was failed to be deducted at source, so that the payment was disallowed under section 40(a)(ia) of the Act. When the matter came up in second appeal, the Assessing Officer was directed by the Tribunal to verify whether the assessee had filed documents to show that the recipient of brand charges had paid the tax thereon. It was for this purpose of verification, the matter was remanded in *Amit Jindal* v. *Dy. CIT* [2019] 70 ITR (Trib) 545 (Chandigarh).

(iv) Fees for technical service

Where action was taken for non-deduction of tax at source from roaming charges paid to other telecommunication companies, the Assessing Officer inferred that the payments were in the nature of fees for technical services, so as to require tax deduction under section 194J. However, it was found that it is common knowledge that the communication is not by human intervention, but by visit to operator for providing the service carried out by way of telecommunication for which interconnection charges are paid. Because of lack of human intervention, it could not be treated as fees for technical service. There is no requirement for tax deduction at source in such cases as held in *Asst. CIT* v. *Bharti Airtel Ltd.* [2019] 70 ITR (Trib) (S. N.) 55 (Ahd) following *CIT (TDS)* v. *Vodafone South Ltd.* [2016] 7 ITR-OL 298 (Karn).

Commissioner's powers

Condonation of delay

Commissioner (Appeals) has discretion to condone the delay in appeals filed before him on showing of sufficient cause. Where the appellant is a Government organisation and its explanation was that its attention was drawn to the demand only when the Department pressed for the payment and that the delay initially was caused because the necessary information was required from employees, but such information was delayed in correspondence. This explanation, which was not accepted by Commissioner (Appeals) was found to deserve to condonation, so that the appeal was directed to be admitted and dealt with after giving opportunity to the assessee in *Divisional Railway Manager, Jaipur* v. *Asst. CIT (TDS)* [2019] 70 ITR (Trib) 590 (Jaipur) following *Collector, Land Acquisition* v. *Mst. Katiji* [1987] 167 ITR 471 (SC).

Penalty

(i) Section 271(1)(c)

Where depreciation was claimed on the basis of the assessee's estimate of the value of depreciable asset, but the Assessing Officer adopted a lower value, there could be no reduction in admissible depreciation on estimate based upon wrong invoices, when the purchase in this case was recorded only by journal entries. The Tribunal found that journal entries were amply supported and that in view of the fact that asset was used by the assessee and not by the other party on whom invoice was wrongly raised, the claim was in order. Penalty could not, therefore, have been levied as decided in *S. D. Health and Beauty* v. *Dy. CIT* [2019] 70 ITR (Trib) (S. N.) 14 (Mum).

The assessee, engaged in business of construction, claimed expenditure of Rs. 2.35 crores, but it had been moved to work-in-progress and was allowed in the following year. In the same case, it was also found that there was failure to deduct tax at source in respect of payments for a project, besides bank interest of a sum of Rs. 27,892, which was directly credited to capital account and not offered for tax. These were all mistakes which, according to the assessee, had happened due to ignorance and not willfully. All the same, penalty was levied and confirmed in first appeal, but the Tribunal found the explanation given by the assessee was not found to be false nor was it disputed. There was no concealment in the sense the items concerned were not concealed. It is under these circumstances, the Tribunal found that the principles laid down by the Supreme Court in *T. Ashok Pai* v. *CIT* [2007] 292 ITR 11 (SC) and *CIT* v. *Reliance Petroproducts Pvt. Ltd.* [2010] 322 ITR 158 (SC) would justify non-levy of penalty, so that penalty was cancelled by the Tribunal in *V. K. C. Jayamohan* v. *Asst. CIT* [2019] 70 ITR (Trib) 328 (Chennai).

In another case, an addition was made on the basis of information regarding issue of share capital of Rs. 1.6 crores with premium brought to the notice of the Assessing Officer by the Investigation Wing. The amount was admitted as income in a revised return. It was found that mere disclosure cannot escape the inference of concealment of income in the original return filed by the assessee, so that penalty of Rs. 5.5 lakhs was levied for concealment of income of Rs. 1.6 crores, which was confirmed in first appeal. The Tribunal found that voluntary disclosure did not release the assessee from the mischief of penalty proceedings. Identity, genuineness and creditworthiness of the share subscribers had not been proved. There was not even a revised return filed before survey but admitted only after issue of notice under section 148. There was, therefore, no case for sparing penalty, which was justified under *Explanation 1A* to section 271(1)(c) and, therefore, upheld by the Tribunal in *Soni Ashokkumar Maganlal* v. *Asst. CIT* [2019] 70 ITR (Trib) 409 (Ahd).

(ii) Section 271B

Failure to get accounts audited under section 44AB before the due date for filing return under section 139(1) is vulnerable as it is subject to penalty under section 271B. Where penalty of Rs. 1.5 lakhs was levied under this section, it was found in appeal that the audit report was filed belatedly along with returns of income for the two years under consideration, though audit itself had been completed within time. It was further found there was no prejudice caused to the Revenue because of delay, so that the breach was only technical with no loss to the exchequer. Penalty was, therefore, deleted in *T. T. Kuruvilla* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 10 (Cochin) following *CIT* v. *A. N. Arunachalam* [1994] 208 ITR 481 (Mad).

In another case, where the receipts were about Rs. 75 crores, section 44AB was mandatory. Though audit had been carried out by March 28, 2014 for the assessment year 2013-14, it was not filed before the due date, so that penalty under section 271B was levied. The audit report, however, was made available at the time of assessment, but still penalty was leviable because of the delay. The explanation for the delay was due to virus attack of the computer system, whereby the data got erased and the assessee had not maintained a back-up. Penalty of Rs. 1,50,000 levied by the Assessing Officer was sustained in first appeal, but the Tribunal found that the audit report was made available at the time of assessment, so that no prejudice was caused to the Revenue. The assessee's default was, therefore, technical and venial. There was no loss to the exchequer. Penalty was, therefore, deleted in *Johns Biwheelers* v. *Asst. CIT* [2019] 70 ITR (Trib) 325 (Cochin) following *CIT* v. *A. N. Arunachalam* [1994] 208 ITR 481 (Mad).

(iii) Not exigible

Where the show-cause notice did not strike off the inapplicable portion as between concealment of income and furnishing of inaccurate particulars, such notice is invalid and so is the levy of penalty in pursuance of notice. Further the return of the assessee under section 153A with the impugned income of Rs. 8.75 lakhs reported as short-term capital gains was accepted by the Assessing Officer and there was no material found during search to justify the conclusion that there was either concealment of income or furnishing of inaccurate particulars. The show-cause notice was issued prior to completion of the assessment without considering the materials taken into consideration for the assessment. The issue of show-cause notice itself was without justification indicating that the Assessing Officer had chosen to levy penalty even prior to the assessment, a situation impermissible in law.—*Smt. Babita Khurana* v. *Dy. CIT* [2019] 70 ITR (Trib) (S. N.) 63 (Delhi).

Where the assessee had accepted cash loans to the extent of Rs. 79,18,000, action was taken under section 271D for violation of section 269SS, though it should have been action under section 271E for violation of section 269T. The borrowing was in respect of business, which was closed seven years before, but the assessee was heavily in debt, so that it had to borrow heavily from unorganized financial sector to discharge existing liabilities. The assessee had liability to the extent of Rs. 50 crores and also had a mortgage of its properties for about Rs. 5 crores. It is in view of these adverse circumstances, the assessee had to accept cash loans. The Assessing Officer had levied penalty to the extent of Rs. 79.18 lakhs, but the Commissioner enhanced the same as the correct amount worked out to Rs. 88.18 lakhs. The Tribunal remanded the matter back to Commissioner

(Appeals) but the Commissioner (Appeals) reiterated his earlier decision. The Tribunal on second round pointed out to the circumstances of financial need with the creditors pressing hard, so that the assessee was obliged to approach the unorganized sector from which he had no option except to accept cash loan. This was accepted as a reasonable cause by the Tribunal to spare the assessee from penalty, in *P. R. Associates* v. *Asst. CIT* [2019] 70 ITR (Trib) 469 (Pune).

Where the show-cause notice did not strike off the inapplicable portion as between concealment of income and furnishing of inaccurate particulars, such notice is invalid and so is the levy of penalty in pursuance of the notice as held in *Ms. Simran K. Sayyed* v. *ITO* [2019] 70 ITR (Trib) 472 (Bang). Apart from the show-cause notice being invalid, legal issue regarding the admissibility of additional ground raised by the assessee was challenged on the ground that it involved admission of new evidence. Such an argument was found untenable as the materials were already on record and the additional ground went to the root of the matter, so that there was no error in admission of the additional ground especially in the light of the Supreme Court decision in *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC). The appeal was, therefore, allowed.

(iv) Penalty in post-search cases

Amount discovered during search but not been recorded in the books at the time of search, could be immune from penalty, if surrendered by the assessee during the course of search as decided in *Sanjay Dattatray Kakade* v. *Asst. CIT* [2019] 70 ITR (Trib) 519 (Pune).

In the same case, it was also decided as under :

(1) Income surrendered during search if brought to account and tax is paid thereon, it could be exempt from penalty, if the assessee also discloses the manner in which income is earned, so as to escape a penalty of 10 per cent. of the undisclosed income.

(2) Where penalty is leviable, it does not have to follow recording of satisfaction before initiation of penalty proceedings in respect of penalties under section 271AAA.

(3) Another penalty as regards income from bank deposits of Rs. 5.86 lakhs declared suo motu though not detected in course of search is not valid as it does not fall within the purview of income found during search, so that penalty is not exigible.

(4) The conditions for immunity from penalty under section 271AAA were claimed to be not satisfied in respect of Rs. 70 lakhs paid to C, which was offered for tax by C and Rs. 8 lakhs representing credit in capital account out of Rs. 5.77 crores was sought to be made liable for penalty

under section 271(1)(c) and penalty was levied on income of Rs. 2.07 crores. Such income was increased by further income of Rs. 2.07 crores in first appeal. Since the assessee had not disclosed the manner in which income was earned, penalty was held justified by the Tribunal following *Asst. CIT* v. *Gebilal Kanhaialal, HUF* [2012] 348 ITR 561 (SC). The enhancement of income by Rs. 2.07 crores for penalty was held not justified following *Lokenath Tolaram* v. *CIT* [1986] 161 ITR 82 (Bom) ; *CIT* v. *Sardari Lal and Co.* [2001] 251 ITR 864 (Delhi) [FB], *CIT* v. *Shapoorji Pallonji Mistry* [1962] 44 ITR 891 (SC) and *CIT* v. *Rai Bahadur Hardutroy Motilal Chamaria* [1967] 66 ITR 443 (SC).

Out of Rs. 5.77 crores, which was taken as the income base for penalty, the assessee has challenged penalty in respect of Rs. 70 lakhs which was paid by K to C, who offered it for tax in his hands, so that there could be no penalty in respect of income of third party.

(5) As regards payment of Rs. 4.10 crores to K, Rs. 70 lakhs had to be eliminated for the reason in the immediately preceding paragraph and Rs. 8 lakhs had to be excluded as pertaining to earlier years wherein they were taxed.

(6) Penalty in respect of Rs. 2.77 crores promptly offered for tax, when the documents relating to such amounts were seized during search. But the amount was in the name of S different from the assessee K, but in absence of Permanent Account Number of S and the photograph being different, this S could not be the assessee, so that the related income could not have been taxed in the assessee's hands. Penalty thereon was also, therefore, deleted.

Ratnagiri District Central Co-operative Bank Ltd.'s case

The Tribunal, in *Asst. CIT* v. *Ratnagiri District Central Co-op. Bank Ltd.* [2019] 70 ITR (Trib) (S. N.) 19 (Pune), decided the following issues as under :

Business expenditure–Provision towards overdue interest : The assessee had disclosed income on gross basis and thereafter made a provision for non-performing advances to the extent of Rs. 13.23 crores, which was allowed in the assessment, but disallowed by invoking reassessment jurisdiction. Such disallowance in reassessment was reversed in first appeal, but the Tribunal found that it is necessary to go into the manner in which the provision was reckoned and thereafter proceed in the light of such information, so that it was remanded back to the Assessing Officer.

Provision for non-performing advances : The assessee had also made a provision for non-performing advances at Rs. 65,14,898 for which details were not furnished and, therefore, added. The information was, however, furnished in first appeal, so that Rs. 54,18,898 was found to be a provision against ascertained liability and was, therefore, allowed. However, the relief allowed in first appeal was remitted by the Tribunal back to the

Assessing Officer for verification and a decision admitting any fresh evidence in the process.

Bad debts : The assessee had claimed an amount of Rs. 11,28,99,295 as bad debts and a further amount of Rs. 9,11,34,070 on account of overdue interest adding up to Rs. 20,40,33,365. The Assessing Officer found that the entire amount claimed was not debited to the profit and loss account, so that he made an addition of Rs. 20.40 crores as inadmissible. However, the Commissioner (Appeals) entertaining fresh materials deleted this addition of Rs. 20.40 crores, so that the effective addition got reduced to Rs. 2,80,95,247. The Tribunal found that the Commissioner (Appeals) had entertained new evidence without giving opportunity to the Assessing Officer, so that the matter was remitted to the Assessing Officer to decide the matter afresh.

Income under section 41(1) : While the tax audit report referred to an income of Rs. 157.55 lakhs, the assessee had shown only an amount of Rs. 1,10,03,824. The difference of Rs. 47,51,176 was added by the Assessing Officer, but it was deleted in first appeal on details filed by the assessee, but in view of the admission of fresh materials in violation of rule 46A, the order on this point was set aside and the matter remanded to the Assessing Officer to decide afresh.

Interest on non-performing advances : While interest receivable was Rs. 16.07 crores, the assessee did not take into account Rs. 4.78 crores being interest on non-performing advances not accepted by the Assessing Officer but allowed in first appeal. It was found that fresh materials were entertained on this issue as well in violation of rule 46A, so that it was also remanded to the Assessing Officer to decide the matter afresh.

Bad debts written off out of reserves : Assessee had claimed a deduction of bad debts written off out of reserves to the extent of Rs. 50,47,56,484 under section 36(1)(vii). The excess over the provision, which had been allowed, should be permissible as a deduction. Such excess at Rs. 26.31 crores not allowed by the Assessing Officer was allowed in first appeal. This was also a matter of violation of rule 46A, so that this too was remitted to the Assessing Officer for a fresh consideration.

In view of wider jurisdiction available to the Commissioner (Appeals) in deciding the appeal before him as decided in *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC), the inference of violation of rule 46A in respect of appeal jurisdiction under section 254 was a misdirection in law, so that these matters could have been entertained and decided by the Commissioner (Appeals) himself.

Vishweshwar Sahakari Bank Ltd's case

The Tribunal in *Vishweshwar Sahakari Bank Ltd.* v. *Asst. CIT* [2019] 70 ITR (Trib) (S. N.) 23 (Pune) has dealt with following issues :

Stock valuation : The assessee had stock of securities, which were required to be valued at the end of each year. Since the assessee did not adopt a uniform method, the loss claimed by him could not have been allowed, so that the Assessing Officer reworked the stock valuation disallowing the change in method of valuation during the year resulting in addition of Rs. 97,57,794. It was found that in matters of year-end valuation, it is not necessary to record any transaction on the basis of which valuation was done, so that the addition was not warranted, where the assessee changed its system of valuation as to one of cost or market value, whichever is lower, following the decision in *Kedarnath Jute Manufacturing Co.* v. *CIT* [1971] 82 ITR 363 (SC).

Method of valuation of stock : The assessee is entitled to change any method during the year as long as the changed method is consistently followed thereafter. Where it was not shown that it is consistently followed, the change in method was required to be accepted following *Chainrup Sampatram* v. *CIT* [1953] 24 ITR 481 (SC).

Computation of loss : The assessee was rightly following the method prescribed for valuation of stock of securities by Reserve Bank of India, where as a result of such valuation, a loss had arisen, it had to be amortised over the coming years. In view of this entitlement, which was not followed, the Tribunal remitted the matter for vetting the deduction, so that the assessee does not get any double deduction. Since the assessee had shifted its method of valuation from what was approved by the Reserve Bank, there was probably no entitlement to loss, as found by the Tribunal for which the matter was remanded.

Janapriya Engineers Syndicate Ltd's case

In *Janapriya Engineers Syndicate Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) 370 (Hyd), following issues were dealt with :

Section 40(a)(ia) : There was failure to deduct tax from an amount of Rs. 4.48 crores and a short-deduction of tax on payment of Rs. 55.93 lakhs. Both the payments were disallowed under section 40(a)(ia). It could have been disallowed only if the recipient had not declared the income in his gross income as provided under the proviso to section 201(1). Since the assessee had not furnished the necessary documents, disallowance and charge of interest for the period of default was held justified following *Hindustan Coca Cola Beverages (P.) Ltd.* v. *CIT* [2007] 293 ITR 226 (SC).

Unexplained investments : The assessee had agreed to purchase five acres of landed property for Rs. 3 crores which was to be paid in cash except for Rs. 15 lakhs. The assessee was unable to show the source of income of Rs. 1.5 crores, so that this amount was brought to tax under section 69B. It was the assessee's case that no such payments were made as the deal had fallen through. It is under these circumstances, the matter was remanded for verification, whether the agreement of sale was acted upon and payments were actually made.

Where searches in the case of the assessee group were made, agreements for sale, sale deeds, development agreements and receipts were discovered from which the Assessing Officer determined an amount of Rs. 6.11 lakhs as not satisfactorily explained out of Rs. 9.20 crores deployed by the assessee. The matter was remanded by the Tribunal for an opportunity to explain the matter further.

Where the assessee had purchased land for Rs. 1.34 crores, while there is a simultaneous agreement of sale of constructed property over such land for total amount of Rs. 4.72 crores out of which Rs. 2.10 crores was to be paid in cash and balance of Rs. 2.62 crores in the form of constructed area, the Assessing Officer felt that there was a shortfall of Rs. 78.37 lakhs in the assessee's accounting of the sale proceeds on the basis of registered sale at Rs. 1.31 crores and the agreed consideration of Rs. 2.10 crores, so that the difference of Rs. 78.37 lakhs was inferred to have not been routed through regular books of accounts but as unrecorded cash component taxable under section 69B. The Tribunal pointed out to the possibility of difference in value between value of consideration registered and the payment for two stages one for the land and the other for construction. There was also another sale, so that a comparison was possible to find out the truth. The matter was, therefore, remanded for enquiry in this regards in respect of addition under section 69B.

Section 69C : Where the Assessing Officer inferred unexplained expenditure to the extent of Rs. 6.30 crores on the basis of seized documents and sworn statement of a director of the assessee companies, the addition was deleted in first appeal as there were other additions, so that a separate addition of this amount was not warranted. This finding was upheld by the Tribunal.

Section 80-IB(10) : Where the assessee had claimed deduction under section 80-IB(10) in respect of the housing project on a proportionate basis in respect of flats within the permitted size, but it was disallowed for non-compliance as regards the requirements of size, the disallowance was affirmed in appeal, but the Tribunal remanded the matter as regards the stage of completion of project and size of flat, following *Dy. CIT* v. *Anand Ashok Gandhi* in (I. T. A. No. 2004/Pune/2014, dated May 27, 2016).

Flex Engineering Ltd.'s case

In *Flex Engineering Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) 417 (Delhi), the following issues are dealt with :

Search and seizure : Where there were searches in the group companies of which the assessee was one, the addition was made on account of kickbacks inferred from Volker Committee Report constituted by United Nations to examine the "oil for food" programme. The Assessing Officer had presumed without any concrete evidence found during search, that the assessee should have made money on kickback, when there was no incriminating material found for this inference, so that the addition in the assessment under section 153A was held to be without jurisdiction following *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi) ; *Pr. CIT* v. *Meeta Gutgutia, prop. M/s. Ferns "N" Petals* [2017] 395 ITR 526 (Delhi) and *CIT* v. *Sinhgad Technical Education Society* [2017] 397 ITR 344 (SC).

Unexplained expenditure under section 69C : Another pro rata addition for kickbacks of Rs. 55,675 on the same Volkar Committee report under section 69C could not be sustained as found by the Tribunal following *International Forest Co.* v. *CIT* [1975] 101 ITR 721 (J&K).

Section 80HHC : Where the assessee had failed to claim relief under section 80HHC to which it was entitled in the original return and claimed it before the Assessing Officer, it was rejected. The assessee then filed a revised return, which was also rejected. The Commissioner (Appeals) found that the claim made originally before the Assessing Officer was required to be examined, so that he directed such examination. This was upheld by the Tribunal.

Gupta and Co. Pvt. Ltd.'s Case

The following issues were decided by the Tribunal in *Dy. CIT* v. *Gupta and Co. Pvt. Ltd.* [2019] 70 ITR (Trib) 608 (Delhi) as under :

(i) *Income found during search* : The addition, which was made by the Assessing Officer and upheld in first appeal was endorsed by the Tribunal as the addition was based on certain papers seized during search, which belonged to the assessee as found by the Settlement Commission. These papers contained incriminating information, so as to justify the addition.

(ii) *Matters pending adjudication* : Where an income was inferred by the Settlement Commission to belong to the assessee, so as to be covered by the settlement, it could not also be subject matter of assessment in the hands of the assessee. The order of the Settlement Commission in this case had not attained finality as it was before the Supreme Court, though upheld by the High Court, the assessment has to be made on the lines of the High Court decision, subject to the decision of the Supreme Court as and when available.

(iii) *Unaccounted sales* : Where part of estimate of unaccounted sales was not found in the seized records, the excess was deleted as the addition has to be confined to the incriminating seized documents.

(iv) *Discrepancy in stock account* : Mere defect by way of discrepancy in stock inventory does not justify estimate of income, except where the assessee's contention that there has been no misreporting or inflation in quantity or prices of materials especially raw materials was found to be faulty. Where this exception does not apply, the addition is not justified. Since the assessee's objection had not been met, the order in first appeal deleting the addition was upheld by the Tribunal.

Gold Finch Jewellery Ltd.'s case

The Tribunal in *Gold Finch Jewellery Ltd.* v. *Dy. CIT* [2019] 70 ITR (Trib) 629 (Ahd) has dealt with following issues :

Disallowance of interest : Where the assessee had diverted its funds to the extent of Rs. 70 lakhs which were interest-bearing towards an advance for capital asset, the Assessing Officer felt that the interest to the extent of Rs. 8.70 lakhs could be treated as income foregone but assessable in the hands of the assessee. This addition was confirmed in first appeal. But since the assessee had other interest-free funds, which would accommodate the funding in capital asset, the addition was held unjustified following *CIT* v. *Reliance Utilities and Power Ltd.* reported in [2009] 313 ITR 340 (Bom) and *CIT* v. *HDFC Bank Ltd.* reported in [2014] 366 ITR 505 (Bom).

Labour charges : Where the assessee in jewellery business with a large turnover of nearly Rs. 99 crores had claimed labour expenses for making them to the small extent of Rs. 19.2 lakhs, genuineness of the labour charges could not have been doubted. When all the details of labourers with addresses and PAN were made available, an addition made without any verification of such details on the part of the Assessing Officer, merely disbelieving the payment even when tax had been deducted at source thereon, because the assessee had raised the bill only at the end of the accounting year, disallowance of the labour charges made by the Assessing Officer and confirmed in first appeal was deleted by the Tribunal.

Section 14A : Where no disallowance was made by the assessee himself, the Assessing Officer adopted rule 8D to disallow proportionate cost relating to exempt investment. This disallowance was upheld in first appeal. But it was found that there was no income from exempt assets during the year, so that disallowance was found to be unwarranted following *CIT* v. *Corrtech Energy Pvt. Ltd.* reported in [2015] 372 ITR 97 (Guj).

Car expenses/depreciation : The assessee had claimed depreciation in respect of vehicles used by it but standing in the name of its directors. Since the beneficial owner was the company, the fact that the vehicles were registered in the name of a director need not disqualify the right to depreciation, following *Mysore Minerals Ltd.* v. *CIT* [1999] 239 ITR 775 (SC). The other disallowances of interest on car loan, petrol expenses, repairs and maintenance, which had all been duly supported and related to running expenses of vehicles, were also found admissible.

Metso Minerals (India) Pvt. Ltd.'s case

The Tribunal, in *Dy. CIT* v. *Metso Minerals (India) Pvt. Ltd.* [2019] 70 ITR (Trib) 655 (Delhi), decided the following issues :

Prior-period expenses : An expense relating to an earlier year may be allowed in current year, if it could be shown that the invoice relating to payment was received only in April during the year when the liability got crystallized, so that it cannot be legitimately understood as prior-period expenses.

Business expenditure : (a) Where interest on borrowed capital was capitalised by the assessee and transferred to pre-operative expenses, the assessee cannot again ask for deduction of the same interest on borrowed capital as a deduction of business expenditure because if it is allowed, it would be tantamount to double-deduction and, therefore, not admissible.

(b) Ad-hoc disallowance towards telephone, travelling and staff welfare cannot be made, when the expenditure has direct nexus with business activities, and no instance of personal user other than user by employees had been pointed out.

(c) Repairs and maintenance should ordinarily be considered as revenue expenditure, so that any disallowance taking them as capital expenditure would not be in order.

Section 14A : Where the assessee had not claimed any part of income as exempt, the question of application of section 14A or rule 8D does not arise.

End of Volume 70