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Notes and Comments

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Accounting

Method of accounting

An assessee engaged in the business of real estate and building construction had been following project-completion method as is permissible under Accounting Standard 7. The Assessing Officer determined its business profits adopting 15 per cent. on the estimated outlay, besides an addition of advances of Rs. 50.10 lakhs received from its customers by treating the amounts as bogus advances. The additions were deleted in first appeal. The Tribunal endorsed the decision in first appeal observing that there was nothing erroneous or illegal in the accounts adopted by the assessee. The estimate of income on the basis of work done for the year as was done by the Assessing Officer was erroneous, so was the inference that advances received were bogus, so that rejection of the assessee's accounts was held to be unjustified on every count in *ITO* v. *Shanti Constructions* [2019] 73 ITR (Trib) 115 (Agra).

Income

(i) Deemed dividend – Section 2(22)(e)

In respect of a leasing transaction between the assessee, a shareholder, and the company relating to which a security deposit was to be maintained by the lessee with the lessor, it was felt by the Assessing Officer that inference of deemed dividend under section 2(22)(e) should have application for the reason that the assessee was having substantial interest in the company and the deposit as a security was a commercial one, but in first appeal, the finding of the Assessing Officer was reversed as the Commissioner (Appeals) did not agree that the security deposit in respect of land

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leased would attract the provision. All the same, he agreed with the alternative contention of the assessee that the total addition has to be restricted to total accumulated profits of the relevant year or the amount adjusted, whichever is less, after netting the amount already added as deemed dividend. The order of the Assessing Officer was, therefore, confirmed, subject to these restrictions. The Tribunal found that the security deposit is a natural consequence of any lease agreement in respect of any immovable property, so that the payment of security deposit being the result of a contractual relationship between lessor and lessee, does not give rise to any doubt that the payment of security deposit could not be treated as deemed dividend, as was held in a group of three cases in *Anil Verma* v. *Dy. CIT* [2019] 73 ITR (Trib)(S.N.) 59 (Chand).

In the same case, another issue related to the fact that total security deposit never exceeded the limit stipulated in the lease agreement. Security deposit is a matter to be settled between the parties, so that there was no scope or reason for the department to reject it. The transaction was in the course of business, so that provision relating to deemed dividend under section 2(22)(e) was held inapplicable.

A still another issue in this case related to a cash deposit of Rs. 64.25 lakhs on different dates during the year. Though the assessee had not maintained regular books, cash flow statement had been prepared to explain the credits. The Tribunal found that the opening and closing cash balances in the balance-sheet and the cash flow statement proved the source of deposits in the bank account, so that this addition too was deleted.

(ii) Disallowance under section 14A

The assessee, a company engaged in business of investments, derived income from investments made by it in its subsidiary companies as strategic investments in the course of its business, so that it cannot be treated as mere investments for earning exempt income so as to attract application of section 14A. The disallowance made by the Assessing Officer on application of rule 8D at Rs. 2,31,20,089, partly restricted in appeal was entirely deleted. In fact, the net disallowance was already deleted in first appeal as investments being strategic ones did not warrant application of section 14A. However, exclusion of strategic investments was justified also for the reason that rule 8D had application only from assessment year 2016-17, while sparing liability for the assessment year 2015-16. The Tribunal, however, held that there is no scope for a different treatment for what is inferred as strategic investments since normal expenses being managerial, clerical and office expenditure are also incurred for earning

such income. Considering the main business, which was investment, there was no scope for restricting the disallowance with reference to those investments excluded on the inference of strategic investments. It was under these circumstances, the view taken by the Assessing Officer was approved subject to a correction by way of addition to disallowance of claim for depreciation in the context of the assessee's business being only one of investments as decided in *Chettinad Holdings P. Ltd*. v. *Dy. CIT* [2019] 73 ITR (Trib)(S.N.) 31 (Chennai).

Rule 8D authorising proportionate disallowance with reference to the turnover deployed in investments yielding exempt income to total turnover, was brought into the statute only from the assessment year 2008-09 by Notification No. 45 of 2008 dated March 24, 2008 by the Income-tax (Fifth Amendment) Rules, 2008. It could not have, therefore, been applied for any year earlier to the year of Notification as was held in *Greaves Cotton Limited* v. *Asst. CIT* [2019] 73 ITR (Trib) 406 (Mum) following *CIT* v. *Godrej Agrovet Ltd.* (I. T. A. No. 934 of 2011, dated January 8, 2013 (Bom)).

In the same case, where a loan was waived, the amount payable was added without verification, whether the loan was for acquiring capital asset and whether the interest component had been allowed as a deduction for earlier years, so that the matter was remanded.

Another complaint of the Revenue that application of section 50C was not considered in respect of acquisition of a capital asset, though the stamp value was higher, was also remanded.

A still another matter which was remanded in this case related to the adoption of arm's length price without choice of the most appropriate method and the other requirements relating to procedure for determination of arm's length price.

(iii) Remission or cessation of liability

A private limited company on conversion to a public limited company had also changed the shareholding pattern, the outgoing directors selling their holdings to the continuing directors, apart from adjustments of bank loans and personal loans as between them. Accumulated loss was set off against the outstanding loan from outgoing directors to the extent of about Rs. 31 lakhs and about Rs. 1.15 crores each apart from waiver of amounts due to the extent of 1.61 crores. Such amount of waiver to the extent of Rs. 1.59 crores out of Rs. 1.61 crores was taxed in the hands of assessee company, but found in first appeal that this being related to a capital account and not claimed as expenditure, no addition on this account is warranted. Section 41(1), which bring to tax any amount due which is forgone was

also not applicable to the facts of the case. The Tribunal, however, felt that the history of the loan and the reserves, which were part of the amounts waived, was not available with details, so that the entire matter was remitted back to the Assessing Officer for fresh consideration in *ITO* v. *Team Front Line Ltd.* [2019] 73 ITR (Trib) 9 (Cochin) (following *CIT* v. *T. V. Sundaram Iyengar and Sons Ltd.* [1996] 222 ITR 344 (SC) and *Solid Containers Ltd.* v. *Dy. CIT* [2009] 308 ITR 417 (Bom).

(iv) Cash credit—Section 68

An addition for credit in the bank account of a third party, where such credit was also explained by the third party as relating to them, there can be no inference for addition in the assessee's case without any material to justify the addition as was held in a group of case in *Dy. CIT* v. *Sumeet Agarwal* [2019] 73 ITR (Trib) 148 (Jodhpur).

Where the assessee had brought in certain amount as sale proceeds of crops and such amount was deposited in a bank account used for repayment of gold loan, addition was made for failure to produce any bills and vouchers relating to the source of deposit claimed to be out of agricultural operations without details of expenditure and the date of taking gold loan, so that the addition was held justified in *Kalli Narayana Appa Rao* v. *ITO* [2019] 73 ITR (Trib) 364 (Vizag).

Where a resident assessee was maintaining a foreign bank account in Hong Kong for the benefit of two foreign firms, the marketing activities of which were within the scope of the assessee's business, an amount credited in the foreign bank explained as account belonging to these foreign firms though deposited by the assessee, there is no scope of addition of the amount in the assessee's hands as was held in *Vaibhav Lakhi* v. *Dy. CIT* [2019] 73 ITR (Trib)(S.N.) 47 (Jaipur). This precedent incidentally discussed the effect of credit card transactions. Where credit cards are used by an assessee for payments, the assessee has necessarily to explain the payments made by the use of credit cards. Where it had been done, there could be no inference of any financial irregularity with reference to other details of credit card transactions to justify any disallowance on the assumption of any unexplained expenditure in the hands of the assessee. It was also so pointed out in the same case.

(v) Share application money

Where nine companies operated by one person came together and invested about Rs. 70 lakhs in a company recently started without any prior declaration of dividend or otherwise indicating creditworthiness or scope of potential profit, such investments in share capital along with commission

thereon at Rs. 12,250, where there was no explanation as to how such a large investment is made towards share capital in such companies, it was held, could only be treated as unexplained income and, therefore, the addition of the same, which was deleted in first appeal, was reversed by the Tribunal on departmental appeal in *ITO* v. *AASI (India) Properties in Infrastructure P. Ltd*. [2019] 73 ITR (Trib)(S.N.) 50 (Delhi) following *Pr. CIT* v. *NRA Iron and Steel P. Ltd*. [2019] 412 ITR 161 (SC).

Where the share contributions along with premium were treated as unexplained credit under section 68 on the ground that no material evidence was furnished and that the premium charged was solely supported by valuation made by the Assessing Officer himself purportedly under rule 11UA read with section 56(2)(viib), the additions under section 68 and section 56(2)(viib) were deleted in *Lalithaa Jewellery Mart Pvt. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 532 (Chennai).

(vi) Mutuality principle

A society formed by members of a residential block had invested its surplus funds and its reserves meant for repairs and maintenance in fixed deposits in banks even as required by its bye-laws. The assessee was in receipt of interest from the bank in respect of both corpus and other funds. The principle of mutuality is applicable even in respect of such interest, though received from banks, because they were received on behalf of members of society from funds contributed by them. It was further decided that any expenditure relating to income covered by this principle of mutuality is entitled to be set off against each other as decided in *Windsor Home Owners Welfare Association* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 30 (Hyd).

International taxation

(i) Treatment of legal and other services

The issue related to a dispute between a non-resident and a resident in India ONGC in respect of maintenance of high resolution CT scanner inextricably connected with extraction and production of mineral oil taxable on presumptive basis under section 44BB. A non-resident lawyer by profession was engaged by ONGC to represent it before a foreign court. The question arose whether payment for his services would be construed as payment liable for tax in India, so as to require tax deduction at source. It was sought to be taxed as payment for technical service liable to tax under section 9(1)(vii). Since, however, Double Taxation Avoidance Agreements are overriding, it was understood that article 12 of the Agreement between India and U.S.A. would not treat it as technical service as no particular

knowledge or skill was made available and that, therefore, it can only be treated as professional service rendered outside India and, therefore, not liable to tax in India. It was also not directly associated within the scope of service under section 44BB, so as to be covered by presumptive taxation. But it was found that the scanner was inextricably connected with extraction and production of mineral oil, so that application of section 44BB was inevitable. It was so decided in *ONGC* v. *Dy. CIT (IT)* [2019] 73 ITR (Trib)(S.N.) 21 (Delhi) following *ONGC as representative assessee of Dewey and LeBoeuf International Company LLC, USA Dehradun* v. *Dy. CIT (IT)* (I. T. A. Nos. 1329 and 1335/Delhi/2016 dated April 25, 2018).

(ii) Accrual of income

Income derived by a non-resident from marketing services of goods exported by the assessee, where the entire marketing service had been carried outside India and with no permanent establishment for the non-resident in India, would not be taxable income of the non-resident in India as decided in *Dy./Asst. CIT* v. *Cryogas Equipment P. Ltd.* [2019] 73 ITR (Trib)(S.N.) 42 (Ahd) following *GE India Technology Center Pvt. Ltd.* v. *CIT* [2010] 327 ITR 456 (SC) and *CIT* v. *Toshoku Ltd.*, AIR 1981 SC 148.

In the same case, where the income exempt under section 10AA/80-IA(10) from export undertaking in Special Economic Zone was doubted on the suspicion that the assessee had inflated its profits from transactions with sister concerns, an inference drawn from the fact that the profit was abnormal, it was held by the Tribunal that the question of estimate of the assessee's income cannot arise when the proved payments for advertisement and sponsorship itself were not taxable in India in absence of a permanent establishment in India. The deletion in first appeal was upheld by the Tribunal following *ITO* v. *Pramukh International* (I. T. A. No. 68/Ahd/2011 dated August 12, 2016).

The Tribunal, in *Sumitomo Corporation* v. *Dy. DIT* [2019] 73 ITR (Trib) 443 (Delhi), decided a number of issues relating to international taxation as under :

(1) *Transfer outside India* : Payment for offshore supply, wherein the risks and the title were transferred to the assessee outside India, was brought to tax in India on the inference that non-resident supplier had a permanent establishment, but it was found in first appeal that this inference was incorrect, so that it was held that the non-resident had no liability in India. The risk, customs clearance, inland transport, etc., had all been transferred outside India, so that such offshore supply of equipment abroad was not taxable in India. It was also found that a similar inference for an earlier year found in favour of the assessee was accepted by the Department,

so that there could be no liability for the non-resident for this year as well in India, following *Ishikawajima-Harima Heavy Industries Ltd*. v. *DIT* [2007] 288 ITR 408 (SC).

(2) *Supervisory charges* : Supervisory charges received in respect of service to a non-resident with the entire expenses of the persons deputed by the non-resident being borne by the non-resident, the payments, which related to many purchase orders were all treated independently of each order being for a deputed period of less than 180 days. The inference that such supervisory services could be treated as technical service was found to be erroneous being contrary to article 12(2) of the Double Taxation Avoidance Agreements between India and Japan, so that there could be no liability for the non-resident as the amount not being business income or fees for technical services following the decision in the same case in *CIT* v. *Sumitomo Corporation* [2016] 382 ITR 75 (Delhi) and other cases in *DIT* v. *Mitsubishi Corporation* and *Jacabs Civil Incorporated* [2011] 330 ITR 578 (Delhi) and *DIT* v. *Alcatel Lucent USA Inc* [2014] 2 ITR-OL 276 (Delhi) followed by the Tribunal in *Nortel Networks India International Inc.* v. *Asst. CIT (I. T.)* [2014] 33 ITR (Trib) 97 (Delhi).

(3) *Advance tax* : An amount which, if at all taxable, requires tax deduction at source does not impose any liability for payment of advance tax, so that no interest could be charged under section 234B for failure to pay advance tax following *DIT* v. *Mitsubishi Corporation* and *Jacabs Civil Incorporated* [2011] 330 ITR 578 (Delhi).

(4) *Loss in operation and maintenance of a project* : Loss in operation and maintenance of a project was disallowed on the inference that the loss was on account of loss of fees for technical services, so that it was disallowed by the Assessing Officer and the disallowance upheld in first appeal purportedly following the order of his predecessor. The Tribunal found the nature of fees for operation and maintenance could not be treated as technical service under article 7(3) of the Double Taxation Avoidance Agreements between India and Japan on net basis, so that the loss was found admissible.

(5) *Extra claim for additional work* : Payment of extra claim for additional work in erection and commissioning and for timely completion amounting to Rs. 1.70 crores, was taxed as fees for technical services taxable on gross basis under section 44D. In first appeal, it was found that the facts were not clear for a decision, whether the payment was for technical service or otherwise. But the Tribunal, after going through the operation and maintenance contract, found that it related to services for construction

and assembly in the nature of business, so that it could not be taxed as payment for technical service.

(6) *Transportation charges* : Transportation charges claimed at Rs. 1.97 crores was partly disallowed to the extent of Rs. 1.25 crores as this part of the payment was paid by the assessee to another. It was held that the payment, which was for transportation of materials supplied, being an existing and ascertained liability, was clearly deductible as business expenditure and that the disallowed amount was also found to have been physically paid, so that the disallowance was held unjustified.

(7) *Accounting of interest earned* : Interest earned was disclosed at Rs. 2.88 crores in the original return, but revised after enquiry on the ground that the initial omission was an inadvertent error. Accepting that it was not a deliberate mistake and that the income by a mistake was accounted though not under the head interest, so that the addition was deleted.

(8) *Credit for tax deducted* : Where the Assessing Officer had not given credit for tax deducted to the extent of Rs. 2,86,48,984 claimed in the return without any reason, though all the details had been furnished, the Tribunal directed the Assessing Officer to grant credit for tax deducted at source.

(iv) Royalty

Payment for purchase of a software, which was a copyrighted article, does not amount to payment for copyright itself, so that such payment cannot be construed as royalty falling within the scope of section 9(1)(vi). The addition of the amount made by the Assessing Officer as royalty was confirmed in first appeal. The purchase of the software known as Brew was found by the Tribunal to be taxable under section 9(1)(vi) besides article 12 of the Indo-U.S. Double Taxation Avoidance Agreements. Another agreement along with this one for supply of test tools was of the same nature as one for helping the operation of the Brew system, so that the income from the same has to be treated as supply of Brew system itself as decided in *Qualcomm Technologies Inc.* v. *Dy. CIT* [2019] 73 ITR (Trib) 573 (Delhi) following *DIT* v. *Infrasoft Ltd.* [2014] 3 ITR-OL 333 (Delhi), because the licence agreement shows that the payment was for a non-exclusive non-transferable licence for the use of software in accordance with the agreement. There is a vast difference between the sale of copyright itself and sale of a copyrighted article as pointed out in this case.

Double Taxation Avoidance Agreements

Management fee

Management fee received by an assessee from its subsidiary cannot be construed as fees for technical services as there is no parting with any technology, the amount being received as part of its business income, which is taxable only if the non-resident has permanent establishment, business connection or other significant economic presence in India. In the absence of any such presence in India in the assessee's case and in the light of article 5(6)(b) of the Double Taxation Avoidance Agreements between India and Singapore, which is overriding, liability is not warranted for a non-resident even for this reason.

Another issue decided in this case relates to question of exposure of non-resident to Indian income to pay advance tax in the matter of interest received by it. Since such interest, as had already been found, is not taxable in India, there can be no obligation to pay advance tax. Even otherwise, an amount, which is liable for tax deduction at source, cannot be subject to advance tax as was also decided in *Dimension Data Asia Pacific Pte. Ltd.* v. *Dy. CIT* [2019] 73 ITR (Trib) 213 (Mum).

Another matter covered by articles 7 and 12 of the Double Taxation Avoidance Agreements between India and Singapore related to payment by a resident to a non-resident in Singapore for providing bandwidth services. The non-resident itself did not have any equipment deployed by it for access to such bandwidth services. It did not also have any permanent establishment or business connection in India, so that there was no liability in the context of either section 195 or 195A in respect of the payment for bandwidth services to the extent of Rs. 95,14,725 and in the light of articles 7 and 12(3) of the Double Taxation Avoidance Agreements between India and Singapore. The amendment to section 9(1)(vi) relating to the definition of "royalty" also did not make any difference to the conclusion on the issue before it in absence of any permanent establishment or business connection for the non-resident in the light of article 7 of Double Taxation Avoidance Agreements between India and Singapore as was decided by the Tribunal in *Dy. CIT* v. *Reliance Jio Infocomm Ltd.* [2019] 73 ITR (Trib) 194 (Mum).

Transfer pricing

(i) Determination of arm's length price

The assessee, a renowned actress, acted as brand ambassador in various activities like cricket matches, photo-shoots, press interviews and personal appearances. The assessee's husband entered into an agreement for

purchase of shares in a foreign company in which the assessee was a signatory binding her for rendering certain services without any charge to the 100% subsidiaries of the company. The non-resident company was treated by the Assessing Officer as an associated enterprise and the transactions were treated as international ones, so as to attract transfer pricing rules in the context of the fact that the income arose in India. The services of the assessee were to be rendered in India for a period of 18 days at Rs. 30 lakhs per day. But the Assessing Officer determined the arm's length price at Rs. 540 lakhs as a transfer pricing adjustments, which was confirmed in first appeal following the order in first appeal for earlier year in the same assessee's case. The Tribunal, on further appeal by the assessee, found that there was no scope for inference of the share-purchase agreement as one involving an associated enterprise inasmuch as a prerequisite of a prior agreement between a non-associated enterprise with an associated enterprise was not fulfilled, so that Chapter X could have no application. Section 92 itself is not an independent charging section, so as to bring in a new head of income. In this context it was held that there could be no transfer pricing adjustment in this case in *Shilpa Shetty* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 56 (Mum) following the same case *Shilpa Shetty* v. *Asst. CIT* [2018] 13 ITR (Trib)-OL 402 (Mum).

In the same case, a disallowance under section 14A on adoption of rule 8D on the ground that the assessee had made investments with exempt income, was confirmed in first appeal. The matter was remitted for verification whether the impugned investments had actually yielded any exempt income following *Asst. CIT* v. *Vireet Investment (P.) Ltd.* [2017] 58 ITR (Trib) 313 (Delhi) [SB].

(ii) Comparables

Comparability does not depend upon the terminology used in the agreements as the assessee had with these comparables, but on comparability of their respective businesses, so that where the Assessing Officer on the basis of comparison of the two different agreements, justified the mark-up of five per cent. as against the amount substantially enhanced by the Transfer Pricing Officer by adopting the profit-split method as the most appropriate method as against internal comparable uncontrolled price method canvassed by the assessee. The upward adjustment on the recommendation of the Transfer Pricing Officer to the extent of Rs. 389 crores on adoption of a higher percentage of 10 per cent. of service revenue as against 5.25 per cent. by the Transfer Pricing Officer, the addition was reduced by the Dispute Resolution Panel to Rs. 289 crores. On further appeal to the Tribunal, it was found that the agreements were distinct and

clear with compensation depending upon the nature of services performed, which is the true test for comparability and not mere terminologies used in the agreement. The inference against the assessee merely with reference to nomenclature without appreciating the difference in nature of services was found unacceptable to the Tribunal. It was also found that, even where the profit-split method is adopted, the procedure described in Circular No. 2 of 2013 dated March 26, 2013 [2013] 352 ITR (St.) 1 would require to be taken into consideration. It was found that the Transfer Pricing Officer had wrongly applied section 44C, which applies to payments to headquarters and not to associated enterprises, so that there was a basic mistake in the approach of the Assessing Officer. The upward adjustment made by the Transfer Pricing Officer and upheld by the Panel to the extent of Rs. 289 crores was entirely deleted by the Tribunal in *Synergy Maritime P. Ltd.* v. *Dy. CIT* [2019] 73 ITR (Trib)(S.N.) 6 (Chennai).

Software development service is a distinct service, so that a comparable for a company engaged in such services could only be another company engaged in software development services, while engineering services are quite distinct from software development services. A comparable engaged in engineering services cannot be compared with software development services rendered by the assessee, as was pointed out in this case in *Approva Systems Private Ltd*. v. *Dy. CIT* [2019] 73 ITR (Trib) 219 (Pune).

Charities

(i) Section 2(15)

The assessee was a statutory body with the object of carrying out planned urban development by allotment of sites and flats to economically weaker sections of the society at concessional rates. The income from allotment of sites and flats was to be solely applied for constructing grade separators, bridges on flyovers, renovations and remodeling, which were themselves prompted by the object of general public utility, so that it fell within the definition of "charitable purpose" under section 2(15). The Assessing Officer felt that its activity of selling sites by auction to highest bidder did not serve the purpose of providing affordable housing to the public and denied exemption. Such denial was upheld in first appeal. But the Tribunal found that broader purpose of preservation of environment and water bodies could not be characterized as merely commercial in character. The sites and flats were made available only to the economically weaker sections constituting the poor in the society, so that it satisfies the object permissible under section 2(15). Its income was also used for putting up public facilities, the entire activities being prompted by planned urban development of the city and not for profit making, entitling the assessee to

exemption under section 11 in *Bangalore Development Authority* v. *Dy. CIT (E)* [2019] 73 ITR (Trib) 711 (Bang).

(ii) Cancellation of registration

As regards information received by the Commissioner regarding the receipt of sum of Rs. 85 lakhs in exchange for cash, the amount received was claimed by the assessee as donations. The assessee was neither apprised of this information nor allowed to cross-examine the persons, who made such allegations. It was also found that even a wrong donation in one year does not justify cancellation of registration for other years, so that cancellation was retrospective in effect, which is not justified. It was under these circumstances, the cancellation to the extent it was retrospective was held impermissible in *Urmila Devi Charitable Trust* v. *CIT (E)* [2019] 73 ITR (Trib)(S.N.) 12 (Delhi) following *Andaman Timber Industries* v. *CCE* [2016] 38 GSTR 117 (SC) and *Asst. CIT* v. *Agra Development Authority* [2018] 407 ITR 562 (All).

(iii) Exemption

A mere incidental or ancillary activity such as hiring out of art gallery or selling paintings cannot be construed as commercial in character in the case of a charitable trust or institution, which is registered, so that the right to exemption could not be denied. The exemption disallowed by the Assessing Officer was reversed in first appeal in the view that the rental income of Rs. 4.80 crores and receipts from galleries and miscellaneous income to the extent of Rs. 8,12,987 could not be treated as falling under the second proviso to section 2(15) merely because receipts exceeded Rs. 10 lakhs. It is to be noted that rental income is income from property and that other miscellaneous income could not be treated as business income, prompting the Tribunal to dismiss the departmental appeal against exemption in *ITO(E)* v. *All India Fine Arts and Crafts Society* [2019] 73 ITR (Trib)(S.N.) 25 (Delhi) following the decision in the same case in *All India Fine Arts and Crafts Society* v. *Addl. CIT(E)* [2019] 15 ITR (Trib)-OL 1 (Delhi)

Income from house property

(i) Annual value

The only information relating to rental income was the annual let-out value available from the Cantonment Board. Since there was no other information as regards the fair rent in excess of annual value available from Cantonment Board, the Assessing Officer had no option except to adopt such value placed by Cantonment Board for purposes of computation of

income from property as well, as decided in a group of cases in *Radhika Roy* v. *Dy. CIT* [2019] 73 ITR (Trib) 239 (Delhi).

(ii) Notional rent

Inference of notional income as rent from unsold flats in the hands of real estate developer was held to be non-taxable income, where no income has actually been earned by the assessee. It is for the reason that the unsold flats are only stock-in-trade of the assessee's business awaiting sale, that they could not ordinarily be let out. Inference could have been different, if the assessee was a developer, who held the constructed property as part of its business. It was this law, which was explained in *Kolte Patil I-Ven Townships Pune Ltd*. v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 49 (Pune). It was so held in the same case in *Kolte Patil Developers Ltd*. v. *Dy. CIT* [2019] 72 ITR (Trib)(S.N.) 20 (Pune) following *CIT* v. *Neha Builders P. Ltd*. [2007] 164 Taxman 342 (Guj), *C. R. Developments P. Ltd*. v. *CIT* (I. T. A. No. 4277/Mum/2012 dated May 13, 2015), *Cosmopolis Construction* v. *ITO* (I. T. A. Nos. 230 and 231/Pune/2018 dated September 12, 2018).

The same issue had come up in another case in *Bengal DCL Housing Development Co. Ltd*. v. *Dy. CIT* [2019] 73 ITR (Trib)(S.N.) 70 (Kol), which dealt with a special purpose vehicle promoted by West Bengal Housing Board to undertake large-scale construction of housing complexes within the State. In this case, the Assessing Officer estimated notional income from unsold flats at Rs.56,09,885 after allowing special deduction under section 24 at 30 per cent. brought to tax as income from house property. Income from house property is taxed in the hands of owners, while in the case before it, the Scheme is operated by assessee at the behest of State Government to promote housing in the State. It is never the intention that the assessee should hold the property for deriving income from rent. The apartments were waiting to be allotted as and when willing purchasers come forth. On the fact that the unsold flats were disclosed as "inventory" in the balance-sheet, such apartments cannot be treated as giving rise to income from property, so as to attract section 23(1)(c) as the assessee was not to be the owner of the finished apartments.

(iii) Business income

The assessee had constructed a mall at Gauhati maintaining the property and providing necessary service to the tenants, but its income was assessed as income from property, but it was concurrently found in first appeal and the Tribunal that its primary object is not letting out property but the commercial activity of exploitation of immovable property as a business asset, so that the income was held to be assessable as business

income in *Dy. CIT* v. *ATC Realtors P. Ltd.* [2019] 73 ITR (Trib)(S.N.) 54 (Gauhati) following *PFH Mall and Retail Management Ltd.* v. *ITO* [2008] 298 ITR (AT) 371 (Kol), *Asst. CIT* v. *Steller Developer (P.) Ltd.* [2015] 68 SOT 34 (Mum) and *Shreeji Exhibitors* v. *Asst. CIT* [2015] 42 ITR (Trib) 596 (Mum).

In the same case, the investment made by the assessee in business, besides share capital and premium of Rs. 90 lakhs, the further investment of Rs. 1.5 crores, it was held should also be accepted, in absence of any facts to distinguish the facts of the case for the year, so that the addition was deleted by the Tribunal following *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC). Another issue decided in this case, related to parking fee paid by the assessee for its own use, which was disallowed to the extent of 20 per cent. of such payment, but the addition was deleted as the books themselves had been accepted in the assessment order under section 143(3). The books not having been rejected, the disallowance was held unwarranted.

Depreciation

(i) Rate

A computer, which forms an integral part of an automated teller machine would be eligible for higher rate of 60 per cent. available for computers on its cost, notwithstanding the fact that the automated teller machine is eligible only for depreciation at 15 per cent. as was decided in *Financial Software and Systems P. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 14 (Chennai) following *Royal Bank of Scotland N. V.* v. *Dy. DIT (IT)* [2016] 47 ITR (Trib) 513 (Kol) and *CIT* v. *Saraswat Infotech Ltd.* (I. T. A. (L) No. 1243 of 2012 dated January 15, 2013 (Bom)) .

(ii) Intangible asset

An assessee, who had a contract with National Highways Authority of India for construction of toll road under Build, Operate and Transfer (BOT) contract with right to collect toll fees, should be taken to have acquired an intangible asset, so as to be entitled to depreciation as was held in *Mokama Munger Highway Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 62 (Hyd) following *Ashoka Infrastructure Ltd.* v. *Asst. CIT* [2017] 189 TTJ 749 (Pune).

Another issue in this case related to a provision for maintenance of the roads to be incurred in future claimed to have been made on a scientific basis. But since this claim was not examined by the Assessing Officer, the matter was remanded back to the Assessing Officer to examine the alleged

scientific method as to whether it forms reasonable basis for allowing the provision as a deduction.

Business loss

When deductible ?

Where the assessee has suffered loss in respect of e-commerce transaction by a sale less than the cost price, it was sought to be disallowed on the ground that the loss was occasioned due to predatory pricing and was incurred as capital expenditure. The debit being a loss shown in the profit and loss account could not have been disregarded and was, therefore, allowed as a deductible loss in *Joint CIT* v. *Flipkart India Pvt. Ltd.* [2019] 73 ITR (Trib) 392 (Bang).

Business expenditure

(i) Breach of lease agreement

Loss incurred by the assessee on forfeiture of deposit for breach of lease agreement was disallowed by the Assessing Officer. The lease agreement had been terminated by the assessee for failure of the landlord to provide electricity connection, so that the loss was held to be allowable as business loss by the Tribunal in *Nalli Trust* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 3 (Chennai) following *CIT* v. *Mysore Sugar Co. Ltd.* [1962] 46 ITR 649 (SC) and *Tamilnadu Magnesite Ltd.* v. *Asst. CIT* [2018] 407 ITR 543 (Mad).

In the same case, interest on borrowings for a deposit with Harvard University to the extent of Rs. 89.51 crores for higher education of his daughter claimed as a deduction as interest under section 36(1)(iii) was disallowed on the ground that the borrowings was not for purpose of the assessee's business. Since the assessee's daughter started working for the assessee with business benefiting by her participation, it was held that the expenses were incurred for the assessee's business and that interest could not have been disallowed.

(ii) Employees' contribution to provident fund

Section 36(1)(va) provides for deduction of the employers' contribution to provident fund, once such amount has been collected from the employees. Such deduction and deposit of the amount so deducted should have been paid before the due date under the relevant Labour Welfare Act. Any failure on the part of the assessee would justify the disallowance as was held by the Tribunal in *K. K. Purushothaman* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 28 (Cochin) following *Popular Vehicles and Services Pvt. Ltd.* v. *CIT* [2018] 406 ITR 150 (Ker).

Issue relating to deduction under section 36(1)(va) was remanded in *Lalithaa Jewellery Mart Pvt. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 532 (Chennai) relying upon the decision in *CIT* v. *Industrial Security and Intelligence India (P.) Ltd.* (T. C. (A) Nos. 585 and 586 of 2015 dated July 27, 2015).

(iii) AB Capital's case

The Tribunal, in *Asst. CIT* v. *AB Capital* [2019] 73 ITR (Trib) 23 (Kol), has decided the following issues on business expenditure as under :

Interest on borrowed capital : The assessee, which had borrowed Rs. 5.37 crores out of which Rs. 4.75 crores were given to its two partners claimed to have been made for purposes of meeting business promotion expenses, furnished details to support the claim including records of actual payments made after deduction of tax at source. However, the entire interest payment of Rs. 75,59,235 was disallowed by the Assessing Officer purportedly under section 36(1)(iii) of the Act. It was found concurrently in first appeal and the Tribunal, that the assessee had explained the purpose of the loans supported by payments in ledger accounts with explanations for the drawings. There could have been no reason to disbelieve the assessee's explanation without any proof or even an allegation as to the incorrectness of the explanation, so that the disallowance was found unsustainable.

Ad hoc disallowance : An ad hoc disallowance of 30 per cent. made by the Assessing Officer out of business promotion expenses was found unsustainable, besides a disallowance of even salary payments in respect of insurance commission business for which an income of Rs. 14.27 crores was disclosed.

Salary : The disallowance of salary to the extent of Rs. 9.13 crores was held not justified in the context of absolutely no reason having been given for such an ad hoc disallowance in this case. It was also incidentally found that the partners' accounts themselves had substantial balances to their credit as against the amount shown to have been advanced to them. Further, the disallowance was calculated at 16 per cent. of the advance for the year, while the advance itself was made practically towards the end of the year.

(iv) Interest on borrowed capital

The assessee was setting up a business incurring expenses on capital work-in-progress and as capital advances of an amount of Rs. 18 crores of which the Assessing Officer disallowed an interest payment of Rs. 53,70,247 under section 36(1)(iii). This disallowance was held unjustified as

similar payment of interest from brought-forward liability had been allowed in the earlier year. A further disallowance of Rs. 33,75,694 under section 36(1)(iii) as interest paid for borrowing for non-business purposes was deleted, as nothing was shown to indicate that any disallowance was for non-business purposes in *Dy. CIT* v. *BBF Industries Ltd.* [2019] 73 ITR (Trib) 428 (Chand) following *CIT* v. *R L Kalthia Engineering and Automobiles P. Ltd.* [2013] 215 Taxman 9 (Guj) (Mag), *Asst. CIT* v. *Upper India Steel* (I. T. A. No. 920/Chd/2009 dated February 8, 2012), *CIT* v. *Reliance Utilities and Power Ltd.* [2009] 313 ITR 340 (Bom), *Bright Enterprises Pvt. Ltd.* v. *CIT* [2016] 381 ITR 107 (P&H), *Asst. CIT* v. *Deepak Builders* (I. T. A. No. 1000/Chd/2013 dated February 26, 2016) and *Asst. CIT* v. *Omax Bikes Ltd.* (I. T. A. No. 1085/Chd/2013 dated August 6, 2015).

In the same case, the disallowance under section 14A to the extent of Rs. 1,22,13,515 by adopting rule 8D was deleted as no exempt dividend was received from its investments during the year following *CIT* v. *Lakhani Marketing INCL* [2015] 4 ITR-OL 246 (P&H), *CIT* v. *Delite Enterprises* (I. T. A. No. 110 of 2009—Bom), *CIT* v. *Kapsons Associates* [2016] 381 ITR 204 (P&H), *CIT* v. *Shivam Motors Pvt. Ltd.* [2015] 230 Taxman 63 (All), *Empire Packages (P.) Ltd.* v. *Dy. CIT* (I. T. A. No. 1186/Chd/2013 dated May 23, 2016), *Ganeshay Overseas Ltd.* v. *Dy. CIT* (I. T. A. No. 186/Chd/2015 dated October 19, 2015) and *Interglobe Enterprises Ltd.* v. *Dy. CIT* [2015] 4 ITR (Trib)-OL 300 (Delhi).

(v) Lease rent

As regards disallowance of lease advance of Rs. 15 crores towards rental agreement amounting in all to three months monthly rent, the matter was remanded for further examination in *Lalithaa Jewellery Mart Pvt. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 532 (Chennai).

Capital gains

(i) Computation of long-term capital gains in the light of section 50C

Where an addition was made on the difference between the admitted consideration of Rs. 155 lakhs as against stamp value of Rs. 2,61,53,980, the matter on the assessee's objection was referred to District Valuation Officer, who adopted a value even higher than what was fixed by stamp duty authority, a course of action, which was primarily unwarranted without any evidence of receipt of such amount. The Tribunal pointed out that the reason for the difference was dependent on the fact that it was a residential property as per record, but the location as well as use of it was for commercial purposes explaining the higher stamp value. The location by itself cannot convert a residential property into a commercial one, so

that there was a misdirection in valuation on the part of the District Valuation Officer. The difference between State Public Works Department and Central Public Works Department rate also required to be reconciled. The comparables relied upon by the District Valuation Officer were not put to the assessee for rebuttal. For all these reasons, the estimate by the District Valuation Officer was set aside for redetermination afresh after considering the objections of the assessee in *Vijay Kumar Patni* v. *ITO* [2019] 73 ITR (Trib) 36 (Jaipur).

(ii) Computation

Where the issue related to deduction of transfer fees and development charges paid to a housing society in computation of its business income in trading in commodities and shares, the disallowance of such payment notwithstanding production of receipt for the payment was not warranted because the Assessing Officer had no reason to disallow the same. If he had any doubt, he could have got confirmation from housing society to which the payments were made. The disallowances, not having any cogent materials, were, therefore, found to be unjustified in *Dinesh Chhaganlal Thakkar* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 23 (Ahd). In the same case, it was held that the assessee's claim for bad debt in its brokerage business in respect of outstandings due from customers, but not settled by them, could be treated as an expenditure or loss incurred in the course of business or allowable as bad debt.

(iii) Short-term or long-term capital gains

The assessee had transferred shares, which were purchased at low price merely for obtaining interest-free loan equivalent to market value of shares. Since the consideration that accrued was same as prevailing market price, capital gains had to be worked on that basis. Since the assets were held under the depositories mechanism, the determination as between long-term and short-term holdings has to be decided on first-in-first-out basis. It was on this basis, the income of Rs. 1.30 crores had to be treated as short-term capital gains as inferred by the Assessing Officer and confirmed in first appeal. The Tribunal justified this inference because of the law on the subject relating to shares held in depositories account. The assessee himself declared an income of Rs. 1,67,64,284, but without admitting that it was short-term capital gains, so that the tax liability, if it were not short-term capital gains, worked out to Rs. 108 crores. The Assessing Officer's inference that the amount related to short-term capital gains was not found to be based upon the report of the Investigation Wing and application of his mind to the facts of the case so as to show a live link between

tangible materials on the basis of which he formed his belief. He had, however, computed short-term capital gains at Rs. 130 crores. The Tribunal found that after introduction of section 45(2A) and the Depositories Act, 1996, the inference drawn by the authorities that the surplus had to be understood as short-term capital gains, first-in-first-out method was upheld.

The Assessing Officer determined the consideration on the basis of certain quotations from stock exchange at Rs. 135 per share reckoning the receipts at Rs. 78.05 crores for purposes of calculation of capital gains. He was of the view that he was entitled to adopt full value of consideration irrespective of any other factor. Considering the fact that the sale was of shares of a closely linked and controlled company, which were pledged to another company for raising a huge loan free of interest, the matter of valuation cannot be linked with the agreement for loan, so that the matter was directed to be further considered after taking into account the call option agreement.

As regards the shares jointly purchased between husband and wife in connection with accommodation for interest-free funds, the price adopted has to be considered in the light of the whole transactions making light of the guise of loan agreement. The adoption of Rs. 4 per share as against the price quoted in stock exchange at Rs. 140 per share would clearly indicate under-estimation of capital gains to the extent of Rs. 55.89 crores.

As regards the difference in share price, the price adopted was justified. But the Assessing Officer felt that he is entitled to adopt the fair market value even if it resulted in deemed income, so that the addition of Rs. 43.82 crores was held justified. The Tribunal, however, felt that the fair market value has to be determined under rule 11UA, which permits the adoption of quotations in a recognised stock exchange, so that the addition on this basis was held justified and the entire addition of Rs. 43.82 crores was confirmed by the Tribunal in *Radhika Roy* v. *Dy. CIT* [2019] 73 ITR (Trib) 239 (Delhi).

As regards another issue, relating to a property in Mussoorie, the Assessing Officer estimated the assessee's share of rent from the property at 0.8 per cent. at cost at Rs. 65,35,315, so that the monthly rent came to Rs. 52,000 and the annual rent at Rs. 6,24,000 after special deduction of 30 per cent. under section 24, the income was determined at Rs. 4,36,800. In first appeal, the Commissioner (Appeals) wanted a remand report for working out the fair rental value on the basis of prevailing rent as per websites. He decided that the annual income should range between 7.5 per cent. to 10 per cent. of the cost for the covered area of the property let out, so that he

fixed a monthly rental of Rs. 52,272 per month and annual value of Rs. 6,27,264, so that the net addition after special deduction came to Rs. 2,19,542. The Tribunal felt that annual letting value as fixed by Cantonment Board should have been accepted as against hypothetical method adopted for determination of rent with reference to cost. The reduction in the estimate of income from Mussoorie property was taken up by the Department in first appeal, where no additional evidence was admitted.

In another case, the assessee was a regular investor in shares and mutual funds. There was a loss suffered during the year. But it was disallowed as a colourable device for creating a loss, so as to enable set-off of long-term capital loss carried forward by the assessee from the past. The inference that the income was from capital gains was not consistent with the view adopted in the earlier year in the same case, so that the set off claimed was disallowed by the Assessing Officer and confirmed in first appeal. The Tribunal found that no similar disallowance was made for such transactions in the past. The loss related to only investments in mutual funds, which formed a mere 1.38 per cent. of total investments during the year at Rs. 3,604.39 crores. There was, therefore, no scope for suspicion. The Tribunal, therefore, directed acceptance of loss from capital gains and allowed set off in *Agencies Rajasthan P. Ltd.* v. *ITO* [2019] 73 ITR (Trib) 633 (Jaipur) following *CIT* v. *Walfort Share and Stock Brokers (P.) Ltd.* [2010] 326 ITR 1 (SC) and *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC).

Another item discussed in this case related to payment of salary to the extent of Rs. 15,42,282 for employees out of which Rs. 5.4 lakhs related to directors. The assessee had shown business income of Rs. 59.91 lakhs with interest from money-lending business to a large number of parties amounting to Rs. 21.06 lakhs apart from interest at Rs. 7.74 lakhs from fixed deposits. The claim that the expenditure on salary related to business was not accepted by the Assessing Officer, so that he disallowed the entire salary paid to employees to the extent of Rs. 15,42,282, which was reduced by Rs. 1 lakh in first appeal. The Tribunal, considering the facts of the case, found that in the absence of any item of expenditure relating to personal user or diversion for non-business purposes, limited the disallowance to 10 per cent. of the expenditure at Rs. 1,54,228 after oddly pointing out that the assessee was best judged to take care of his own interest and to take decisions. If so, why the disallowance ?

(iv) What is transfer ?

The assignment of a know-how relating to an oncology product under development was understood as a transfer of know-how for the right to manufacture, so as to attract tax on capital gains. It was, however, found that there was no right to manufacture involved at the stage of assignment. There was also no cost because it was a self-generated asset, so that it was held that there was no chargeable capital gains within the meaning of section 55(2)(a) as was held by the Tribunal in *Bharat Serums and Vaccines Ltd. v. Asst. CIT* [2019] 73 ITR (Trib) 205 (Mum).

(v) Section 54B

Section 54B grants relief for reinvestment of profit on sale of agricultural land, if made on other agricultural lands. In considering what constitutes sale of agricultural land, the Tribunal in *Rajendra Bastimal Chordiya* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 68 (Pune) pointed out that the land that is sold need not be completely covered by agricultural operations during the year and for two immediately preceding years for purposes of requirement of relief under this section. Where it is partly cultivated, proportionate deduction could be allowed, so that what could not be allowed is only proportionate disallowance as held following *Dy. CIT* v. *Mahesh Danabhai Patel* (I. T. A. No. 1534/Pune/2015 dated January 31, 2018).

(vi) Section 54F

The assessee had declared profit by way of capital gains on sale of land amounting to Rs. 53.6 lakhs, but claimed relief under section 54F with reference to investment made in a housing project to the extent of Rs. 40 lakhs. Since the property purchased was not taken possession of, the claim was disallowed by the Assessing Officer and confirmed in first appeal. The Tribunal found that the affairs of the company was handled by its director and that there was no evidence or any other reason for not getting possession of property in respect of which relief under section 54F was claimed. Moreover, the company had shown a receipt of Rs. 40 lakhs as loan from the purchaser and not as an advance for sale of property, so that the entries in the assessee's books which are crucial for deciding the intention behind the transactions did not support the assessee's case, so that relief claimed was disallowed in *Yunus Yasin Qureshi* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 38 (Ahd).

Incentive deductions

(i) Section 10AA v. section 80-IA(8)/(10)

The assessee was a manufacturer and trader in gold jewellery located in a special economic zone along with a unit outside the zone. The Assessing

Officer felt that the businesses of both units inside and outside the special economic zone being similar, there was no justification for the assessee to show extraordinary profits in respect of exempt unit, so that it was felt that this claim was exaggerated. The Assessing Officer limited the relief to three per cent. of admitted turnover for relief under section 10AA without in any manner indicating any miscalculation in the amount claimed as relief by the assessee under section 10AA. The onus is strictly on the Assessing Officer to discredit the claim. Merely because one unit shows an abnormal profit as against the other unit, the same profit cannot be presumed for the other. It is also found that even where deduction was claimed under section 10AA, the Assessing Officer on a wrong reference applied the conditions under section 80-IA(8) and (10), which were not applicable for a claim under section 10AA at all. The deletion of disallowance in first appeal was, therefore, upheld by the Tribunal in *SJR Commodities and Consultancies P. Ltd*. v. *ITO* [2019] 73 ITR (Trib)(S.N.) 1 (Mum).

(ii) Section 80JJAA

In *Financial Software and Systems P. Ltd*. v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 14 (Chennai), the claim for eligibility of deduction under section 80JJAA on salary paid to workmen, who were additionally employed amounting to Rs. 4,75,71,586 was the issue. The deduction was disallowed by the Assessing Officer but allowed in first appeal. On further appeal, the Tribunal decided that additional employees were engaged for duties in computer software and such employees had also to be regarded as workmen within the meaning of the Industrial Disputes Act, so that the assessee was entitled to weighted deduction by way of additional deduction under section 80JJAA, subject to the assessee obtaining a report in this regard and filed before the Assessing Officer preferably before the completion of assessment as was also pointed out in this case.

Mat/book profits tax

Section 115JB

Diminution in value of debts due was sought to be brought within the scope of book profits tax overlooking the bar against such addition by insertion of *Explanation 1* to section 115JB by the Finance (No. 2) Act, 2009 with retrospective effect from the assessment year 2001-02. However, the assessee's return in this case was filed for the assessment year 2007-08 before the date of retrospective amendment, so that the assessee cannot justifiably be expected to file a return, when he had no knowledge of amendment yet to be adopted. It was pointed out, it was not possible for the assessee to file a revised return after the amendment because the time

limit for revised return had also already expired. It was under these circumstances, the additions to the book profits with reference to the retrospective *Explanation 1* was found untenable in the assessee's case in *Bobcards Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 1 (Mum).

In the same case, two other issues were also decided :

(1) An amount of write-back of Rs. 363.37 lakhs out of a provision of Rs. 3,449.82 lakhs could not have been lightly questioned because even after the write-back, the provision was found to be excessive with reference to the resultant figures available for later years, so that in absence of anything to controvert the amount written back, there was no adjustments necessary in computation of book profits especially when a similar treatment on the part of the Assessing Officer for the immediately preceding year was found untenable, so that in absence of any change in material facts, the order of earlier years was bound to be followed.

(2) Disallowance of tax deducted but deposited at source for payments made to Visa/Master Card by the Assessing Officer for the immediately preceding year had been found to be unjustified concurrently in first appeal and the Tribunal, so that a different view, it was held, is not possible in the light of the binding decisions of the previous year as held in *CIT* v. *HCL Comnet Systems and Services Ltd.* [2008] 305 ITR 409 (SC).

Assessment

(i) Computation of income of electricity company from generation of electricity

Electricity is a State monopoly governed by All India Legislation under the Indian Electricity Act, 2003, which fixes the price at which the distribution agency is bound to pay for its purchase of the energy from the manufacturer. Delhi Transco Ltd. paid for the purchase for electricity distributed within its region at the price fixed by the Electricity Act. However, where the income was computed by the Assessing Officer with reference to section 115JB on its book profits, this was found to be erroneous as section 115JB has no application for electricity companies, so that the efficiency gains made by the assessee over and above the profits otherwise possible did not belong to itself, but was governed by the regulations either for relief to consumers or for future application to be adjusted against future tariff. The addition for efficiency gain was, therefore, deleted in *Tata Power Delhi Distribution Ltd*. v. *Addl. CIT* [2019] 73 ITR (Trib)(S.N.) 10 (Delhi) following *North Delhi Power Ltd*. v. *Asst. CIT* [2018] 68 ITR (Trib) 439 (Delhi).

In the same case, the assessee had claimed relief under section 80-IA to the extent of Rs. 98.38 crores, which was recomputed by the assessee by making certain disallowances without opportunity to the assessee, but deleted in first appeal. On further appeal, the Tribunal referred to Circular No. 37 of 2016 dated November 2, 2016 [2016] 388 ITR (St.) 62 holding that Chapter VI-A deduction has to be allowed not with reference to eligible business but only confined to business activity to which benefit of Chapter VI-A was eligible as was also decided in this case.

In the same case, reallocation of option premium of about Rs. 86 lakhs to Cochin unit was remanded back to the Assessing Officer for de novo examination.

(ii) Computation of income from real estate business

The following issues relating to computation of income from real estate project was decided in *Dy. CIT* v. *Eskay Constructions P. Ltd.* [2019] 73 ITR (Trib)(S.N.) 65 (Mum).

(1) *Method* : Percentage-completion method is permissible, but cost of land would have to be excluded in this method.

(2) *Valuation of stock* : In respect of valuation of unsold flats to be recorded as closing inventory at the end of the accounting year, it is permissible to adopt either cost or market value, whichever is less, following *Chainrup Sampatram* v. *CIT* [1953] 24 ITR 481 (SC) and *United Commercial Bank* v. *CIT* [1999] 240 ITR 355 (SC).

(3) *Receipt of on-money* : Receipt of consideration over and above the disclosed sale price cannot be assumed in every case without evidence of actual receipt of extra money as otherwise, the addition cannot be sustained following *K. P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC) and *CIT* v. *Sati Oil Udyog Ltd.* [2015] 372 ITR 746 (SC).

(iii) Burden of proof

Where a surplus on sale of shares raises an issue, whether such surplus constitutes long-term capital gains or business profits depends upon the inference whether the shares were held as investments or stock-in-trade. The burden of proof in such cases to claim the benefit of lower tax on long-term capital gains always lies on the assessee. Where the assessee, a qualified professional chartered accountant and also director of few companies, who was well aware of stock markets trend and was also a habitual investor entering into transactions in shares through his broker with the transactions being themselves supported by documents, any inference of non-genuineness is ruled out. The profits from these transactions, if it were business transactions, would be exempt under section 10(38), which was

the claim of the assessee, ordinarily expected to be accepted on the basis of track record of the assessee. All the same, the law on burden of proof would expect him to prove the claim. But the law on burden of proof is purely a question of fact, so that this law on burden of proof by itself need not have made any vital difference as to the inference of exemption under section 10(38). In response to a query, the assessee admitted sale of 2,50,000 equity shares held by him on various dates through a recognised stock exchange realizing a surplus of Rs. 11,93,55,564 exempt under section 10(38). The Assessing Officer, on a report from the Directorate of Investigation suggesting that the transactions were meant to be sham to convert income from undisclosed sources as income from exempt capital gains to avoid tax otherwise payable under section 115BBE, but was claimed to be exempt under section 10(38), rejected the assessee's claim. Considering the back record of the assessee, the Assessing Officer could not have merely rejected the assessee's case without any enquiry merely on the basis of investigation report of a prevailing practice. There could have been no rejection of the assessee's claim without any specific enquiry or investigation in the light of the assessee's claim and other relevant facts. Mere acceptance of an allegation in a report as to the general practice, the addition could not have been sustained as found in first appeal and endorsed by the Tribunal in absolute absence of any enquiry or investigation or even investigation of the broker referred in the report from Investigation Wing either at the stage of assessment or appeal. The facts indicated that the assessee had discharged the onus placed on him by law, so that the Assessing Officer was directed by the Tribunal to accept the claim of the assessee, as found in first appeal in *Deepak Nagar* v. *Asst. CIT* [2019] 73 ITR (Trib) 74 (Delhi) following *CIT* v. *Fair Finvest Ltd.* [2013] 357 ITR 146 (Delhi).

(iv) Service of notice

Where notice under section 143(2) is served on a person who was not authorised to receive notices meant for the assessee or to represent the assessee in any proceedings, such service is invalid, so that the assessment order passed in pursuance thereto was also held invalid in *Anidhi Impex Pvt. Ltd.* v. *ITO* [2019] 73 ITR (Trib) 379 (Mum) following *CIT* v. *Chetan Gupta* [2016] 382 ITR 613 (Delhi) and *CIT* v. *Kanpur Plastipack Ltd.* [2017] 390 ITR 381 (All) – on appeal [2018] 405 ITR (St.) 27 (SC).

(v) Principles of natural justice

Observance of principles of natural justice would mean that an opportunity is always granted for meeting any proposed decision adverse to the

party. When an addition is proposed in a post-search assessment consequent on search, the materials found during search cannot be automatically treated as adverse to the assessee, so that any admission made without confronting the assessee with the facts found and the proposed inference therefrom is not valid, so that the order of the Commissioner (Appeals) in such a case of addition was set aside for a fresh hearing. It was found to be in order by the Tribunal in *Ankit Metal and Power Ltd.* v. *Joint CIT* [2019] 73 ITR (Trib) 374 (Kol) following *Andaman Timber Industries* v. *CCE* [2016] 38 GSTR 117 (SC) and *Tin Box Co. Ltd.* v. *CIT* [2001] 249 ITR 216 (SC).

Return

Revised return

Revised return has to be filed within one year from the end of assessment year or the date of completion of assessment, whichever is earlier. Where the limitation of one year had not expired and the assessment was still in progress, it was held that it was open to the assessee to file revised return, which could not have been rejected as time barred as decided in *Ashraf Khan* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 26 (Indore), so that there was no case for penalty for the disallowance by ignoring the revised return.

Reassessment

Not valid

Where a property was jointly owned by husband and wife, an addition made in the case of the husband on the assumption of extra payment of the property over and above the payment in the revised agreement was not accepted in the husband's case, a decision which was accepted by the Revenue by not filing any further appeal. Having done so, a different view cannot now be taken in the wife's case as such a stand would violate the principle of consistency expected of the Revenue. It was in this context that the addition in the wife's case confirmed in first appeal was deleted by the Tribunal based on this principle in *Smt. Amarjit Kaur* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 16 (Chand) following *Berger Paints Ltd.* v. *CIT* [2004] 266 ITR 99 (SC) and *CIT* v. *Leader Valves Ltd.* [2007] 295 ITR 273 (P&H).

Mere report from Investigation Wing about the practice of building up capital by accommodation entries could not be acted upon for initiation of proceedings under section 147 without conducting an enquiry as regards the allegations and its relevance to the assessee's facts and that too without hearing the assessee on the allegations. The initiation of proceedings cannot, therefore, be valid as decided in *Lakshya Ice and Cold Storage Pvt. Ltd.* v. *ITO* [2019] 73 ITR (Trib) 95 (Agra) following *Deepraj Hospital (P.)*

Ltd. v. *ITO* [2018] 65 ITR (Trib) 663 (Agra) and *Pr. CIT* v. *Meenakshi Overseas (P.) Ltd.* [2017] 395 ITR 677 (Delhi). Requirement of tangible material for formation of belief was stressed in this case.

Reassessment was considered necessary in the case of a firm consequent on an appeal order in the case of a partner of such firm in the view that amount in question added in the partner's case was required to be considered as an addition in the firm's case. The normal time limit for reopening under section 148/150 and even extended period of time limit was not available in this case to justify initiation of reassessment proceedings in the case of partner; the notice of reassessment was held to be invalid in *Goodwill Timber Supply* v. *ITO* [2019] 73 ITR (Trib) 225 (Jaipur). It was pointed out that limitation has to be considered from the date of passing the assessment order in the partner's case. It is in the light of such reckoning, initiation was found to be time-barred.

Where a notice under section 148 was issued without the approval of the designated authority, such notice has to be construed as one issued without any jurisdiction in view of the failure to follow the mandatory condition for proper notice under section 148, so that the resultant assessment was held to be bad in law in *Dy. CIT* v. *Bhaijee Fortfolio Pvt. Ltd.* [2019] 73 ITR (Trib) 403 (Delhi).

Where reassessment proceedings were initiated on the basis of tangible information received from Investigation Wing suggesting escapement of income, the Assessing Officer is not expected to carry out detailed investigation at that stage, so as to arrive at a conclusive finding of escapement for purposes of mere initiation of reassessment proceedings. Such positive conclusion is also not necessary for the choice of case for scrutiny for issue of notice under section 143(2). Where it was alleged that the assessee had misused the client's code to claim a loss relating not to the assessee but to another, with the assessee denying the allegation, which was not rebutted by establishing any collusion or connivance between the assessee and the share broker, the addition was held to be based on mere presumption without evidence, so that the disallowance of what was inferred as non-genuine loss to the extent of Rs. 2,31,82,203 in derivative trading was found to be unjustified, as also the commission on these transactions estimated at three per cent. leading to another addition of Rs. 6.95 lakhs as unproved expenditure under section 69C, both from which were deleted. The deletions were not sustained by the Tribunal as the allegations levelled against the assessee were without any cogent or supporting evidence with jurisdiction for reassessment itself lacking as was decided by the Tribunal in *Dy. CIT* v. *Vipul D. Shah* [2019] 73 ITR (Trib)(S.N.) 39 (Mum) following

ITO v. *Pat Commodity Services P. Ltd.* (I. T. A. No. 3498/Mum/2012 dated August 7, 2015) and *Sambhavnath Investment* v. *Asst. CIT* (I. T. A. No. 3109/Mum/2011 dated December 31, 2013).

During a search, third-party records indicating sundry payments of Rs. 52 lakhs had come to the notice of the search officer, so that this amount was brought to tax by the Assessing Officer and confirmed in first appeal. The records indicated it was not even known whether the amount was one of payment or receipt, but understood by the Assessing Officer as payment at the time he recorded his reasons for reopening the assessment, albeit without certainty. Under the circumstances, there was no information to justify reopening the assessment in absence of a reasonable belief on the facts found. Jurisdiction for reassessment is not meant for making fishing enquiries, so that the initiation of proceedings under section 147 was held to be invalid, leading to the reassessment being quashed in *Murudeshwar Power Corporation Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 44 (Bang) following *Pr. CIT* v. *Manzil Dineshkumar Shah* [2018] 406 ITR 326 (Guj). The departmental application for special leave against this decision was dismissed by the Supreme Court [2019] 411 ITR (St.) 5.

In pursuance of a search and survey in the assessee's premises, reassessment proceedings were initiated for the recorded reasons that the assessee had invested in 7,19,781 unquoted shares of B at a price of Re. 1 each, while the fair market value per share estimated under rule 11UA was Rs. 21. The difference was brought to tax under section 56(2)(viia). The validity of initiation of reassessment proceedings was unsuccessfully questioned in appeal, but the Tribunal found that there was no incriminating materials relevant to the conclusion that the real value of the share was more than Re. 1 per share, the inference based upon the valuation was treated as one of suspicion and could not be a ground for reopening the assessment as was held in *Priya Tools P. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 546 (Chand) following *Krown Agro Foods Pvt. Ltd.* v. *Asst. CIT* [2015] 375 ITR 460 (Delhi), *CIT* v. *Gupta Abhushan P. Ltd* [2009] 312 ITR 166 (Delhi), *CIT* v. *Anupam Kapoor* [2008] 299 ITR 179 (P&H), *Pr. CIT* v. *Meenakshi Overseas Pvt. Ltd.* [2017] 395 ITR 677 (Delhi) and *CIT* v. *Smt. Paramjit Kaur* [2009] 311 ITR 38 (P&H).

In the same case, it was also decided that section 56(2)(viia) itself was applicable only with effect from June 1, 2010, while the impugned transfer of shares took place on May 10, 2010 as is evident from a certificate issued by a practicing Company Secretary. This information was confirmed from the portal of Ministry of Corporate Affairs, so that the application of section

56(2)(viia) for a transaction prior to the enactment of the provision was not justified even for this reason.

A reassessment for assessment year 2011-12 on an amount of Rs. 59,74,821 was annulled in first appeal, while directing action against the legal heirs for which the time limit for initiation had already lapsed. Such direction could not have been issued and, therefore, to be treated as non est in law rendering the reassessment directed as not valid. It was so decided in *Anshuman Ghosh* v. *ITO* [2019] 73 ITR (Trib) 685 (Lucknow).

In another case, where the Commissioner (Appeals) while annulling an assessment directed the Assessing Officer to carry out remedial action under section 148, where the time limit under section 149(1)(b) for such action had already expired, such direction was, therefore, held to be non est in this decision as well in *Allahabad Bank Karamchari Co-operative Credit Society Ltd*. v. *ITO* [2019] 73 ITR (Trib) 700 (Lucknow).

Rectification

Not justified

An assessee-company, which declared loss of about Rs. 332 lakhs for the assessment year 2012-13 and such loss had been accepted, the Assessing Officer thereafter noticed profit on sale of old machinery at Rs. 91,78,920, which was directly taken to the balance-sheet without routing through profit and loss account constituting an error apparent from the mistake, so that he rectified the assessment bringing such profits to tax on an assessment of book profits under section 115JB. In first appeal, rectification order was upheld as there was no provision to justify the adjustment in clauses (i) to (viii) of *Explanation 1* to section 115JB(2), so that the Assessing Officer was right in passing the rectification order. The Tribunal pointed out that the issue, whether a capital loss has necessarily to be routed through profit and loss account and not directly taken to the balance-sheet in the context of company law provisions, which requires any adjustment to be routed through profit and loss account, is unsettled. The company law mandates any amount in computation of book profits to be routed through profit and loss account with divergent views yet to be settled by the Supreme Court. It is under these circumstances, it was held that there could not be an inference of apparent mistake to justify jurisdiction of rectification under section 154, so that the order under section 154 was quashed in *Madhucon Sugar and Power Industries P. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 52 (Hyd).

Interest

Section 234B

Where a non-resident was providing management advisory services to a resident in India in respect of management, sales, marketing, finance and administrative human resources and information technology, the fees received for all such services from its Indian subsidiary could not have been treated as technical service, so that there is no liability for the non-resident in India, in the absence of a permanent establishment in India. It was also found that there could be no liability for non-resident to pay advance tax in matters, which are even otherwise liable for tax deduction at source, if at all taxable. It follows that no interest for shortfall in payment in advance tax under section 234B was chargeable as was held in *Dimension Data Asia Pacific Pte. Ltd.* v. *Dy. CIT* [2019] 73 ITR (Trib) 213 (Mum). It was repeated that the assessee had no liability for payment of advance tax, so that the question of interest under section 234B does not arise.

Post-survey assessments

Undisclosed income

In a case, where an assessee surrendered an amount of Rs. 1 crore during a survey on the basis of some paper slips found during such survey, it later explained that there was actually no liability as there was no omission of any income or any investment not found in the books of accounts, documents, information and records to indicate any unexplained asset. The surrender of income actually related to advances receivable, which were considered as business income by the Assessing Officer, while surrendering the amount. No tax was, however, payable on such income, because of set-off of losses to which the assessee was entitled. In first appeal, it was found that the surrendered income was business income, so that there was no liability because of set-off of losses in a group of two cases in *Dy. CIT* v. *Khurana Rolling Mills P. Ltd.* [2019] 73 ITR (Trib) 613 (Chand) following *Famina Knit Fabs* v. *Asst. CIT* [2019] 104 taxmann.com 306 (Chd).

Another issue which arose in this case related to investment made by the assessee to a sister concern to the extent of Rs. 10 lakhs for the source of which the assessee filed a detailed reply. But the Assessing Officer, not being fully satisfied, added Rs. 1.20 lakhs as interest on the amount of Rs. 10 lakhs invested. This addition was deleted in first appeal because it was found that the assessee had sufficient interest-free funds of his own for making this investment following various precedents from the High Courts and the Supreme Court for the proposition that availability of sufficient own funds should explain investments, so that there could be no disallowance of

interest on this amount under section 36(1)(iii) as well. The Tribunal found that the investment of Rs. 10 lakhs is easily explained by sufficient interest-free funds in the form of share capital and reserves to the extent of Rs. 1.49 crores, a fact, which was not controverted, so that the disallowance in respect of interest under section 36(1)(iii) amounting to Rs. 1.20 lakhs was deleted. In this case, the following decisions were relied upon in first appeal for the proposition that availability of own funds to cover loans could not justify disallowance of any interest as decided in *Munjal Sales Corp.* v. *CIT* [2008] 298 ITR 298 (SC), *CIT* v. *Hotel Savera* [1999] 239 ITR 795 (Mad), *CIT* v. *Gopal Krishna Murlidhar, Shree Digvijay Cement Ltd.* v. *CIT* [2007] 289 ITR 250 (Guj) and *CIT* v. *Phil Corp. Ltd.* and *CIT* v. *Reliance Industries Ltd.* [2019] 410 ITR 466 (SC).

Post-search assessment

(i) Unexplained investments

There were two entries in the diary found during a search regarding purchase of two plots. In first appeal, though the Commissioner found that the handwriting in the diary was that of the assessee, the assessee's explanation that it was merely an estimate and not a record of actual sale was not considered. The affidavits of the sellers confirming the documents for sale and explaining the amounts recorded as mere estimate were also ignored, though their explanation was by way of affidavits but dismissed as self-serving evidence, which did not inspire confidence. The addition was explained to be justified under section 69B of the Act. It was found in first appeal that the figures themselves were not consistently the same. The sellers were not examined on their affidavits. The proper enquiry under section 69B is as regards source of funding and not meant for inference of estimate of transaction, which has to be decided on relevant facts. Since there was also nothing to corroborate entries in the diary and it was found that no action was taken against the sellers, whose return for capital gains on the value admitted by them have been accepted in their case, it was held that there was no justification for the additions in the assessee's case in *Manav Singla* v. *Dy. CIT* [2019] 73 ITR (Trib) 88 (Chand).

(ii) Section 153A

Where the assessee had admitted an undisclosed income of Rs. 1 crore on the basis of excess stock in respect of grey fabrics, finished fabrics and yarn, it was found that the excess was worked on a wrong basis by adoption of market value including valuation of waste treated as fresh yarn, so that it was found that the addition relating to yarn could not have been upheld. The order of the Commissioner (Appeals) deleted the addition to

the extent of about Rs. 88 lakhs under the head "yarn" out of the total addition of Rs.107 lakhs. On recalculation of the quantum of stock and its valuation, the addition to the extent of Rs. 19.64 lakhs was held unjustified. In consequence, both the amount added and the extent retained were found to be erroneous, so that entire addition of Rs. 102 lakhs under the head "yarn" was deleted by the Tribunal in *Shreeji Sulz P. Ltd*. v. *Asst. CIT* [2019] 73 ITR (Trib) 165 (Jaipur). In the same case, it was actually found that the mistake had occurred because of the confusion in treating waste as normal stock of yarn.

Revision

(i) Justified

Section 54B allows relief on investment of proceeds on agricultural land in other agricultural lands. Where the assessee had reinvested the proceeds of sale of agricultural lands on purchase of land from a person belonging to scheduled caste or scheduled tribe, such purchase is not valid under the Land Reforms Act of the State of Rajasthan. Since agricultural lands themselves could not be transferred under the law, the sale deed relating to agricultural land was not registered. Even if such agricultural land is converted to non-agricultural before sale, the exemption under section 54B may not still be available. Where such relief was granted, the Commissioner, acting under section 263, had rightly invoked section 263 to set right the wrong relief granted under section 54B, when the transfer of the land purchased was impermissible, so that relief allowed under section 54B was erroneous and prejudicial to the Revenue, so that the order of the Commissioner under section 263 was found valid by the Tribunal in *Ram Charan Meena* v. *Pr. CIT* [2019] 73 ITR (Trib) 568 (Jaipur).

(ii) Not justified

Where an Assessing Officer had conducted necessary enquiries in several rounds of hearing and discussion with the assessee after scrutiny of relevant documents on hearing the assessee, there can be no valid initiation of proceedings under section 263 merely because a Mauritius company had invested in the assessee-company in India. The allegation against the officer on the part of the Principal Commissioner in his order under section 263, that there was no examination relating to payment of dividend or approval by the Reserve Bank of India or about the rate at which the shares were subscribed were found to be without any basis as nothing suspicious about these matters was found during search operations against the assessee. An assessment completed after due enquiry cannot be treated as erroneous and prejudicial to the Revenue, so that no inference can be

lightly drawn to justify jurisdiction under section 263 in a matter, where there had been detailed enquiry by the Assessing Officer and the order is passed after scrutiny of documents and hearing of the assessee after due deliberation, as was held in *Sarda Energy and Minerals Ltd.* v. *Pr. CIT* [2019] 73 ITR (Trib) 138 (Raipur) following *CIT* v. *Max India Ltd.* [2007] 295 ITR 282 (SC).

Where the assessee was in receipt of enhanced compensation along with interest, the Assessing Officer on finding that the initial compensation was itself not taxable, the additional compensation would also have the same character. For the same reason, interest was also not brought to tax. The Commissioner, acting under section 263, was not in agreement as he found that the order to be erroneous and prejudicial to the Revenue. The matter was taken up to the Tribunal, which found that issue relating to interest was academic as no interest was awarded. The decision was also otherwise in accordance with law, so that revision was held to be not valid in the light of the conscious decisions regarding compensation both for enhanced compensation including solatium and interest under the Land Acquisition Act, 1894. Since the original assessment was not liable for tax, the question of relief also did not arise. It was found that the decision of the Assessing Officer was consistent with that of the courts and, therefore, the order under section 263 was set aside in *Abdul Kareem* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 69 (Cochin).

TDS

(i) University employees are not Government employees

The requirement on the employer of tax deduction at source under sections 10(10), (10A) and (10AA) in respect of payments to its employees as covered by these sections had come up in a matter of university employees and the issue was whether they could be treated on par with Government employees, so that the benefit of non-deduction of tax as covered for Government employees under these sections would also be available for them. The payments which related to death-cum-retirement gratuity along with commutation of pension or leave salary, which are exempt not requiring tax deduction at source, was felt by the employer to be non-applicable to university employees, so that tax was deducted at source. Where the payment has been correctly computed and tax was deducted according to honest and fair understanding on the part of employees, the only course left for avoiding tax deduction or for availing of the benefit of first proviso to section 201 is by filing the prescribed certificate from a Chartered Accountant, that the amount has been accounted by the recipient and that tax has been paid thereon, where it is due. It is under

these circumstances, the benefit of this provision under section 201 was permitted and action for failure to deduct tax was spared in this case in *ITO (TDS)* v. *Mahatma Gandhi University* [2019] 73 ITR (Trib) 44 (Cochin) following *Asst. CIT (TDS)* v. *Infosys BPO* [2013] 37 taxmann.com 53 (Bang-Trib). Since the earlier issue, whether university employees could be treated on par with Government employees, no longer called for a decision once the benefit of first proviso to section 201 was availed.

(ii) Section 40(a)(i)

An assessee, for its business, was hiring stalls or other space at exhibitions and conferences for promoting its business and paying licence fee to the organizers for the use of the premises. The Assessing Officer, being of the view that the payment of a rental nature required tax deduction at source, disallowed the payment under section 40(a)(i) for failure to make the deduction since the organizers were trust or societies could have been exempt either under section 12A or section 10(23C). But in the absence of any details regarding the recipients' claim for exemption for the payment itself, the claim was not found acceptable. However, in view of the possibility of the recipient paying tax on such receipt, tax is not required to be deducted at source in view of second proviso to section 40(a)(i), so that the matter was remitted back to the Assessing Officer for verification of inclusion of such amount by the recipient in *Appasamy Associates* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 33 (Chennai) following *CIT* v. *Ansal Land Mark Township (P.) Ltd*. [2015] 377 ITR 635 (Delhi).

(iii) Section 194B/194BB

Section 194B requires tax deduction at source from winnings from lotteries and crossword puzzles, etc. while section 194BB requires tax deduction from horse race winnings. Delay in deduction of tax at source on payment made by the Turf Club to the horse owner under section 194B was the subject matter of levy of interest under section 201(1A). It was noticed that Central Board of Direct Taxes referred to the amendment to section 194B excepting the stake money from the scope of section, so that deduction from such monies under section 194BB was also not justified. Since the Circulars are binding, levy of interest under both sections 194B and 194BB was held not justified in *Royal Western India Turf Club Ltd.* v. *Asst. CIT (TDS)* [2019] 73 ITR (Trib) 670 (Mum) following *Hindustan Coca Cola Beverage (P.) Ltd.* v. *CIT* [2007] 293 ITR 226 (SC) in the view that the owners of horses themselves had declared the receipt of such income in their tax returns, so that there was no loss of revenue.

Appeal

Monetary limits

The law that where the stakes involved is less than the amount prescribed in Circular No. 3 of 2018 dated July 11, 2018 [2018] 405 ITR (St.) 29, the departmental appeals will not be entertained, was followed in *Asst. CIT* v. *Khandelia Udyog Pvt. Ltd.* [2019] 73 ITR (Trib)(S.N.) 64 (Chand) following *Pr. CIT* v. *Surinder Kumar Singal* (I. T. A. No. 406 of 2016 dated January 30, 2017).

The law that departmental appeal in a case, where the stakes are less than what has been stipulated in Circular No. 3 of 2018 dated July 11, 2018 [2018] 405 ITR (St.) 29 modified by another Circular dated August 20, 2018 [2018] 407 ITR (St.) 7, is not maintainable, so that the application of the circulars affected validity of appeal filed on the basis of information from external law enforcement agencies became the subject matter of adjudication before the Tribunal in *ITO* v. *Late Amarchand P. Shah* [2019] 73 ITR (Trib) 588 (Mum), wherein it was decided that the appeals were not maintainable due to the low tax effect in the light of the circulars, unless the issues covered in these appeals were exceptions indicated in the circular in which case, a miscellaneous application for the recall of the order, which had been dismissed on grounds of maintainability, is permissible.

Tribunal's powers

Additional evidence

There is no bar for the Tribunal to admit fresh evidence as was found in a case of a film producer, who produced further evidence of payment to artists in the relevant assessment year with proof of documents, in *Vipul Amrutlal Shah* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 35 (Mum). The matter was remitted back to the Assessing Officer to adjudicate the issue on merits afresh following *CIT* v. *Dharma Productions P. Ltd.* [2019] 13 ITR-OL 443 (Bom) and *Mukta Arts P. Ltd.* v. *Asst. CIT* [2007] 292 ITR (A.T.) 16 (Mum).

Penalty

(i) Section 221(1)

Where the assessee filed a return declaring an income of Rs. 36.87 crores without payment of self-assessment tax due on such amount to the extent of Rs. 8.07 crores, penalty of five per cent. amounting to Rs. 14,34,524 was levied. But penalty was deleted in the view that the assessee had reasonable cause for non-levy of penalty regarding non-payment of self-assessment tax especially in the context that such tax has been subsequently paid in instalment with assessee explaining the huge financial crunch and hard-

ship to which it was exposed, so that financial stringency was considered to be good and sufficient cause for non-levy of penalty under section 221 by the Tribunal in *Dy. CIT* v. *Tulip Star Hotels Ltd.* [2019] 73 ITR (Trib) 694 (Delhi) following *CIT* v. *Bhikaji Ramchandra* [1990] 183 ITR 478 (Bom), *Addl. CIT* v. *Free Wheels India Ltd.* [1982] 137 ITR 378 (Delhi), *Asst. CIT* v. *Rakesh Kumar Garg* [2015] 64 taxmann.com 367 (Delhi Trib.), *CIT* v. *Raunaq and Co. (P.) Ltd.* [1983] 140 ITR 407 (Delhi) and *Life Time Reality (P.) Ltd.* v. *Dy. CIT* [2017] 163 ITD 553 (Mum.Trib.)

(ii) Exigible

Where shortage of stock to the extent of Rs. 7,77,010 was detected on physical verification during a survey, an addition of Rs. 2,61,930 was made in the assessment and affirmed concurrently both in first appeal and the Tribunal. Penalty levied at the time of initiation was for concealment of income and for furnishing inaccurate particulars of income. But the assessee challenged the penalty order before the Tribunal on the ground that the precise default whether concealment or furnishing inaccurate particulars had not been indicated in the show-cause notice. The Tribunal pointed out that the finding that there was no dispute on this point at the stage of assessment or before the Tribunal nor was the order of the Tribunal challenged before the High Court, though the matter was taken up to the High Court. The appeal was, therefore, dismissed as no substantial question of law had arisen. It was under these circumstances, the penalty levied was confirmed by the Tribunal in *Harish Chand Narang* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 45 (Jaipur).

(iii) Not exigible

A mere fact that the assessee claimed payment of rent to co-owners of property of which he had part interest himself does not render the payment of rent to other part owners non-deductible, but levy of penalty of Rs. 80,000 as regards the payment came up before the Tribunal on concurrent finding in favour of the Revenue by the Assessing Officer and in first appeal. The payment by a part owner to co-owners is not a matter, which can give rise to suspicion. There is nothing mala fide in such payment. The penalty was, therefore, directed to be deleted in *Vinod Ahuja* v. *Asst. CIT* [2019] 73 ITR (Trib) 20 (Delhi) following *CIT* v. *Reliance Petroproducts Pvt. Ltd.* [2010] 322 ITR 158 (SC).

In another case, where the Assessing Officer had disallowed payment of interest and business expenses in the assessment and initiated penalty proceedings for allegedly furnishing incorrect particulars regarding them, the show-cause notice itself was found to be defective as it did not strike

out the inapplicable part as between concealment of income and furnishing inaccurate particulars, so that the assessee does not have the opportunity to meet the case against him. Such issue of notices in a stereotyped manner without application of mind on the part of the Assessing Officer is not a valid notice, so that penalty in pursuance thereof was held invalid in *BSM Developers P. Ltd.* v. *ITO* [2019] 73 ITR (Trib) 69 (Delhi) following *CIT* v. *SSA's Emerald Meadows* [2016] 386 ITR (St.) 13 (SC).

Defect in the notice as a result of not indicating whether the notice related to concealment of income or furnishing inaccurate particulars by striking out the inapplicable part renders the notice invalid for failure to give assessee an opportunity to meet the precise fault committed by it. It was this law which was followed in *Ashraf Khan* v. *ITO* [2019] 73 ITR (Trib)(S.N.) 26 (Indore) following *Varad Mehta* v. *Dy. CIT* [2018] 68 ITR (Trib)(S.N.) 93 (Indore).

An addition for cash purchases treated as unproved to the extent of Rs. 65 lakhs was admitted in respect of purchase of raw materials by his son and assessee himself to the extent of Rs. 2 crores; the assessee filed a revised return reporting Rs. 65 lakhs consequent on such surrender as against the originally declared loss. The Assessing Officer, however, accepting the revised return initiated penalty proceedings of Rs. 19.50 lakhs at 30%, but was resisted by the assessee under section 271AAB. The penalty levied by the Assessing Officer and confirmed in first appeal was taken up to the Tribunal in *Shri Balaji Industrial Engineering Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib)(S.N.) 37 (Jaipur). The assessee had originally admitted undisclosed income with reference to the stock and not the addition made in respect of purchases of raw materials. Since, however, no positive concealment had been discovered during search nor any excess stock or discrepancy in stock as recorded in books of account was found, levy of penalty was held not justified.

An amount received by an assessee, shareholder of a company in which he had substantial interest, was understood to be a deemed dividend taxable in the assessee's hands while it was the assessee's explanation that it was only an advance in the course of business received from a company, an explanation which was not accepted by the Assessing Officer and in first appeal. It was found that the assessee was not familiar with the tax law and was not assisted by professionals, so that the explanation that it was an advance in the nature of commercial transaction, was not acceptable because it was not in the course of money-lending business. The liability for penalty levied by the Assessing Officer upheld in first appeal was reversed by the Tribunal, that the omission was not mala fide in not

offering the same to tax as was decided by the Tribunal in *Kewal Krishan Chhabra* v. *Asst. CIT* [2019] 73 ITR (Trib) 421 (Chand). The finding in the case on the merits in first appeal was that the advance was for purchase of an interest in property to be adjusted at the time of registration, but this explanation did not save the assessee from liability apart from being an after-thought. But all the same, his explanation was not shown to be false, so that penalty was held to be not warranted.

The assessee, which was a company formed by splitting up a parent society, claimed carried-forward loss from the parent company on legal advice. It had also made a mistake in claiming 100 per cent. depreciation in respect of an asset, which was used for less than six months during the year. In respect of both, penalty proceedings were initiated. As regards set off, the assessee had disclosed all material facts to prove the right to set off brought-forward loss from the parent co-operative society. The loss suffered by parent co-operative society was not in dispute. The further fact that the assessee had taken over liabilities including the brought-forward losses is also not in dispute. The entitlement to set off loss was, however, claimed on the bona fide belief, but after disclosing all relevant facts, so that penalty which was levied by the Assessing Officer and affirmed in first appeal was deleted by the Tribunal in *Ballabgarh Co-operative Milk Producers Union Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 434 (Delhi). The Tribunal, granted the relief in terms of the law that assessment and penalty proceedings are distinct and independent. While finding in the assessment order has a probative value, it does not follow that the assessee had either concealed his income or furnished inaccurate particulars considering that the assessee was a member of society of farmers and milk sellers. The belief that such carried-forward losses are adjustable was bona fide. While the excess claim of depreciation was clearly one of mistake not necessarily amounting to concealment, penalty in either case was, therefore, held to be not leviable following *K. C. Builders* v. *Asst. CIT* [2004] 265 ITR 562 (SC) and *Pr. CIT* v. *Neeraj Jindal* [2017] 393 ITR 1 (Delhi). Incidentally, it was also found that the show-cause notice itself, by not striking out the inapplicable part as to whether the assessee concealed its income or furnished inaccurate particulars, penalty proceedings, was vitiated and penalty for this reason also was not leviable following *CIT* v. *SSA's Emerald Meadows* [2016] 386 ITR (St.) 13 (SC).

A post-search assessment in the case of a real-property dealer with income also from consultancy and other sources revealed suppressed income during a search resulting in his admitting income of about Rs. 25 lakhs and Rs. 1 lakh for the assessment years 2006-07 and 2008-09, but revised by enhancing the admitted income by various other additions for

which revised returns were filed. Penalty proceedings were, however, taken levying Rs. 16.5 lakhs and Rs. 36.7 lakhs for the two years under consideration. But because the show-cause notice did not specify whether the assessee's default was for concealment or for furnishing inaccurate particulars, the notice was invalid and untenable suffering from the infirmity of non-application of mind on the part of the Assessing Officer. Penalty levied by the Assessing Officer and confirmed in first appeal was deleted by the Tribunal in *Usman Khan* v. *Dy. CIT* [2019] 73 ITR (Trib) 723 (Indore) following *Varad Mehta* v. *Dy. CIT* [2018] 68 ITR (Trib)(S.N.) 93 (Indore). In view of the defect in the notice, it was not considered necessary to go into the merits of levy of penalty, which have been rendered academic, so that the assessee's appeal was allowed and penalty rendered invalid.

(iv) Not exigible (Section 272A)

Section 272A(2)(k) provides for penalty for delay in filing statement of tax deducted at source. But such penalty is spared only, where the delay is explained as arising out of reasonable cause within the meaning of section 273B. It was this law, which came up for adjudication in *Sudip Roy Choudhury* v. *Jt. CIT(TDS)* [2019] 73 ITR (Trib) 606 (Kol). In this case, the delay in filing quarterly statements of tax deducted at source was explained on the ground of deep administrative difficulties of the sole proprietor of business due to sudden resignation of his accountant, while he himself was not aware of the failure, but on coming to know of it, filed the statements. The Tribunal found that the delay in this case was not intentional and the assessee's explanation did indicate reasonable cause for the delay. It was further pointed out that the delay itself did not result in any loss of revenue either by deferment of tax liability or not did it constitute a fraud. It was found that it was clearly a case, where the assessee's explanation can be accepted as reasonable cause and penalty spared following *Hindustan Steel Ltd.* v. *State of Orissa* [1972] 83 ITR 26 (SC).

Indus Towers Ltd.'s case

The following issues were decided in *Dy. CIT* v. *Indus Towers Ltd.* [2019] 73 ITR (Trib)(S.N.) 17 (Delhi) as under :

(1) *Payment of ex gratia and gratuity in respect of employees borrowed from sister concerns for a joint venture project* : Where the assessee had a joint venture with telecommunication companies with the main object of creating telecommunication infrastructure, the use of which is to be shared by them, there had been borrowings of employees from some of the companies to the assessee company, who were enrolled as full-time employees for the time being. As ex gratia and gratuity payments in terms and conditions of appointment depending upon the period of continued

service was found to accord with the agreement in a remand report, the disallowance of payment of gratuity to the extent of Rs. 42,25,273 was deleted in first appeal and such deletion was upheld by the Tribunal following *CIT* v. *Premier Cotton Spg. Mills Ltd*. [2002] 258 ITR 253 (Mad).

(2) An addition of Rs. 30.32 crores on account of net accrual of equalization reserve made by the Assessing Officer was deleted in first appeal and such deletion was upheld following *CIT* v. *Shoorji Vallabhdas and Co*. [1962] 46 ITR 144 (SC) and *Godhra Electricity Co. Ltd.* v. *CIT* [1997] 225 ITR 746 (SC).

(3) The assessee had borrowed from several banks as well as its shareholders. The assessee engaged in building up communication towers had commenced leasing during the year, while accounting receipts for equipment and services relating to capital work as work-in-progress, it capitalized some other expenses under consideration. In view of the credit made available by the suppliers, the work often got completed even before the payments were due or were paid, the fact of actual completion was supported by active installation certificates with other evidence before the Commissioner (Appeals), so that the addition made by the Assessing Officer as capital expenditure was deleted in first appeal as no part of the loans were utilised for construction of the towers.

(4) The assessee had taken Rs. 79,239 telecommunication sites under "indefeasible right to use" agreement from telecommunication companies with effect from January 1, 2009 paying, till March 31, 2009, an amount of Rs. 268.20 crores, claimed as revenue expenditure. The information supplied by the assessee and the confirmations regarding them had not been properly verified either by the Assessing Officer or the Commissioner (Appeals), so that the matter was remanded for further opportunity of hearing taking regard of all relevant evidence.

(5) The assessee had borrowed an amount of Rs. 1,850 crores from banks and financial institutions, which involved a payment of one-time processing fee as "upfront fee" to the extent of Rs. 21.88 crores which was claimed as revenue expenditure though for accounting purposes, it was amortised over the period of respective loans. Since the borrowings was for normal business operation not involving any enduring benefit for the assessee, the claim was found admissible since none of the expenditure related to incomplete work, the amount being solely used for construction for telecommunication work, so as to be deductible as revenue expenditure supported by relevant evidence. The claim was found to be rightly admissible by the Tribunal.

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