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BUDGET, 2020 — IN BRIEF

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In the context of stagnancy in the economy due to fall in growth rate and GDP, there was a feeling of stagnation in the state of the economy, the Hon'ble Finance Minister's Budget Speech has come as a fresh air giving confidence as to the future with the assurance at the start of the speech. The Hon'ble Finance Minister assured that the fundamentals are strong. It is one of the longest speech, well delivered, addressing every grievance of different quarters with particular emphasis for industrial development.

The most important contribution in the budget speech is the decriminalization of defaults. Particularly pointing out how the Company Law department has been abusing the powers of prosecution ruling out similar possibility of prosecution provisions under the income-tax law being abused. Income-tax defaults hereafter will only be defaults and not of criminal offences.

The most welcome part of the budget speech for the taxpayer is abolition of dividend distribution tax, which is additional income-tax under section 115-O by restoring the previous law that the taxpayer will pay tax appropriate to the income on dividend received effective from 1st April, 2021.

One of the measures of interest to the taxpayers is the Taxpayer's Charter, which was hitherto referring to what was prescribed by the Central Board of Direct Taxes now becomes part of the Act with recognition of its rights and duties under section 119A with effect from 1st April, 2020.

Provisions are made for encouraging foreign investments while protecting Indian industries against dumping. Agriculture has not been neglected,

1. Retired Member, ITAT.
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with liberal credit facilities available for agriculturists. Insurance has been used not only for protection of health, but also by increasing the guarantee limit for fixed deposit with the scheduled bank.

There has been reduction in tax rates as incentives provided to individuals, HUFS and resident co-operative societies along with certain conditions provided as option to the taxpayers.

Co-operative societies are given more liberal treatment including option to concessional tax rate with certain conditions or to continue the present law. Alternate Minimum Tax (AMT) is made applicable for co-operative societies which could have probably been avoided.

Now manufacturing companies are more liberally treated by way of reduction of tax rates. Micro, Small and Medium Enterprises (MSME) are also encouraged by increasing the audit limit from Rs. 1 crore to Rs. 5 crores.

For encouraging ease of doing business, especially the Real Estate Investment Trust (REIT), are now relieved from the requirement of listing their units in the Stock exchange.

The time limit pertaining to the income-tax benefit available to affordable housing projects under section 80-IBA has been extended.

The tolerance limit regarding margin for application of section 50C, which adopts the difference between the stamp duty value and the admitted sale consideration, is substituted by 10% instead of 5%.

In respect of charities, issuance of Unique Registration Number is proposed for ease of tax compliance and the registration procedure is centralized for new trusts, besides all charities being monitored by electronic data requirements.

The present attempt to substitute electronic means instead of direct contacts described as faceless assessments under section 274 is also further extended to the present system of settling disputes/appeals.

Section 285BB requires uploading of annual information statement in the prescribed form as part of use of electronic means for easing assessment procedure.

Non-resident investments are encouraged by providing tax concessions for sovereign wealth fund of foreign Government and foreign investments.

Survey powers are limited as it is now restricted to those approved by a Joint Director or a Joint Commissioner to spare the taxpayers from abuse of survey powers.

The last date for filing voluntary returns for the first time under section 147 has been extended from 30th September to 31st October under *Explanation* to section 139(1).

Section 234G applicable to charitable institutions has introduced an obligation to communicate donations received by a charitable institution providing for fine of Rs. 200 per day for delay in delivering of the necessary certificate, obviously enacted to ensure the donor accounts for the source of donation.

The holders of Aadhaar will now be automatically entitled to instant PAN on application.

ANALYSIS OF BUDGET, 2020

S. Rajaratnam[1] and V. G. Aravindanayagi[2]

Introduction

The hon'ble Finance Minister, Mrs. Nirmala Sitharaman's longest Budget speech running to nearly 137 minutes laid down the highly structured and ambitious plans to strengthen the Indian economic growth and to reverse the current slowdown. The Finance Minister has attempted well to bring in fiscal consolidation and to sustain economic growth by accommodating deviations from fiscal targets.

The Finance Minister tries to cater to the requirements of every sector and has attempted to satisfy every grievance of every industry. Along with corporate industries, it has also made significant attempts to cater to the needs of individuals, HUFs, Corporations, Co-operative Societies and Charitable Institutions. Special attention has been given to micro, small and medium enterprises (MSME), affordable housing, education, real estate, banking, infrastructure, power industry and start-ups.

It is expected that the budget proposals of the Finance Minister should act as a catalyst to improve the national economy and to mitigate the sluggish economic environment. She has also simplified the tax regime to some extent, by removing certain exemptions and deductions and also by reducing tax rates. In this article, we will attempt an analysis of each and every section of tax law that has been amended together with the reason.

Direct tax proposals

The major objectives of this budget are national economic development, aspirational India and caring society which come under the broad captions of governance, ease of doing business and attention to financial sectors. The Finance Minister has guaranteed decriminalisation of tax matters besides assuring no tax harassment and extending the spirit behind faceless assessments to appeals. These are welcome moves that would help to set in motion the economic growth of the nation.

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Dividend distribution tax

• The abolition of Dividend Distribution Tax levied under section 115-O is a major step. Dividend from shares and units are now taxable in the hands of recipients. Deduction for inter-corporate dividend received are continued to be allowed under section 80M to the extent of dividend distributed.

Rate of income-tax and TDS/TCS

Individuals, HUFS

• Reduction in the income-tax rates subject to certain conditions has been provided as an option to the taxpayers, who are individuals, HUFs and resident co-operative societies.

For taxation under the new slabs, the following deductions are not allowed :

• LTA, rent under section 10(13A), allowance under section 10(14), Standard Deduction on salary at Rs. 40,000, interest on self-occupied property besides some deduction under business income and deduction under section 57 on other income, income of minor at Rs. 1500, besides Chapter VI-A deductions, except for withdrawal of contribution to Central Government pension scheme and deduction from additional employment. Also, options where provided for, once exercised by assessee, will continue for 5 years with option to come out for only one year.

Co-operative societies

• The Co-operative societies have now been given more liberal treatment including option to the concessional rate of income-tax, subject to a few conditions. However, Alternate Minimum Tax (AMT) is made applicable to them.

Corporations

• Concessional rate of income-tax of 15 per cent. is made available to the new domestic corporates engaged in the manufacturing and power sector.

Tax deducted at source

• Individuals and HUFs whose turnover is more than Rs.1 crore [Rs. 50 lakhs for profession], are required to deduct tax at source under 194C, 194H, 194I, 194J.

• The system of issue of TDS certificate is abolished.

Tax collected at source

• Seller of goods is required to collect TCS at 0.1 per cent. on sales in excess of Rs.50 lakhs. If there is no PAN, tax at 1 per cent. is applicable.

• E-commerce operators are required to deduct tax at source at 1 per cent. But there was no obligation for TDS for individual and HUF sellers with turnover up to Rs. 10 lakhs. Where PAN is not available, TDS will be at 5 per cent.

• Authorised dealers are required to collect tax at source at 5 per cent. on the foreign exchange sold/tour package cost, in excess of 7 lakhs per annum.

• The assessee can authorise any person to represent him.

Housing and Real estate

• Tax benefits available to affordable housing are extended.

• Interest claim of Rs. 1.50 lakhs available under section 80EEA on housing loan sanctions extended up to March 31, 2021.

Real Estate Investment Trust

• The Real Estate Investment Trusts (REIT), are now relieved from the requirement of listing their units in the stock exchange. This is a welcome measure to encourage ease of doing business for real estate business.

Tolerance limit against stamp value increased to 110 per cent. of actual consideration

• If the actual sale consideration adopted by the assessee exceeds 110 per cent. (earlier 105 per cent.) of value adopted by the stamp valuation authority, then the difference is taxable, so that the tolerance limit for application of section 50C is increased from 5 per cent. to 10 per cent.

Start-ups

• Tax audit limit is increased from Rs. 1 crore to Rs. 5 crores, subject to the conditions that sales/gross receipt in cash and cash expenses should not exceed 5 per cent.

• Tax benefits to start-ups provided by way of 100 per cent. deduction of their profits are enhanced by increasing period of eligibility. Option is made available for the employee to postpone tax later, on exercise of stock options on the sweat equity.

Charitable institutions

• Charitable Institutions are required to furnish a certificate of donation to the donor and file statements with the tax authority, so as to enable verification of the source of donations. Deduction under section 80G will be allowed only after such verification.

• Issuance of "Unique Registration Number" is introduced to all charitable trusts and institutions for easy tax compliance.

Non-resident investments encouraged

• Tax concession provided for sovereign wealth fund of foreign Governments and other foreign investments are now given subject to conditions.

Survey powers restricted

• Survey powers are restricted to those approved by a Joint Director/ Joint Commissioner to avoid abuse of survey powers

All reports to be filed one month prior to due date of filing return of income

• Tax audit report, transfer pricing reports and other audit reports are now required to be filed at least one month prior to due date of filing return of income.

Aadhar holders will now be automatically entitled to instant PAN on application

Indirect Tax

• A variety of considered steps are taken by the Finance Minister in respect of indirect tax. Simplified GST return is applicable from April 1, 2020 and the refund process is to be fully automated. For health sector, "health cess" is introduced on import of medical equipment and others, to discourage imports and to encourage manufacture of equipment in India.

Conclusion

On the whole, the Budget 2020 is well-planned with a large number of specific proposals to deal with a wide-range of issues relating to different categories of assessees and industries. The Government, through this budget, has initiated several tax measures to kick-start the Indian economy.

Measures have been taken to improve access to finance for MSMEs and startups, sops to industries such as the power, education, real estate, etc. along with decriminalisation of defaults and reduced taxation for the middle-income segment. Increased use of technology in the Government administration and functioning plans for disaster resilience, social security through pension and insurance, improving physical infrastructure, increasing the digitization are other significant steps, which should contribute to economic growth.

The Indian economy is at the crossroads now. These planned set of measures of the Budget, 2020 is anticipated to combat the economic slow-down and would help to revive the medium and long-term growth of the Indian economy. The best it has done is the total effect of the assurance of the opening words of the budget speech "Our fundamentals are strong" followed by attempts to make them stronger.

Notes and Comments

S. Rajaratnam[1]

Income

(i) Deemed dividend—Section 2(22)(e)

An advance or loan made by the company to any of its substantial shareholders could be treated as deemed dividend under section 2(22)(e) of the Act. What is contemplated is clearly "any advance or loan", where the balance-sheet or any other information indicated any loan or advance. Treatment of a personal loan obtained by the assessee as a builder from a company to the extent of Rs. 3.55 crores, where the assessee had substantial interest in both the lending and borrowing concern, the amount of loan was taxable as deemed dividend under section 2(22)(e) of the Act. Part of the addition of Rs. 3.55 crores was an addition of Rs. 25,68,322 based on ITS data regarding which the assessee was not able to reconcile this amount with details, so that this part of addition was remanded for fresh adjudication to the Assessing Officer for necessary verification of details after giving the assessee an opportunity of hearing as decided in a group of three cases in *Lalitkumar Kesarimal Jain* v. *Dy. CIT* [2020] 77 ITR (Trib) 394 (Pune).

(ii) Diversion by overriding title

Diversion by overriding title spares an assessee liability on such income over which there is an overriding title for someone else before such income reached the assessee. It implies that the assessee himself has no control over the transaction. There is an overriding title for secured creditor over a mortgaged property as against any other creditor. Where an assessee became a defaulter in respect of a term loan taken from a bank, which treated the assessee's account as non-performing asset taking over the property which was offered as a security for the loan, there is a clear overriding title over the mortgaged property in favour of the bank as was pointed out in this case in *Perfect Thread Mills Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 603 (Mum) discussing exhaustively the concept of diversion by overriding title, which was recognised in *RM. Arunachalam* v. *CIT* [1997] 227 ITR 222 (SC) in a case, where there was a pre-existing overriding title

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

to a bank following the decision of the Supreme Court in *CIT* v. *Attili N. Rao* [2001] 252 ITR 880 (SC).

This concept had been followed in a number of cases after enactment of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI). After this Act, the question is often raised whether intervening action under this Act would constitute diversion by overriding title. It cannot obviously dilute a pre-existing mortgage, but it can prevent any further action adverse to the right of the creditor recognised under this Act. After the SARFAESI, the banks are no longer involved in litigation in view of its overriding title. The SARFAESI provides unfettered powers over the property to the creditors/ banks.

Where there is intervening action under SARFAESI, diversion of income by overriding title was accepted by the Member of the Tribunal, who wrote the judgment, the other Member with a dissenting view wrote a separate order tracing the history of diversion of income by overriding title from the decision of *CIT* v. *Sitaldas Tirathdas* [1961] 41 ITR 367 (SC), besides the decision in *RM. Arunachalam*'s case (supra) and *V. S. M. R. Jagadishchandran* v. *CIT* [1997] 227 ITR 240 (SC). There should be a clear legal title in favour of another for inference of overriding title as explained in a still later decision of the Supreme Court in *CIT* v. *Sunil J. Kinariwala* [2003] 259 ITR 10 (SC) as an instance of application of the principle of diversion of income by overriding title as explained by the Supreme Court in *Attili N. Rao*'s case (supra). Where an expenditure is incurred by the assessee to remove an encumbrance created by himself on a property, it is not a case involving this principle. The dissenting opinion would consider that the present development regarding the concept of diversion of overriding title has the effect of overruling some earlier decisions in *CIT* v. *Shakuntala Kantilal* [1991] 190 ITR 56 (Bom), *CIT* v. *Abrar Alvi* [2001] 247 ITR 312 (Bom) and *CIT* v. *Smt. Thressiamma Abraham (No. 1)* [1997] 227 ITR 802 (Ker). It is in the light of the development of this law relating to principles of diversion of income by overriding title that it was held, in the facts of the case, that the amount of Rs. 95,000 paid for discharge of mortgage debt would not amount to a receipt by the creditor as the payment is in discharge of an obligation arising out of mortgage debt, so that it is a case of application of income and not diversion by overriding title. The SARFAESI, no doubt, gives an overriding title, but there is no element of diversion of income consequent on application of the SARFAESI.

In view of the difference between the members, the matter was referred to a Third Member in this case, who felt, there was essentially no difference between the two members, since there was no divergence between them regarding the concept of diversion by overriding title. The decision in *Attili N. Rao*'s case (supra) and *RM. Arunachalam*'s case (supra) amply demonstrate the meaning of the concept, so that there is hardly any scope for further explanation of this concept, except of application for which one has to bear in mind the real meaning of the concept of diversion by overriding title before making a conclusion. The Third Member concluded that in the case before him, there had been diversion of income by overriding title merely because the principal component of loan was adjusted by the bank on application of the SARFAESI, so that adjustment made by bank cannot be treated as diversion of income by overriding title, so as to be deductible from total consideration, which accrued to the assessee on sale of property.

(iii) Cash credits – section 68

The assessee had borrowed Rs. 50 lakhs at Rs. 25 lakhs each from two companies. The Assessing Officer was of the view that the assessee had not satisfactorily established the identity and creditworthiness of the lenders. The addition was confirmed in first appeal. It was found by the Tribunal that the inferences drawn from bank statements and internet about the creditors without confronting the assessee violated the principles of natural justice, so that the matter was remitted back to the Commissioner (Appeals) to obtain from the Assessing Officer all evidence assumed to be against the assessee and by confronting the assessee with such evidence and deal with the matter in accordance with law as decided in *Balwinder Kumar Sharma* v. *Asst. CIT* [2020] 77 ITR (Trib) 380 (Chand).

Share application monies to the extent of Rs. 68.52 lakhs without premium was added as unexplained cash credits under section 68 by the Assessing Officer. The addition was partially reduced in first appeal to Rs. 41.52 lakhs. The Tribunal found that merely because they were bank transactions, the amount does not become acceptable where the Assessing Officer discharges the onus on him to disprove genuineness of cash credits after giving reasonable opportunity to the assessee. The applicants for shares in this case were not creditworthy nor were the transaction found to be genuine. Though they were received by way of cheques on banks, the amount in the bank account was immediately preceded by cash deposits, so that genuineness was found to be lacking. The addition as confirmed in first appeal was, therefore, upheld by the Tribunal in *Badrinath Steels P. Ltd.* v. *ITO* [2020] 77 ITR (Trib) 465 (Hyd) following *CIT* v. *NR Portfolio P. Ltd.* [2014] 2 ITR-OL 68 (Delhi).

When a credit of Rs. 15 lakhs in the assessee's bank account was by way of cheques from family friends for purchase of site, which did not materialise, so that the moneys received were returned by drawing self-cheques except for two cheques issued in their names. At the time the cheques were issued, the assessee did not have enough funds for encashment of those cheques to the extent of Rs. 15 lakhs. The Assessing Officer added the credit of Rs. 15 lakhs made later as unexplained. The addition was confirmed in first appeal though the assessee filed the copy of the bank account. The amount of Rs. 15 lakhs withdrawn was held for a period of four months before redepositing it in his bank account. During the intervening period, the assessee was constructing a house and the amount withdrawn was apparently utilised for this purpose. If so utilised, it would not be available for redeposit. When the matter came up before the Tribunal on appeal filed by assessee, it was found that the assessee had not acquired any property. The inference of the Assessing Officer and the Commissioner (Appeals) was that the assessee had not shown any agreement or document in support of his case. The expectation of a document makes no sense, when the assessee did not acquire the site for which the funds were raised. The expectation that assessee should have produced some document to show that the amounts were meant for purchase of site was, therefore, not realistic in expecting an assessee to prove a negative. There was nothing to show that the amount was utilised for construction. In absence of any evidence to indicate that the assessee has any income other than salary as a salaried employee, it was felt that the inference that the assessee had any income other than salary, is not sustainable as held in *P. Ramachandra Reddy* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 49 (Hyd).

Where the assessee had obtained loans of Rs. 90,000 and Rs. 8 lakhs on June 30, 2010 and October 8, 2010 from a loan creditor out of which Rs. 7,90,000 was deposited by him in his bank account on October 8, 2010 being part of unsecured loans of Rs. 43,04,368, the Assessing Officer found that the creditor did not have such large transactions with the bank at any time except for Rs. 8 lakhs transferred to the bank account on October 8, 2010 on which date Rs. 8 lakhs had been advanced. The creditworthiness of the lender was also disbelieved and the amounts were added as unexplained cash credits under section 68 and confirmed in first appeal. The Tribunal found that there could have hardly been any savings out of the declared income after household expenses and it was not also shown that any interest was paid to the lender till date. There was no explanation of the source of Rs. 8 lakhs deposited by the lender for advance to the assessee. The loan amount of Rs. 8 lakhs was, therefore, disbelieved by the Assessing Officer and the Commissioner (Appeals) and such finding concurrently made by the authorities below was confirmed by the Tribunal in *Dibyajyoti Chemicals P. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 40

(Cuttack). Penalty of Rs. 2,47,000 in respect of this cash credit was also affirmed in first appeal, while the Tribunal, which confirmed the addition, however, deleted the penalty because of the defect in show-cause notice in not striking out the inapplicable part as to whether charge against the assessee was for concealment or for furnishing inaccurate particulars.

In another case, where the assessee had voluntarily offered higher income by way of revised return, which was found acceptable, there could be no penalty under section 271(1)(c) with reference to the lower income in the original assessment as was found in a case, where cash credit not admitted in the original return had been admitted in the revised return filed after a search in the assessee's premises. Penalty was not found leviable in respect of additional income offered in the fresh return filed in response to notice under section 153A in view of the fact that the assessee satisfied all the conditions under *Explanation (5A)* to section 271(1)(c), so that penalty was found to be not leviable for the two assessment years 2010-11 and 2011-12. As for the later years from the assessment years 2012-13 to 2015-16, the show-cause notice was defective as inapplicable portion of the notice was not struck off as between concealment and furnishing of inaccurate particulars, so that penalty was not leviable even for these years also as held by the Tribunal in *Dr. Subash Chandra Jena* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 44 (Cuttack) following *Snita Transport Pvt. Ltd.* v. *Asst. CIT* [2014] 42 taxmann.com 54 (Guj).

(iv) Unexplained investments – section 69

The assessee had purchased two properties at a cost of Rs. 58.88 lakhs and Rs. 48.21 lakhs, respectively, during the assessment year 2014-15, the source of which was sought to be explained by a loan of Rs. 48 lakhs from his relatives and Rs. 55 lakhs from his own resources by way of loan and gift for which confirmation letters were filed. The Assessing Officer did not accept the explanation to the extent of Rs. 49.5 lakhs and made a small addition of Rs. 10,000 on an excessive claim for deduction. The income was computed at Rs. 52,84,650 as against the disclosed income of Rs. 3,24,650. An additional explanation for the purchases was that part of the outlay was that of his brother by way of remittance from Kuwait, where he was employed and that the amount was cash lying with his father. The assessee's explanation that he was only a co-owner of the investments along with his brother, who had made remittance from Kuwait, was considered to be a shifting of his stand during the assessment. It was felt that the deployment of the amount received from his brother whether as gift or loan was also not explained. It was under these circumstances, the matter was remanded back to the Commissioner (Appeals) for a decision afresh in *Mustafa Chhawaniwala v. ITO* [2020] 77 ITR (Trib) (S.N.) 5 (Indore).

(v) Unexplained money–Section 69A

Where cash deposits to the extent of Rs. 14,05,000 were found in the savings bank account of the assessee, the source of which was explained to be a cash gift of Rs. 11,01,500 from her brother under a gift deed dated March 15, 2013, while the remaining amount was claimed to be out of withdrawals from her professional receipts in the same bank account. The gift story was disbelieved because the document recording the declaration of gift was dated March 15, 2013 on a stamp paper of Rs. 100 purchased on March 13, 2015 clearly indicating that it was ante-dated. The story of gift was, therefore, not believed, while the addition of Rs. 3,03,500 as drawings from her professional income was accepted. This addition concurrently justified below was deleted by the Tribunal considering totality of facts and circumstances in *Soniya Ashokkumar Sachdev v. ITO* [2020] 77 ITR (Trib) (S.N.) 54 (Pune).

Schedular System of Taxation

(i) Business or income from property ?

The assessee was a builder-cum-developer. It derived rent from unsold flats which were stock-in-trade of the assessee. Such rental income was assessed as income from house property by the Assessing Officer. In first appeal, the claim of the assessee that it was business income was accepted. The Tribunal pointed out to an amendment to law by the Finance Act, 2017 with effect from April 1, 2018 invoking sub-section (5) of section 23, which provided for taxation of rental income from property held as stock-in-trade in housing project as income from business till the completion of the construction and obtaining of completion certificate from competent authority. Since the assessment relates to the assessment year 2015-16 prior to amendment, the law prior to amendment had to be applied. The business income being nil for the year, the income from letting out the property can only be assessed as property income for the year as decided by the Assessing Officer and upheld in first appeal and the Tribunal in *Rafiahamad Rasul Patel* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 16 (Pune) following *Cosmopolis Construction* v. *ITO* (I. T. A. Nos. 230 and 231/Pune/ 2018 dated September 12, 2018) and *Tricon Builders* v. *ITO* (I. T. A. No. 475/Pune/ 2018 dated December 4, 2018).

The assessee-company was providing services in the field of information technology and call-centre services. Two agreements were registered with another addendum for providing certain ancillary services, such as scanning and digitisation. It received a composite payment of Rs. 12.50 per booklet for physical storage, indexing, scanning of records, etc. The consolidated payment of Rs. 12.50 per booklet was bifurcated as between Rs. 10.75 for providing storage space over a period of three years and Rs. 1.75 per booklet for providing ancillary services. The assessee offered income of Rs. 13,68,88,726 as income from house property. But the Assessing Officer treated it as business income on the ground that the assessee was not merely letting out space, but also made available complex services such as scanning, indexing, auditing and digitisation of records, so as to require the treatment as business income. In first appeal, the agreements were understood essentially as nothing more than warehousing of house property. Merely because some services like security or providing labour for loading, unloading, lighting, cleaning, etc., the dominant object of exploitation of the house property by letting out with services being merely incidental cannot be overlooked, so that he held the income to be assessable as property income. The Tribunal found that the addendum is not an afterthought and when both the documents have to be read together, the items mentioned in the agreement have to be verified as to the veracity and genuineness. Addendum could not be dismissed as a mere afterthought without giving reason for such conclusion. The assessee's bifurcation as between property and business was found to be in conformity with law with rate for each service being comparable with market rate, so that bifurcation was done on scientific basis with no infirmity pointed out by the Assessing Officer. Acceptance of the assessee's bifurcation in first appeal was held justified and, therefore, upheld by the Tribunal, inter alia, deciding that the assessee was entitled to 80 per cent. depreciation on hand sets, phones and 60 per cent. depreciation for the projector in *Asst. CIT* v. *Dr. ITM Ltd.* [2020] 77 ITR (Trib) 338 (Chand).

The assessee-company was having a flat which was used by a non-resident director as residence besides for his own business as found by an Inspector on enquiry. On further enquiry, the assessee submitted that there were two flats, which belonged to the director's brother, which may have been used for business, but not the flat made available to the director, so that its income therefrom used for business could not have been treated as rent taxable as property income. But the Assessing Officer rejected the argument and brought the amount of Rs. 10,00,808 to tax. This assessment as property income was confirmed in first appeal. The portion of property occupied by the director as an employee of the company for use of company's business, it was argued, has to be taken to be nil as the property was solely used for the company's business. The Assessing Officer rejected this argument as an afterthought and assessed the annual value as determined by municipality to be the assessee's income from property at Rs. 14,730 per month. Inspector's report that the flat was used for the residence of the director was not made available to the assessee. The argument of the assessee that the director was a non-resident and that whenever he visited India, he stayed in the flat meeting the charges for electricity and society maintenance, etc., a fact, which was verified by the Inspector. But all the same, the claim for treating the property as self-occupied was not found acceptable as it was a business asset. However, the offer to have income assessed as property income on the basis of municipal value was not acceptable as the flat was clearly a business asset used partly for business and partly for residence of the shareholder director. The flat being a business asset, it could not have been treated as property income as was decided by the Tribunal in *Record Investments and Leasing Pvt. Ltd.* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 76 (Mum) following *Dy. CIT* v. *Prabhukripa Overseas Ltd.* (I. T. A. Nos. 1092 and 1093/Kol/2011), *CIT* v. *Vazir Sultan Tobacco Co. Ltd.* [1988] 173 ITR 290 (AP) and *CIT* v. *New India Maritime Agencies P. Ltd.* [1994] 207 ITR 392 (Mad).

Income from house property taken by holder on long-term lease would still be assessable as income from property as lease rental as was decided by the Tribunal in *Nahalchand Laloochand P. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 664 (Mum) following *CIT* v. *Durga Prasad More* [1971] 82 ITR 540 (SC). In a civil case relating to the same assessee in *Nahalchand Laloochand Pvt. Ltd.* v. *Asst. CIT* [2014] 3 ITR-OL 434 (SC), it was decided that lease for a period not less than 12 years would constitute a deemed transfer in the case of immovable property. In the light of the same, the rental derived by the lessee has to be assessed as income from property as was decided in this case especially in the context of enlarged meaning of "owner of house property" by clause (iii) of section 27 leaving no doubt as to the nature of receipt as income from property.

(ii) Business or capital gains ?

The assessee had sold three flats which were shown in its balance-sheet as investments and had offered the rental income as income from property. He sold them as he was in need of funds after two or three years. The properties were claimed to have been acquired for putting up construction, while one of them was already fully constructed. The properties were purchased by an incorporated society in which the assessee had also had an interest. They were not held for three years after completion of construction. The sale of the three flats for Rs. 5.06 crores and four flats for Rs. 6.33 crores were during the financial years 2010-11 and 2011-12 for which the agreement for purchase by the assessee was on March 27, 2008 from a society to whom they were sold back. The assessee had four more flats in the same society. The Assessing Officer inferred the income therefrom as income from business, considering the number of transactions and the facts that the purchases were not ready for occupation at the time of purchase and that the purchases were in bulk in a society with which the assessee had interest.

It is in the above circumstances, profit from the transactions was taxed as income from business, while the assessee's claimed that the income was from capital gains. The mere fact that the assessee had shown the properties as investments in the balance-sheet cannot justify the inference that the assessee's income was from capital gains, when totality of all the facts are considered as held by the Tribunal in *Haresh Khiamal Nanwani* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 24 (Mum).

(iii) Business or other sources ?

The assessee had received in the course of its business an amount as interest, such interest not being taxable under separate head as it was part of business income. A separate addition under the head Other Sources was held unjustified by the Tribunal in *Asst. CIT* v. *Nadella Venkata Nageswara Rao* [2020] 77 ITR (Trib) (S.N.) 94 (Vizag).

International taxation

Bandwith services

Nature of payment to a non-resident in providing bandwith services came up for adjudication as to whether there is liability for a non-resident in India. As it was found that there was no right in the nature of industrial, commercial or scientific knowledge of equipments or even for right to use of any process, payment was in the nature of business transaction with profits and not fees for any technical service or royalty. The non-resident was not having business connection or permanent establishment in India, so that there was no scope for taxing any income of the non-resident for the payment by a resident for its services as falling under section 9(1)(vi). In fact, Article 3(2) of the Double Taxation Avoidance Agreements between India and Singapore would not entitle India to tax such amount, which was also pointed out by the Tribunal in *Asst. CIT* v. *Reliance Jio Infocomm Ltd.* [2020] 77 ITR (Trib) 578 (Mum). It is not open to the authorities to pick out a part of definition of royalty under domestic law. The expression "process" used in the treaty has to be understood in the limited context in the sense that process by itself has no independent existence. Royalty has an exhaustive meaning like the process under *Explanation 6* to section 9(1)(vi).

Process is not to be understood on a standalone basis in a case, which covers a payment for royalty.

Provision of domestic law cannot be imported in understanding Double Taxation Avoidance Agreements by extending the meaning of process in the context of defining royalty as was also pointed out in this case. Interpretation of agreement is a simple one and not based on the outcome of any ambulatory interpretation incompatible with fundamental principles of treaty interpretation under the Vienna Convention on the Law on Treaties, 1969. What the assessee has received was only access to service and not any equipment of the non-resident deploying such equipment for service to the resident. All infrastructure and process for providing bandwith services was under the control of the non-resident. The service itself was not held secret involving intellectual property rights nor was it registered in any specific owner's name. Any amendment under section 9(1) under the Income-tax Act can hardly have any impact in understanding Double Taxation Avoidance Agreements. Where there is no significant economic presence of the non-resident in India by way of business connection or permanent establishment, there can be no business profits for the non-resident taxable in India as was pointed out in this case. The concept of "make available" in the matter of technical services has been stressed in the case apart from article 12(4)(c) dealing with technical service defined in wider term not having any application for bandwith services rendered by the non-resident in this case relying on the decision in the same case in *Dy. CIT* v. *Reliance Jio Infocomm Ltd.* [2019] 73 ITR (Trib) 194 (Mum).

The concept of treaty override in the manner understood in India after the decision of the Supreme Court in *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC) is probably too wide as all that is necessary as pointed out in *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320 (Bom) is that, what is contemplated can be described as "rule of referential incorporation or incorporation cannot be applied when we are dealing with a treaty (Double Taxation Avoidance Agreements) between two sovereign nations" because "it is open to a sovereign Legislature to amend its laws" subject to "reasonableness" as pointed out in *Siemens'* case (supra) approved by the Supreme Court of Canada in *Her Majesty The Queen* v. *Melford Developments Inc.* 82 DTC 6281. *Explanation 6* to section 9(1)(vii) intended to restate legislative intention cannot possibly have an impact on Double Taxation Avoidance Agreements. Article 26 of the Vienna Convention on Law on Treaties expects every participant to a treaty to act under the treaty "in good faith". Though India is not a signatory to Vienna Convention, the Supreme Court, in *Ram Jethmalani* v. *Union of*

India [2011] 339 ITR 107 (SC), has pointed out that Vienna Convention contains many principles of customary international law giving broad guidelines in interpretation of treaty, so as to be applicable in India as well. It was further pointed out in this case that mere repair services do not make available any technology. The Tribunal also pointed out to the two decisions both in favour of the assessee in *DIT* v. *Guy Carpenter and Co. Ltd.* [2012] 346 ITR 504 (Delhi) and *CIT* v. *De Beers Minerals India Pvt. Ltd.* [2012] 346 ITR 467 (Karn). The need to "make available" for inference of technical services is settled in India after the decision of the Supreme Court in *Ishikawajima Harima Heavy Industries Ltd.* v. *DIT* [2007] 288 ITR 408 (SC).

Transfer pricing

(i) Determination of arm's length price

The question of finding arm's length price arose in respect of placement charges paid by broadcasters for placing their channels at preferred positions. An amount of 10% of such payment was added as being in excess of arm's length price. But such addition was made without following the prescribed procedure of finding the proper choice of appropriate method for benchmarking with adjustment justified by comparables. A mere ad hoc determination is not permissible under section 92C and, therefore, was not sustained by the Tribunal on the assessee's appeal in *Hathway Cable and Datacom Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 55 (Mum) following *CIT* v. *Lever India Exports Ltd.* [2017] 78 taxmann.com 88 (Bom).

(ii) Comparables

The question of acceptance of comparables in determination of benchmark under transfer pricing rules had come up in *Evalueserve.com Pvt. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 97 (Delhi).

Where the assessee had adopted transactional net margin method (TNMM) as the most appropriate method, the ratio of operating profit to operating cost will be the profit-level indicator. On this method, profit margin came to 18.94 per cent., but the assessee short-listed nine comparables to arrive at 10.75 per cent. The Transfer Pricing Officer found that the filters and parameters besides six out of twelve comparables were not acceptable on the ground that they were functionally different. E had to be excluded as decided by the Tribunal following *Rampgreen Solutions Pvt. Ltd.* v. *CIT* [2015] 377 ITR 533 (Delhi), *Pr. CIT* v. *Evalueserve SEZ (Gurgaon) P. Ltd.* [2018] 11 ITR-OL 436 (Delhi) and *Pr. CIT* v. *E-Valueserve SEZ (Gurgaon) P. Ltd.* [2019] 416 ITR 51 (Delhi).

As for comparable X, it was found there was a major difference as between the ratio of the employee cost to total sales, so that such difference where it exceeded 25 per cent. required exclusion of X, a claim upheld by the Tribunal considering that X also carried on business of infrastructure facility which constituted 49 per cent. of its revenue.

As regards comparable I, which was excluded, it was found to require exclusion not only because of much higher turnover, but also higher brand value and intangibles as against the assessee's case, where intangibles were all of insignificant value with major difference in risk and it was further found that I was a capital service provider, which made it functionally different, so that I had to be excluded.

Similarly TCS was a giant company with high brand value and intangibles in terms of risk profile, skill, nature of service, revenue etc, besides the large difference in human resources with reference to the number of employees, so that TCS was not comparable and had, therefore, to be excluded as was also decided by the Tribunal following *Avaya India Pvt. Ltd.* v. *Asst. CIT* [2019] 416 ITR 638 (Delhi).

For the above reasons, both the Assessing Officer and the Transfer Pricing Officer were directed to recompute the arm's length price in the light of its findings.

Exemptions

Section 10(13A)

Section 10(13A) permits deduction of the house rent allowance received by a salaried employee, subject to 10 per cent. of his salary. This allowance was granted to the assessee on his receipts from employment including an amount received as part of performance bonus in reckoning exemption under section 10(13A). Section 10(13A) read with relevant rule would justify the inclusion of this bonus as part of salary for reckoning the 10 per cent. disallowance. It was in this context, it was found by the Tribunal that the deletion of addition of excess deduction over 10 per cent. of salary without inclusion of the performance bonus, was justified in *Sudip Rungta* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 63 (Kol) following *CIT* v. *B. Ghosal* [1980] 125 ITR 744 (Ker).

Charities

(i) Section 10(23C)(vi)

The assessee was an educational institution entitled to exemption under section 10(23C)(vi). It had to get the approval from the Commissioner for exemption to be accepted by the Assessing Officer. The Assessing Officer had not accepted the claim for exemption on the ground that satisfaction recorded by the Commissioner was signed by an Income-tax Officer on behalf of the Commissioner with Commissioner only carrying out corrections and modifying the language in his own handwriting. It is, therefore, not vitiated, the assessee being undisputably an educational institution, it cannot be treated as having been engaged in a commercial purpose, so that withdrawal of exemption under section 10(23C)(vi) was held unjustified in *Singhania University* v. *CIT (E)* [2020] 77 ITR (Trib) 501 (Jaipur). In the matter of the approval signed by a subordinate officer like Deputy Commissioner, where the approval has to be signed by the Commissioner, such approval by the Deputy Commissioner could be accepted by understanding the communication of Deputy Commissioner as one under the powers delegated to him following *Modern School Society* v. *CIT(E)* [2018] 63 ITR (Trib) 399 (Jaipur).

It was further pointed out that the assessee was a university established by a statute by State of Rajasthan and exemption for it was recognised under section 10(23C)(vi) from the assessment year 2009-10. For the proposal for withdrawal of the approval of the Commissioner from the Assessing Officer for the assessment year 2013-14, a show-cause notice was issued by the Commissioner and exemption was withdrawn from this year. The inference for withdrawal was that the university was running some courses without approval, so that these were inferred to be not genuine courses. Since it is open to the university to provide any kind of educational activity according to its own perceptions, the exemption was restored by the Tribunal. The inference that any activity of the university was non-genuine, when there was hardly any change in its already approved activities, the withdrawal was unjustified following *Geetanjali University Trust* v. *Chief CIT* [2013] 352 ITR 427 (Raj). It was pointed out that the university was running in the same manner continuing to render genuine educational activities both in respect of its educational activity and running a hospital without any commercial motive hardly making any earnings but actually carrying on medical research and acting as a teaching hospital with the sole object of taking care of the general health and wellness of the students and the staff of the assessee.

(ii) Exemption under section 11

The assessee was a charitable trust registered with the Charity Commissioner as well as section 12A of the Income-tax Act, 1961, but had not claimed exemption under section 11, with the result, for the assessment year 2012-13, the assessee had paid a tax of Rs. 4,69,004 on its admitted income at maximum marginal rate. It was only after the assessment, the assessee realised its right to exemption and filed an appeal against the assessment. The assessee was, no doubt, entitled to exemption, but the assessment had been made treating it in the status of association of persons. The Commissioner (Appeals) found that registration was effective from the assessment year 2015-16 and not for the assessment for assessment year 2012-13 before him. The matter was taken up to the Tribunal which found that status adopted was wrong as it was not an association of persons, but continued to be an individual. Merely because beneficiaries were group of individuals, the status of trust or institution could not be treated as AOP with reference to beneficiaries. Apart from the same, the term "individual" does not always mean a single living human being. A body of individuals constituting a unit could be an individual. It was in this view, the Tribunal found that even if income is assessable, it should be assessed in the hands of beneficiaries as held in *Saraswat Hitwardhak* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 89 (Mum) following *DIT (Exemptions)* v. *Shardaben Bhagubhai Mafatlal Public Charitable Trust* [2001] 247 ITR 1 (Bom).

(iii) Registration

Merely because a charitable institution had created a company for complying with corporate social responsibility requirement, its activities does not cease to be genuine, so that the withdrawal of registration on this ground was held unjustified by the Tribunal in *Roundglass Foundation* v. *CIT (Exemptions)* [2020] 77 ITR (Trib) 288 (Chand). It was also found that rental income brought to tax from flats which were held as stock-in-trade has to be assessed as income from property till two years after the end of the financial year in which certificate of completion of construction was obtained. Since the assessment related to the assessment year 2015-16, the amended section 23 had no application. In coming to this conclusion, the Tribunal followed *Cosmopolis Construction* v. *ITO* (I. T. A. Nos. 230 and 231/ Pune/2018 dated September 12, 2018) and *Tricon Builders* v. *ITO* (I. T. A. No. 475/Pune/2018 dated December 4, 2018)

(iv) Cancellation of registration

Registration continues unless it is cancelled. It can be cancelled only, where the trust or institution, which has been registered under section 12A/12AA fails to carry out the objects on the basis of which registration had been granted. Where exemption was granted to a registered society from the assessment year 1998-99 to the assessment year 2008-09, it is odd that registration should be cancelled from the assessment year 2009-10 in the view that the amendment of definition of "charitable purpose" under section 2(15) with effect from April 1, 2009 justified cancellation. The lease rent received by the association was applied wholly for charitable or religious purposes. There was no receipt of any other income. The lease rent accepted as a legitimate income cannot be treated as commercial income only from the assessment year 2009-10, when the activities of the assessee continues to be charitable even during the year. Registration cannot be cancelled so as to discontinue the registration already granted especially in this case, where the assessee was not even provided an opportunity of hearing before cancellation under section 12AA(3). Once registration has been granted, it can be cancelled only by following the procedure under section 12AA(3) and (4). Since the prescribed procedure was not followed, the Tribunal set aside the order of the Commissioner (Appeals), who had upheld the order of the Assessing Officer. The Tribunal further held that registration already granted and exemption allowed from 1998-99 to 2008-09 should be continued thereby allowing the assessee's appeal in *Orissa Olympic Association* v. *CIT(E)* [2020] 77 ITR (Trib) 407 (Cuttack).

(v) Right to depreciation

The assessee, which was running a hospital, had inter alia claimed depreciation of Rs. 10.62 crores. The Assessing Officer held that since income from application of the funds in acquiring the assets was already exempt as it was income of a charitable institution, it was felt that a separate deduction for depreciation would amount to double deduction and, therefore, the claim for depreciation was disallowed. As regards the amount written off for doubtful debts, he found in the case of a charitable institution, actual bad debts of Rs. 9.91 lakhs was held admissible as a deduction and not a mere provision for doubtful debts to the extent of Rs. 20.11 lakhs. The Tribunal found that sections 28 to 44 had no application in computation of income of a charitable institution, so that provision of doubtful debts and bad debts to the extent of Rs. 20.11 lakhs and Rs. 9.91 lakhs, respectively, were disallowed. The loss on sale of fixed assets to the extent of Rs. 20.4 lakhs was also disallowed on the same ground, when the normal deduction under sections 28 to 44 had no application for a charitable institution. The insertion of sub-section (6) to section 11 by the Finance (No. 2) Act, 2014 was with effect from April 1, 2015, so as to be applicable only from the assessment year 2015-2016. The bar against deduction of carried-forward depreciation has, therefore, no application for years earlier to the assessment year 2015-16. The assessee was, therefore, held entitled to depreciation of Rs. 10.62 crores by the Tribunal in *Asst. CIT (Exemptions)* v. *Indraprastha Cancer Society and Research Center* [2020] 77 ITR (Trib) (S.N.) 27 (Delhi).

(vi) Donations

Donations received by a charitable trust or institution can form part of the corpus only if the donation is made towards corpus. Where the assessee treated the amount received as donation as part of the corpus fund, this treatment was upheld because the assessee had filed additional evidence during the course of appeal by way of letter from donor indicating his intention that his donation should form part of the corpus. Since this additional evidence was filed for the first time before the Commissioner (Appeals), the Tribunal found it necessary to remand both the matter of admission and merits, and it was accordingly remanded.

In the same case, the assessee had acquired fixed assets, which had been claimed as part of the amount utilised for charitable purposes, so that depreciation was disallowed as amounting to double deduction. It was found as a matter of fact that the assessee had not claimed purchase of the fixed assets as amount utilised for charitable purposes in reckoning 85 per cent. required by law. This claim of the assessee was not controverted by the Assessing Officer with reference to any evidence, so that there was no reason for not accepting the assessee's claim that in such circumstances, the question of denial of depreciation cannot arise. Even otherwise, the law has since been settled, when special leave petition against the adverse view was declined on the ground that there can be overlapping in computation of income and ascertainment of amount for charitable purpose, as pointed out in *CIT* v. *Manav Mangal Society* [2010] 328 ITR 421 (P&H) on which special leave application filed by the Income Tax Department has also since been dismissed by the Supreme Court [2010] 328 ITR (St.) 9. It was in the light of this development of law, depreciation was found admissible, as decided by the Tribunal in the light of the settled law as indicated above in *Shivapur Shikshana Samiti* v. *ITO(E)* [2020] 77 ITR (Trib) (S.N.) 42 (Bang).

(vii) Approval under section 80G

A charitable institution already registered under section 12A applied for approval under section 80G, which was denied on the ground that the assessee had formed another company for rendering services relating to corporate social responsibility with the directors of the other company being the same as the trustees of the assessee foundation and the entire control was exercised by a single family. It was suspected that the object of forming another company was to divert the donation received for discharging the amount laid out for corporate social responsibility, which is not deductible for income-tax purposes. It was for these reasons, it was found that the assessee did not become entitled to the benefit of section 80G. Merely because it was registered under section 12A, it does not become entitled to approval under section 80G. The Tribunal, however, found that the only objection that could be raised is, where the object contains religious objects for denial of approval of benefit of section 80G is under sub-section (5) of section 80G. Merely because the assessee formed a company for enabling discharge of corporate social responsibility, approval under section 80G cannot be denied as held in *Sabtera Foundation* v. *CIT(E)* [2020] 77 ITR (Trib) 296 (Chand) following *Escorts Skill Development* v. *CIT(E)* (I. T. A. Nos. 527 and 528/Delhi/2017 dated April 26, 2019), *Nanak Chand Jain Charitable Trust* v. *CIT(E)* [2018] 91 taxmann.com 197 (Delhi-ITAT) and *Roundglass Foundation* v. *CIT(E)* [2020] 77 ITR (Trib) 288 (Chand).

Where a charitable institution had already got the approval under section 80G, it was not followed for a year on the inference that genuineness of the charitable activities conducted by the assessee had not been established. Once approval had been granted, it is not open to the Commissioner (Exemption) not to follow the approval already granted by him, when it had not been withdrawn, so as to be continuing. It was, therefore, found that rejection of approval in a following year was redundant in law, besides not being justified on facts as decided in *Ashwini Sahakari Rungnalaya Ani Sanshidhan Kendra* v. *CIT(E)* [2020] 77 ITR (Trib) (S.N.) 61 (Pune).

Depreciation

On vehicles

Where the Assessing Officer restricted the larger claim of 30 per cent. for depreciation even when such higher deduction for vehicles on hire is not applicable for earthmoving machinery, such restriction was upheld by the Tribunal in *Arihant Constructions* v. *Asst. CIT* [2020] 77 ITR (Trib) 171 (Vizag). It was also held that higher depreciation is available only for lorries which are given on hire and not for motor cars even if they are running on hire basis. It was also found, as for as motor cars are concerned, that the assessee has also failed to establish that the dominant purpose of acquiring motor cars was for running them on hire, but for its own purposes. The reason for giving higher depreciation for hired vehicles was that they suffer heavy wear and tear, so that such higher depreciation for motor cars is not justified as held in this case following *N. D. Joseph* v. *CIT* [2010] 325 ITR 200 (Ker) and *CIT* v. *Gupta Global Exim (P.) Ltd.* [2008] 305 ITR 132 (SC).

Business loss

Proof of loss

Where the assessee-company, engaged in providing housing finance, had entered into Securitisation agreement with a bank, which derived profit from such agreement, but had not filed copy of the agreement, which was pre-closed, it claimed the compensation received for such pre-closure as a deduction. It was felt that it could have normally been adjustable against any reserve made for such losses, so that it was disallowed. However, in first appeal, it was felt that it was a loss on revenue account only to the extent of interest for unexpired period and not for remaining loss. The matter was taken up to the Tribunal, which pointed out that the onus was on the Assessing Officer to disprove the loss claimed. Where particulars for the loss had been filed, the Assessing Officer could not have rejected the claim for loss, unless he is able to demonstrate that the loss had been the result of device adopted for tax evasion, fraud or mala fide. It is in this context that assessee was entitled to the payment, which it had to meet for premature termination of the agreement in *L and T Housing Finance Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 85 (Chennai).

Business expenditure

(i) Remuneration to partners

Payment of remuneration to partners is taxable with reference to what is payable as per stipulation in the partnership deed. The assessee revised the original deed by supplementary deed enhancing interest and remuneration to partners, so as to get larger benefit for the firm. The matter came to be considered in a post-survey assessment after which the assessee estimated the net profit at eight per cent. of the gross total turnover resulting in addition to returned income with reference to the impounded documents. But these were not fully reconciled, so that the assessee was confronted with the impounded documents, which according to the Assessing Officer, justified a larger addition. A reconciliation statement filed by the assessee was not found acceptable, so that the income itself was recomputed making an addition to the extent of Rs. 2,22,56,154. But the assessee's claim during appeal, was that salary and interest was paid as per the revised partnership deed. Since it was a post-survey assessment, the Commissioner (Appeals) refused to entertain the claim based upon the supplementary partnership deed. The Assessing Officer was, therefore, directed to allow remuneration to partners as per the earlier deed after estimation of net profit from the gross receipts as decided by the Tribunal in *Mayasheel Construction* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 8 (Delhi) following

CIT v. *Vijay Constructions* [2007] 213 CTR 105 (All) and *Durga Reddy and Co.* v. *Asst. CIT* (I. T. A. Nos. 713 to 715/ Vizag/2013 dated April 19, 2016).

(ii) Licence fees

An assessee engaged in the business of manufacture of pan masala had paid Rs. 2,44,82,272 as trade mark licence utilisation fees under the head "sale and distribution expenses". The payment was to a sister concern. The Assessing Officer noticed that the licence user agreement was with an erstwhile partnership and licence was for an unlimited period for all time to come, subject to the condition that the assessee will not enter into other competing licences of the assessee. The inference of the Assessing Officer was that the expenses are not deductible since it had the character of a capital outlay, while it was allowed in first appeal. The Tribunal, in *Asst. CIT* v. *Vishnu Pouch Packaging P. Ltd.* [2020] 77 ITR (Trib) (S.N.) 10 (Ahd), held that the licence fees was fixed with reference to the turnover so as to be deductible as revenue expenditure. The licence was more for use as long as the assessee manufactures the product covered by the licence. The licence was for an on-going business. It was determined on the basis of a formula laid down in the agreement. There was no assignment of the right to use. There was also no prohibition from terminating the user licence. The licensor continued to retain control over the manner of use of trade-mark. What is paid for mere use could hardly ever be treated as payment on capital account. For all these reasons, the Tribunal found the expenditure was deductible as revenue expenditure.

(iii) Consultancy fees

The assessee, engaged in information technology enabled service, had incurred consultancy expenses during the assessment year 2011-12 to the extent of Rs. 35,30,790, which were covered by bills raised against the assessee along with Form 16A. The consultancy related to the new projects undertaken by the client in U. K. and U. S. A. The Assessing Officer, however, had doubts as to the genuineness of the payment as all the bills were in the same format with original bills not being made available. The sudden increase in payment of consultancy fees from Rs. 1.36 lakhs to Rs. 35.3 lakhs was also a matter of further doubt as to whether so much was really incurred. It, therefore, limited the deduction to Rs. 2 lakhs. However, the addition was deleted in first appeal as all the necessary information relating to the recipient with Permanent Account Number (PAN) as well as the details of the projects for which the consultation was undertaken justified the deduction apart from another major defect in disallowance having been made without giving any opportunity to the assessee. The Tribunal upheld the order in first appeal as all the necessary particulars had been made available with no reason to doubt the genuineness with nothing particularly adverse having been pointed out by the Assessing Officer. It is in this context, consultancy fees paid for the two new projects of the assessee in U. K. and U. S. A. were found to be deductible thereby upholding the view concurrently taken by the Commissioner (Appeals) and the Tribunal in *ITO* v. *Ascendum KPS P. Ltd.* [2020] 77 ITR (Trib) (S.N.) 12 (Ahd).

(iv) Payment of PF and ESI

The disallowance of payments of employees' contribution relating to Provident Fund (PF) and Employees State Insurance (ESI), because of delay beyond the due dates under the provisions of the relevant Acts, by the Assessing Officer was confirmed in first appeal. Since the payments were made before the due date for filing return, no disallowance could have been made as held by the Tribunal in *Arihant Constructions* v. *Asst. CIT* [2020] 77 ITR (Trib) 171 (Vizag) following *Asst. CIT* v. *Brandix India Apparel City P. Ltd.* (I. T. A. No. 485/Vizag/2018 dated January 25, 2018).

(v) Payments prohibited by law

Explanation 1 to section 37(1) disallows expenditure which is prohibited by law. But where the assessee suffers a liability for not meeting contractual obligations, such failure on its part does not constitute an offence for infraction in law, so as to justify the disallowance under *Explanation 1* to section 37(1), so that no disallowance could be made as held by the Tribunal in *Dy. CIT* v. *Mahavir Multitrade P. Ltd.* [2020] 77 ITR (Trib) 165 (Delhi).

(vi) Hire charges

Where the assessee had claimed an amount of Rs. 2 lakhs as machine hire charges without deduction of tax at source, the reason for non-deduction being that the payment was of small amount of less than Rs. 20,000 per day, there is some confusion in application of provisions between section 269SS and the provisions requiring deduction of tax at source. As long as there is a duty to deduct tax, such deduction is mandatory irrespective of the size of the payment. The explanation for non-deduction was found to be highly doubtful in substance. The matter was, therefore, remanded to the Assessing Officer by the Tribunal in respect of disallowance for non-deduction of tax at source for re-adjudication in *Debjyoti Dutta* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 17 (Cuttack).

(vii) Payment to sub-contractors

Payments of Rs. 4,24,045 in cash were made towards purchases and expenses supposedly under compelling circumstances to sub-contractors who had no bank accounts. Since the assessee was doing business in remote areas, where no banking facilities are available, the addition was held to be not sustainable. The disallowance should have been referred to the exception under rule 6DD(g) of the Income-tax Rules, 1962 because of the exception specified therein for the payments made in remote areas, where there was apparently no banking facility. Application of section 40A(3) is excused only with reference to this rule, but the disallowance was deleted without referring to the Rule by the Tribunal in *Debjyoti Dutta* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 17 (Cuttack).

In the same case, there was a cash credit to the extent of Rs. 25 lakhs explained as loan from one K, the brother of the assessee, who was supervising the assessee's business. The assessee had not established either identity or the creditworthiness of the lender. The Assessing Officer issued summons to the lender who claimed his inability to attend due to his illness. The matter in such cases are required to be remanded for establishing identity and creditworthiness of the lender. But where the assessee had submitted a plausible explanation with corroborating documents, it was held by the Tribunal that the onus shifts to the Assessing Officer. In this case, there was proof of repayment of the loan apart from the credibility of the transaction, so that the addition was deleted.

(viii) Fees paid to Registrar of Companies

Fees paid to Registrar of Companies for increase in capital base is clearly capital expenditure even as decided by the Supreme Court in *Punjab State Development Corporation Ltd.* v. *CIT* [1997] 225 ITR 792 (SC). When this disallowance was overlooked, it is a mistake apparent from records, so that such mistake can be rectified as decided by the Tribunal in *Sati Exports India Pvt. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 65 (Bang).

(ix) Interest on borrowed capital – section 36(1)(iii)

The Assessing Officer had disallowed interest paid at 12 per cent. amounting to Rs. 6,17,315 for delay of 60 days in allotment of shares applied for, in the light of a notification by the company law authorities. Section 36(1)(iii), which allows interest on borrowings does not restrict deduction for interest paid for share application monies for the period of delay till the shares are allotted. Disallowance can be made only where there is specific provisions placing an embargo on such deduction. It is in this context, the claim was found admissible as all the necessary documents for claiming interest was placed before the Assessing Officer. The Tribunal remitted the matter back to the Assessing Officer for fresh adjudication in *Panarc Consulting Group Pvt. Ltd.* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 50 (Delhi).

Merely because the assessee had made interest-free advances, interest on borrowings cannot be disallowed, when the assessee could clearly show that interest-free loans was from proprietary funds and not on borrowing as was pointed out by the Tribunal in *ATS Infrastructure Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 70 (Delhi). There were two more reasons for deletion of the disallowance purportedly under section 14A. One of them being that the loan was given for commercial expediency based on the finding that the same loan in an earlier year figured as opening balance of the year, so that the decision of the Commissioner in the preceding year is binding on the assessee. It was also found that prior to disallowance under section 14A, the Assessing Officer is expected to record satisfaction that interest-bearing funds are used to earn tax-free income, which is a requirement for application of section 14A following *CIT* v. *Reliance Utilities and Power Ltd.* [2009] 313 ITR 340 (Bom), *Munjal Sales Corporation* v. *CIT* [2008] 298 ITR 298 (SC) and *CIT (LTU)* v. *Reliance Industries Ltd.* [2019] 410 ITR 466 (SC).

In the same case, the assessee had received dividend income of Rs. 64,59,304 to which also section 14A had application. On application of rule 8D, the Assessing Officer disallowed the proportionate expenditure to the extent of Rs. 1,52,47,867. The addition was confirmed in first appeal, but it was found by the Tribunal that the investment in one of the companies was only Rs. 9,000, while in the case of investment in another, both purchase and sales were in the same year. The disallowance under section 14A has to be applied only in respect of expenses relating to investments, which yielded exempt dividend, but adoption of average of total investments extends the scope of disallowance beyond what is permissible under section 14A. When there is more than one investment, what is to be taken is average of total investments. Further, there was also an omission to record his satisfaction regarding the disallowance warranted under section 14A, where the assessee himself had not admitted any disallowance. Such lack of record of satisfaction, would render the disallowance of section 14A by adoption of rule 8D, invalid in law following *CIT* v. *I. P. Support Services India (P.) Ltd.* [2015] 378 ITR 240 (Delhi), *CIT* v. *Taikisha Engineering India Ltd.* [2015] 370 ITR 338 (Delhi) and *CIT* v. *Abhishek Industries Ltd.* [2016] 380 ITR 652 (P&H).

In another case, the assessee was in a business of manufacturing automobile components. It was receiving trade advances on which interest was being paid. The deduction for interest is not confined to mere borrowings, but also includes interest for debts incurred. The amounts received were more for capital purposes, so that they were not used for business of the assessee, so that the interest was disallowed. The Commissioner (Appeals) pointed out that at the stage of receipt of trade advances, no income arises unless and until repayment itself is unaccounted. Actually, it was observed that the assessee had repaid the amounts. But the addition was sustained in first appeal merely for the reason that trade advance was not used for intended purposes, so as to require disallowance of interest paid on such amounts. But though the borrowings were acquired for construction of building, so as to be on capital account, the building had already been put to use, so that the amount could not be disallowed as being one on capital account. The trade advance was for doing a job work for the client from whom the assessee had received conversion charges to the extent of Rs. 15.77 crores on which the assessee had paid interest till the amount was adjusted to the extent of Rs. 83,78,010, and debited to profit and loss account as interest charges. It was shown by the assessee that the advances were utilised for construction of the property with no reason from the Assessing Officer to rebut this claim. Genuineness of expenditure had not been doubted. There was no diversion of funds of the assessee for non-business purpose. The mere fact that the borrowing was for construction of factory building cannot justify disallowance as found in first appeal and upheld by the Tribunal in *Asst. CIT* v. *Transenergy Ltd.* [2020] 77 ITR (Trib) (S.N.) 74 (Chennai).

In the same case, it was found that the assessee had borrowed the services of employees from another to whom the amount to the extent of Rs. 1,30,28,173 was paid by way of reimbursement of salaries and allowances payable to employees. The Assessing Officer, however, believed that the assessee should have deducted tax at source in the view that the payment was of salary, but this being a mere reimbursement of expenditure of another, the disallowance for non-deduction of tax at source under section 40(a)(ia) was deleted in first appeal. But the Tribunal remanded the matter because the agreement between the assessee and the other party had not been examined with reference to its terms and conditions nor was there any analysis of functions performed by employees, who were deputed.

Capital gains

(i) Effect of amendment to law

The assessee had acquired a property from a partnership firm of which he was a partner by taking over the partnership business at book value; he then sold the property declaring short-term capital gains of Rs. 1.81 crores after taking the cost as revalued in the books of the partnership firm at

Rs. 3.82 crores. The Assessing Officer took the cost to the firm at Rs. 2.5 lakhs, which was the cost of the property in the partnership as the assessee's cost, as required under section 49(1)(iii)(e) of the Act as retrospectively amended from April 1, 1999 by the Finance Act, 2012. Though the amendment is retrospective, it was held that it cannot be applied in a case where the assessee had filed a return under the pre-amended Act according to the then prevailing law, so that an amendment later than the date of filing such return would have no effect for the assessment in pursuance of the return filed as was held by the Tribunal in *Utsav Cold Storage Pvt. Ltd.* v. *ITO* [2020] 77 ITR (Trib) 69 (Jaipur) following *CIT* v. *Hindustan Electro Graphites Ltd.* [2000] 243 ITR 48 (SC) ; *Sedco Forex International Drill Inc* v. *CIT* [2005] 279 ITR 310 (SC) ; *CIT* v. *Vatika Township (P.) Ltd.* [2014] 367 ITR 466 (SC) and *CIT* v. *Walfort Share and Stock Brokers P. Ltd.* [2010] 326 ITR 1 (SC). For arriving at the conclusion, one has to consider whether the difference between a statute is merely declaratory relating to procedure or otherwise. Where it relates to a procedure, retrospective operation can be given, even if it gives rise to new liability or obligation as long as it does not result in any violence of the language of the enactment. But where the amendment is capable of an interpretation that it can be either retrospective or not, it has to be considered to be only prospective. In other words, procedural amendments could have a retrospective effect only where it is construed as merely declaratory.

(ii) Slump sale

The assessee, a medical professional, who was also doing business in manufacture of tea, had sold immovable properties consisting of land, building and tea factory for a consideration of Rs. 1.60 crores during the year relevant to the assessment year 2013-14. Since the law relating to slump sale was not followed, the matter was remitted by the Commissioner under his revisional powers for computing the assessee's liability under the law relating to slump sale. The Assessing Officer thereupon computed the capital gains at Rs. 53,54,394 and also levied penalty of Rs. 16,63,777 under section 271(1)(c). The Tribunal found that since there was no sale of business as a going concern, there was no slump sale. Since the assessee had no stock, the inference, that what was sold was the business itself was a wrong one. Since no consideration was reported for sale of closing stock, it was inferred by the Assessing Officer that the profit on sale of stock had not been disclosed by the assessee especially in the context that the purchaser's account showed receipt of stock for which the consideration would have been necessarily paid. It was the amount in the purchaser's accounts, which was treated as concealed income of the assessee confirmed in first appeal. The matter was taken up to the Tribunal, where the argument was that the stock had no value, so that there was no profit on its sale. This explanation of the assessee also contradicted the stand of the assessee that the closing stock was part of consideration for immovable assets. If no specific value was assigned to the stock, there is inference of understatement of consideration attracting application of section 50C, so as to require addition. It was in this context, addition made was both upheld in first appeal and the Tribunal in *Muthukumaran Rangarajan* v. *ITO* [2020] 77 ITR (Trib) 421 (Chennai). Levy of penalty, though upheld in first appeal was held unjustified by the Tribunal in the context of show-cause notice not striking out the inapplicable part as between concealment or furnishing inaccurate particulars apart from the fact that the levy of penalty was also not justified on the facts in this case following *Amtex Software Solutions Pvt. Ltd* v. *Asst. CIT (OSD)* [2019] 418 ITR 99 (Mad).

(iii) What is appurtenant land ?

A question that arose was whether the assessee had purchased a building constructed only at 150 sq.ft. on land admeasuring 4973.125 sq.ft., but the land was claimed by the assessee as mere appurtenant to property, so that there could be no independent treatment for land and building. The Assessing Officer felt that 25 per cent. of total plot area alone could be considered as appurtenant land to the property and that the balance was land, so that for purposes of reinvestment benefit under section 54 for relief from tax on capital gains, the land part has to be excluded accepting only 25 per cent. of land as appurtenant to residential house property for purposes of relief under section 54. The assessee's explanation was that the open land was also used as car park, septic tank, garden etc., which has to be taken as appurtenant to the house property. But the Assessing Officer considered that 25 per cent. of the plot allowed by him would cover these facilities as well. The Tribunal found that the Assessing Officer's estimate was reasonable and at any rate was not perverse, so as to justify its interference as decided by the Tribunal in *Maduranthagam Selvaraj Ravi* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 6 (Chennai)

(iv) Period of holding to qualify for treatment as long-term capital asset

Shares of unlisted companies, could earlier be treated as long-term capital asset, if held for three years. This minimum period of holding was curtailed to twelve months to qualify as long-term capital asset by way of an amendment effective from the assessment year 2015-16 for transfers prior to March 31, 2014 as was held by the Tribunal in *Mrs. Neelu Analjit*

Singh v. *Addl. CIT* [2020] 77 ITR (Trib) 220 (Delhi) following *Analjit Singh* v. *Dy. CIT* (I. T. A. No. 4737/ Delhi/2017 dated December 1, 2017).

(v) Relief under section 54

Where the assessee had already invested Rs. 53 lakhs in purchase of land within the specified period and that the total investment including construction was Rs. 64.74 lakhs, exemption was claimed under section 54, but was not allowed by the Assessing Officer on the ground that the construction was still incomplete. The Tribunal, in *Rakesh Kumar Kalra* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 36 (Delhi), held that section 54 does not prescribe the completion of construction of residential house by the specified date since the thrust was on the extent of investment of net consideration on sale of original asset and start of construction of a new residential house. Completion of residential house is not a requirement of section 54 as long as the amount has been utilised on construction. Since the assessee had already made an investment adequate for purposes of section 54, the matter was remanded for verification of the assessee's claim on facts since no documents has been furnished, so that the relief under section 54 could be allowed, if the facts claimed are established.

(vi) Relief under section 54F

Relief under sections 54 to 54F is an essential part of computation of capital gains. These provisions give relief for reinvestment in a residential house property or specified assets. There is also a preliminary matter of jurisdiction as relief is available only to the transferor of single house. Where on date of transfer, the assessee has more than one residential house property, the relief is not available. In the case of joint development agreement, this applies even on which liability for capital gains arises, subject to relief on reinvestments in a residential house property. Availability of relief under section 54 in a joint development agreement was the first issue decided by the Tribunal in favour of the assessee in *Prathap Kumar N.* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 66 (Bang). After clarification by way of an amendment to section 54F to bring it in line with section 54, investment in more than one residential house property does not bar relief. Where in a development agreement, the assessee gets more than one flat, which is capable of being combined to one, reinvestment even otherwise has to be construed as one in a single residential house, so as to qualify for relief under section 54F even before amendment as was also pointed out in this case. Where an objection was raised because the assessee had 9 unsold flats, which were treated as self-occupied house property, so as to render application of section 54F ineligible for the assessee, such a view of the Assessing Officer was confirmed in first appeal. But the Tribunal pointed out that on the date of transfer of original asset, there was only a joint development agreement with none of the 24 flats to be owned by the assessee had come into existence at the time of transfer as is inferable from joint development agreement. It is the date of joint development agreement, which should be treated as date of transfer, on which date the assessee did not have more than one residential house property, so that there was no bar for the assessee for availing of the relief under section 54F.

In the same case, it was also pointed out that the amendment to section 54F permitting reinvestment in more than one residential house property though subsequent would have retrospective effect as it is one of relief following *CIT* v. *Smt. K. G. Rukminiamma* [2011] 331 ITR 211 (Karn).

Income from other sources

(i) Valuation under rule 11U/ 11UA

Where the concession in a transfer in a transaction with a non-relative is sought to be taxed under section 56(2)(viib), such concession can be inferred on valuation under the prescribed rules 11U and 11UA. Where the provision was to be applied in a case of sale of shares issued along with a premium at Rs. 380.53 per share, excessive premium was estimated at Rs. 16 per share by the Assessing Officer as against an approved valuer's report, which justified the premium charged. Since there was no proof of any extra money paid, it was the assessee's argument that application of section 56(2)(viib) read with rule 11UA was unlawful on the ground that the assessee did not come under the mischief of section 56(2)(viib). When it was not the case of the Department that the transaction was not clean, there could be no presumption of any excess payment, so as to justify tax on the assessee as was decided by the Tribunal in *Clearview Healthcare P. Ltd.* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 39 (Delhi). Incidentally, it was also pointed out that the shares were sold in next financial year at higher price and that the amount paid according to the valuation of the assessee was not otherwise faulted. Where there was no suggestion of unaccounted money even remotely connected with the transaction, and even by adoption of valuation under rule 11U and rule 11UA on the basis of valuation done by the Assessing Officer, no concession could be inferred. It was also held that there was no liability under section 56(2)(viib) of the Act following *Lalithaa Jewellery Mart P. Ltd.* v. *Asst. CIT* [2019] 73 ITR (Trib) 532 (Chennai).

(ii) Deemed income under section 56(2)(viib)

The assessee purchased a property for a consideration of Rs. 9.10 lakhs but stamp value was Rs. 22.60 lakhs. The difference was treated as a concession received from a non-relative taxable under section 56(2)(viib). The Assessing Officer taxed the difference of Rs. 9,79,350 as deemed income under section 56(2)(viib). The assessment was confirmed in first appeal. The Tribunal, however, found that section 56(2)(viib) had been substituted by the Finance Act, 2013, so as to be applicable from the assessment year 2014-15, while the assessment under consideration related to assessment year 2011-12. The Tribunal, therefore, pointed out that there could be liability only from the assessment year 2014-15 because of amendment to section 56(2)(viib) was effective only from the assessment year 2014-15 making the provision applicable for individuals and Hindu Undivided Families receiving any property. The scope of provision was expanded to cover purchase of immovable property for inadequate consideration as well. But since the transaction under consideration related to financial year 2011-12, the amended provision had no application, so that addition purportedly made under section 56(2)(viib) was deleted by the Tribunal in *Bajrang Lal Naredi* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 91 (Ranchi) following *ITO* v. *Anand Vihar Construction Pvt. Ltd.* I. T. A. No. 335/Ranchi/2017 dated November 28, 2018. It was also incidentally decided in this case, that interest under sections 234A and 234B was chargeable with reference to returned income and not assessed income.

Incentive deductions

(i) Section 10A/10AA

Where the unit of Export Processing Zone became a unit of Special Economic Zone (SEZ), the period of ten years would have to be reckoned from the day it was set up first in export processing zone for purposes of relief under sections 10A and 10AA as was held by the Tribunal in *Classic Linens International P. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 1 (Chennai). This rule applies both for relief under section 10A as well as 10AA.

(ii) Section 80JJAA

Section 80JJAA with a view to encourage manpower employment provides weighted deduction for salaries of newly engaged workmen during the year. The assessee had claimed that all the twenty-four new workmen had put in services of less than 300 days during the year, which would justify weighted deduction for the employer in respect of payment to twenty-four workmen who had satisfied the condition of serving less than 300 days. It was in this context that the assessee claimed weighted deduction. But the Assessing Officer disallowed the same making an addition of Rs. 91,18,238. This was confirmed in first appeal. The Tribunal, however, found that the requirement of section 80JJAA was whether the assessee had engaged new employees during the year as regular workmen. This aspect not having been examined, the matter was remitted by the Tribunal back to the Assessing Officer to allow the weighted deduction under the section, if the new workmen were qualified for treatment as regular workmen in the definition under section 80JJAA of the Act.

In the same case, there was a disallowance under section 40(a)(i) for non-deduction of tax at source in respect of an amount of Rs. 4.76 crores debited to its holding company on account of marketing commission. According to the assessee, this was not liable to tax as it was not a payment covered under section 195 in absence of any permanent establishment or business connection for the non-resident in India. The payment was not in the nature of fees for technical service. The non-resident had no permanent establishment in India. The Assessing Officer was not satisfied by this reply, but wanted invoices on marketing commission and the agreement with the holding company under which the assessee became the marketing representative for promotion of readymade garments manufactured by the assessee for sale in the overseas market. He was of the view that such payment for marketing services would require tax deduction at source. In fact, he felt that it was a device to reduce its income questioning the genuineness of the payment of commission itself. When the payment was disallowed for lack of genuineness, the question of disallowance of payment under section 40(a)(ia) cannot arise. But this was disallowed without prejudice by the Assessing Officer while taking a view contrary to the one taken earlier that the payment itself was genuine for services rendered. This contradictory finding sought to be proved by admission of additional evidence was not acceptable since the additional evidence itself was not admitted. The Tribunal felt that there was no reason for rejecting additional evidence which should have been examined on the merits after remand, if considered necessary. Since he failed to do so, the matter was remitted back to the Assessing Officer for a decision afresh on this matter in *Aquarelle India P. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 2 (Bang).

(iii) Section 80P

The assessee was engaged in the business of milk processing and production of milk products besides business in sale of seeds. It had filed a return admitting an income of Rs. 2,95,03,620 against which it claimed relief under section 80P(2)(iv) to the extent of Rs. 6,07,354 in respect of profit on sale of seeds. The Assessing Officer took the view that assessee had made an excess claim to the extent of Rs. 1,49,479 on verification of figures with reference to actual gross profit worked out by him. The assessee claimed that the expenses reduced in the Assessing Officer's computation did not relate to the eligible income on sale of seeds, but related to his business as commission agent. The Assessing Officer did not accept the explanation as there could be no business without expenses. But he recomputed the eligible profits on net profit as against the gross profit as earlier proposed. The assessee insisted on a relief on gross profit on sale of seeds. The Assessing Officer restricted the deduction by estimating indirect expenditure at 40 per cent., which was upheld in first appeal. The Tribunal partially allowed the appeal by granting reduction of 20 per cent.

In the same case, the assessee had received dividend income of Rs. 16,362 and claimed it to be exempt under section 10(34). The assessee's case was that the investment was not made out of borrowed funds, so that disallowance under section 14A was not applicable. The Assessing Officer disallowed Rs. 4,40,120 by applying rule 8D for investment in earning exempt dividend income of Rs. 16,362. The addition was confirmed in first appeal. The Tribunal had found that assessee had sufficient share capital and reserves, besides surplus funds with nothing to suggest that investments was made out of borrowed funds, so that there could be no disallowance under section 14A and much less application of rule 8D. The very fact that the disallowance was Rs. 4,40,120 related to disallowance under section 14A for earning a meagre dividend income of Rs. 16,362, which itself indicates that the disallowance was not rational as decided by the Tribunal in *Baroda District Co-operative Milk Producers Union Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 87 (Ahd) following *CIT* v. *Corrtech Energy P. Ltd.* [2015] 372 ITR 97 (Guj).

In a matter under appeal against some addition relating to disallowance of commission and claim for bad debt besides a claim for relief under section 80P, the Commissioner (Appeals) allowed deduction for other additions, but disallowed deduction under section 80P(2) of the Act. Since the assessee had claimed bad debt in respect of its activities, it was clear that it was carrying on business and that its income was from business, so that the condition for relief under section 80P(2) was held by the Tribunal to be satisfied in *Rishabh Sahkari Sakh Sanstha Mydt* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 26 (Indore).

In respect of a claim for relief under section 80P meant for a co-operative society, right to deduction does not solely depend upon registration with the Registrar of Co-operative Societies since such registration is not binding on the Assessing Officer. Eligibility has to be decided solely on the basis of the provision as was decided in a case of co-operative society functioning under the Kerala Co-operative Societies Act, 1969 in respect of interest earned on investments with co-operative bank and other banks as part of its banking activity, so as to be assessable as income from business and not other sources. In this case, the matter of eligibility for relief under section 80P was remanded in a group of case of co-operative banks to verify whether the activities were in accord with the provisions of the Kerala Co-operative Societies Act, 1969, so as to accord relief only to the extent available under section 80P(2) as decided in a group of cases in *Pangode Service Co-operative Bank Ltd.* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 33 (Cochin) following *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* [2019] 414 ITR 67 (Ker) [FB].

In the same case, it was found that interest earned on investment with co-operative and other banks has to be treated as part of income from banking activity, so as to be assessable as business income and not under other sources, irrespective of such treatment, so that deduction under section 80P of such interest has to follow for provisions of section 80P as pointed out by the Full Bench of the Kerala High Court in the above case as well as the decision of a co-ordinate Bench of the Tribunal in *Kizhathadiyoor Service Co-operative Bank Ltd.* v. *ITO* (I. T. A. No. 525/Cochin/2014 dated July 20, 2016).

The same issue as regards eligibility for relief under section 80P(2) in respect of interest received from nationalized bank came up, wherein it was decided that interest from nationalised bank was not eligible for deduction under section 80P(2), so that net interest from deposits from scheduled banks would required to be excluded from amount eligible under section 80P as decided in a group of two cases in *Vir Transport Operator Co-op. Credit and Services Society* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 46 (Ahd) following *Sahyog Co-op. Credit Society Ltd.* v. *Dy. CIT* (I. T. A. No. 1132/Ahd/2018 dated November 29, 2019).

(iv) Section 80P(2)/(4)

In the matter of relief under section 80P, the High Court in Kerala had already found that the Assessing Officer is not bound by the registration certificate issued by the Kerala Co-operative Societies classifying the assessee as a co-operative society unless the Assessing Officer on his own enquiry found it to be a co-operative society as decided by the Full Bench of the Kerala High Court in *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* (I. T. A. No. 97 of 2016 dated March 19, 2019[1]) reversing its earlier

1. see *Pr. CIT* v. *Poonjar Service Co-operative Bank Ltd.* [2019] 414 ITR 67 (Ker)[FB}.

decision of the Division Bench in *Chirakkal Service Co-operative Bank Ltd.* v. *CIT* [2016] 384 ITR 490 (Ker), where there had not been any enquiry on the part of the Assessing Officer following the decision of the Full Bench before allowing relief under section 80P. The Commissioner (Appeals) reversed the order of the Assessing Officer for non-examination of a matter, which warranted enquiry and remitted the matter back to the Assessing Officer for necessary enquiry. The assessee took up the matter to the Tribunal, which upheld the order in first appeal and, therefore, dismissed the assessee's appeal in *Chirakara Service Co-operative Bank Ltd.* v. *ITO* [2020] 77 ITR (Trib) 457 (Cochin).

Assessment

(i) Service of notice

Assessment proceedings require a service of notice under section 143(2) before an assessment is made. It follows that such notice should be validly served. Where it has to be served by substitution, where direct service is not possible, it can be done by affixture at the last known address. The manner in which such service by affixture has to be done should follow the requirement of Civil Procedure Code. Where the notice under section 143(2) was issued against a company in the business of providing tourism and travel-related services for tourists from outside India, service by way of affixation of a notice which did not contain the correct address even as acknowledged by the Department without any effort made to ascertain the correct address, was invalid service of notice and so the assessment in pursuance thereof under section 143(3) was void ab initio as decided in *Tourism India Management Enterprises (P.) Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 311 (Delhi). The assessment was, therefore, quashed without going into the merits of the case in view of invalid service of notice under section 143(2).

(ii) Admission during survey

Where the assessee had made a statement admitting income during a survey, but such statement was not under the oath and the retraction itself explained why the admission had to be retracted, it was found that where there was no other materials for the addition, retraction was found acceptable and the addition based thereon was deleted by the Tribunal in *MNP Turnmatics* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 31 (Delhi) following *CIT* v. *S. Khader Khan Son* [2013] 352 ITR 480 (SC).

(iii) Estimate of income

The assessee was engaged in the business of excavation and transportation besides commission business. The assessee had shown an income of

Rs. 1,25,040 under the head other sources as income from transport business conducted in the name of one V regarding which the assessee had submitted both receipts and expenditure. But the receipts had not been accounted in the assessee's books allegedly due to inadvertence. The expenditure relating to the receipts in the name of V was disallowed while excluding the receipt. The addition was partly sustained on a different ground with reference to adoption of 8 per cent. of net profit, so that the assessee got relief of Rs. 18,29,505, while disallowance of Rs. 34,047 was sustained.

Another issue in this case related to a gift of Rs. 10 lakhs received from his mother-in-law and Rs. 2.5 lakhs from his father. Though the gifts were confirmed by affidavits and both had sufficient source of income, the aggregate amount of Rs. 12,50,000 was added besides some other minor additions. The affidavits were not considered sufficient proof in absence of any documentary evidence in support of genuineness of gift and creditworthiness of donors. In first appeal, the assessee had filed some documentary evidence, so that gifts from mother-in-law, who had 50 acres of agricultural land, was accepted when the gift itself was made by a gift deed, which was notarised. The gift deed itself also explained that the gift is out of agricultural income, stridhan and gift received by her from her husband, who is also an agriculturist. The story of gift, which was not accepted by the Assessing Officer and in first appeal, was accepted by the Tribunal on the ground that there was ample proof of source for mother-in-law and that she being a relative within the meaning of the *Explanation* to section 56, it could not even otherwise be brought to tax as decided in *Vinod Kumar Jain* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 83 (Indore).

Reassessment

(i) Valid

The assessee filed a return claiming depreciation on vehicles at the higher rate of 30 per cent. applicable for running vehicles on hire. It was a case of earthmoving machinery which could not be classified along with motor lorries, which were entitled to such higher depreciation. Since the claim of higher depreciation had been allowed in the original assessment, without examining justification for higher rate, the reassessment proceedings initiated for reducing the rate of depreciation under section 147 was upheld by the Tribunal because the original assessment was one by way of intimation under section 143(1), so that fresh proceedings cannot be characterized as one arising out of a mere change of opinion since intimation under section 143(1) is not an assessment within the meaning of the statute. Initiation of the proceedings for one of the years within four years could not also be questioned as the Assessing Officer did not examine the issue for higher depreciation at all in the original assessment. The objection to jurisdiction was on the ground that it was based upon audit objection that there was nothing on record to show that the assessee was using the vehicle for running them on hire so as to justify higher depreciation. Though objection was raised by the audit authority, it was found that there was no evidence available in the record to show that the vehicles were actually used for running them on hire. It is under these circumstances, reassessment jurisdiction was held justified by the Tribunal in *Arihant Constructions* v. *Asst. CIT* [2020] 77 ITR (Trib) 171 (Vizag).

Proceedings were initiated because of a statement given by a Chairman of one S that his company was being used as a front company for manipulation of accounts. Based upon such statement, reassessment proceedings were initiated in the assessee's case with jurisdiction being upheld in first appeal while deleting the addition of Rs. 12.59 crores on account of deemed dividend under section 2(22)(e) ; however, the remaining addition on account of unexplained loans and advances to the extent of Rs. 20 crores besides classification of interest income in computation of taxable income were remanded taking into account the actual advances other than those accommodation entries by S. When the matter came up before the Tribunal in a group of three cases, it was held that in view of the statement from the Chairman of S alleging falsification of books of account and manipulation of accounts for past several years, reopening of assessment cannot be attributed to mere change of opinion, jurisdiction of reassessment was therefore upheld in first appeal and the Tribunal pointing out that Commissioner (Appeals) had already directed examination to the Assessing Officer regarding genuineness of loans and advances to the extent of Rs. 20 crores and other issues relating to segregation of interest between what is admissible and what is not, besides the verification of correctness of treatment of income as trading in shares, so that it dismissed the assessee's appeal in *Elem Investments Pvt. Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) 319 (Hyd).

(ii) Not valid

Reassessment notice under section 148 issued after four years without any allegation as regards any escapement of income, which was failed to be disclosed as also non-disclosure fully and truly all material facts, reassessment jurisdiction was held justified by the Tribunal in *Tarun Goel* v. *ITO* [2020] 77 ITR (Trib) 133 (Jaipur). The notice issued in a post-search assessment where purchase of land at a price accepted in the seller's case with nothing found in respect of its transaction during search, could not justify inference of any unexplained investment, so as to attract liability under section 69B of the Act, so that reassessment jurisdiction under section 147 where there was no failure to disclose material facts, was not valid.

In the same case, there was also an error in assuming reassessment jurisdiction because there were two approvals for this addition in the reasons recorded by the Assessing Officer.

Where the original assessment had been made after examination of the accounts under section 143(3), and the recorded reasons did not show what material particulars were failed to be furnished, approval for reassessment was found to have been mechanically made, so that reopening was held to be bad in law and the notice under section 148 was quashed by the Tribunal in *APC Air Systems P. Ltd.* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 21 (Delhi) following *United Electrical Company (P.) Ltd.* v. *CIT* [2002] 258 ITR 317 (Delhi), *CIT* v. *S. Goyanka Lime and Chemical Ltd.* [2015] 64 taxmann.com 313 (SC) and *Tara Alloys Ltd.* v. *ITO* (I. T. A. No. 2421/ Delhi/2017 dated March 1, 2018).

In response to notice under section 148, the assessee required the original return to be treated as filed in response to reassessment notice under postal acknowledgment. In such a case, the Assessing Officer is bound to proceed with the assessment after issue of notice under section 143(2). Where no notice was issued within stipulated time, the assessment completed under section 144 and interest charged under section 234A were both found to be invalid by the Tribunal in *Flovel Energy Pvt. Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) 441 (Delhi) after elaborate review of precedents on the subject.

Where information regarding a loan granted by the assessee was noticed during a search, it was found that the information was based upon a copy of the agreement. An addition based upon the inference that cash loan was unaccounted without original agreement brought on record nor expert opinion obtained as to the assessee's handwriting before recording the reasons for reassessment, was without jurisdiction. When the assessee was denying the loan transaction, there could be no reassessment on the inference that there was an omission to assess the amount in the assessee's hands, while the correct course of action was to proceed against the borrower under the third-party jurisdiction available under section 153C. It was, therefore, found that reassessment in the assessee's case was without jurisdiction as held by the Tribunal in *Adarsh Agrawal* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 52 (Delhi) following *Indian Express Newspapers (Bombay) P. Ltd.* v. *Union of India* [2008] 300 ITR 351 (Bom), *G. Koteswara Rao* v.

Dy. CIT [2015] 64 taxmann.com 159 (Vizag) and *ITO* v. *Arun Kumar Kapoor* [2011] 140 TTJ 249 (Amritsar).

Notice under section 148 was issued beyond the four-year time limit based upon alleged difference in respect of labour charges accounted by the assessee noticed during a survey without observing the requirement for notice beyond the four-year time limit to indicate any failure on the part of assessee or any new material, which had come to the notice of the Assessing Officer for jurisdiction beyond the four year time limit. When asked to explain the difference in labour charges as recorded in a register at Rs. 11,53,77,094 as against Rs. 9,94,34,061 in its accounts, the assessee said he himself was uneducated and registers were maintained by one of his supervisors. This explanation was not found acceptable nor was a later explanation that an account maintained by one of his supervisors could not have been considered and acted upon for invoking reassessment jurisdiction. The validity of notice under section 148 was upheld in first appeal without considering the reasons recorded. The Tribunal found that the difference in labour charges was noticed during survey, a matter, which was examined during assessment. But it was nowhere stated that there was any failure on the part of the assessee or that any new material had come to the notice in this case for reopening the assessment beyond the four-year time limit. In fact, the difference in labour payments had already been considered in original assessment, so that this could not be a basis for reassessment jurisdiction after four years, so as to be valid as was found in this case in *Reddipalli Srinivas* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 59 (Vizag) following *Sadbhav Engineering Ltd.* v. *Dy. CIT* (Special Civil Application No. 5846 of 2010 (Guj), *CIT* v. *Elgi Finance Ltd.* [2006] 286 ITR 674 (Mad), *Fenner (India) Ltd.* v. *Dy. CIT* [2000] 241 ITR 672 (Mad).

The original assessment on total income of Rs. 760 was accepted, but it was reopened because of the assessee's liability of Rs. 10.73 crores towards securities premium account in the balance-sheet. Apparently the liability had arisen during the year. The Assessing Officer had issued notice under section 142(1) with a view to verify the extent of share premium, but could not be verified in the absence of a response. The Assessing Officer also noticed deposit of a cheque of Rs. 20 lakhs in the assessee's bank account regarding which there was no explanation. It is under these circumstances, the reopened assessment was completed after addition of the cash credit of Rs. 20 lakhs under section 68. The addition was confirmed in first appeal, but the assessee took up the matter to the Tribunal in *Budhiya Agencies P. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 72 (Kol), wherein the Tribunal found that the notice under section 148 was issued more to verify certain particulars based upon an appraisal report received by him indicating the need for further enquiry. Apart from this information being insufficient for assumption of reassessment jurisdiction, there was also no independent application of mind of the Assessing Officer on the information received. Such information was more in the nature of reason to suspect necessitating further enquiry before positive inference of escaped income. The reasons recorded should be on a standalone basis and not on the basis of any extrapolation on a legal issue, so that the reasons recorded, it was found, did not satisfy the conditions for reopening the assessment following *Ganga Saran and Sons P. Ltd.* v. *ITO* [1981] 130 ITR 1 (SC), *Pr. CIT* v. *Shodiman Investiments (P.) Ltd.* [2018] 93 taxmann.com 153 (Bom) and *Dy. CIT* v. *Great Wall Marketing (P.) Ltd.* (I. T. A. No. 660/Kol/2011 dated February 3, 2016).

Action under section 147 beyond the four-year time limit can be initiated only on bringing new and tangible material on record at the time of reopening of assessment. Mere correction of an error in the original assessment cannot justify reassessment jurisdiction as was pointed out by the Tribunal in *Alcatel Lucent India Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) 694 (Delhi) accepting a loss of Rs. 40.29 crores on sale of fixed assets. Though it was an agreed assessment on an agreed addition, it was sought to be reopened alleging a factual mistake in computation of foreign-exchange loss regarding which the particulars were already part of the records and, therefore, subject matter of scrutiny in original assessment. Where the Assessing Officer has not pointed out any omission to disclose material facts, jurisdiction was questioned by the assessee, but it was defended by the Revenue by citing a number of cases. The Tribunal rightly referred to reasons recorded for reopening the assessment. The reasons recorded indicated that it was observed by the Assessing Officer "on perusal of records" that the assessee was allowed wrong deduction of Rs. 1.23 crores in allowing loss on sale of fixed assets on revenue account, while it was capital in nature, so as to require disallowance. This omission to disallow the same, it was inferred, resulted in an underassessment of income to the extent of Rs. 2,45,35,280. It was further recorded that translation of foreign exchange loss into rupees had been done not with reference to date of actual remittance, but by mere statement of liabilities in the balance-sheet. From these two recorded facts, it was inferred that there was failure on the assessee to make a full and true disclosure of all material facts in consequence of which there was escapement of income of Rs. 5,26,83,280.

Where the original assessment was completed under section 143(3) and the recorded reasons showed absolutely no new reason, jurisdiction was found lacking by the Tribunal following the decision of the Supreme Court in *Indian Oil Corporation* v. *ITO* [1986] 159 ITR 956 (SC), wherein it was held that in absence of any new fact other than those already available in the original assessment, there could be no jurisdiction for reassessment. This decision has been followed in a number of cases, which has been listed by the Tribunal in this case for a decision in favour of the assessee, so that the assessee's appeal stood allowed.

Rectification

(i) Section 154

Where the Assessing Officer had adopted fair market value of the property as on April 1, 1981 in computation of the assessee's liability for capital gains in the course of limited scrutiny, he converted the same into a regular one without taking prior approval of competent authority, passing an assessment order and following it with an order of rectification under section 154 for recomputed liability. Since the original assessment was of limited scrutiny not having been converted by procedure enjoined by law, the rectification proceedings under section 154 was also illegal and void beyond the jurisdiction to frame the limited scrutiny assessment as was decided by the Tribunal in *Smt. Gurbachan Kaur (Late)* v. *Dy. CIT* [2020] 77 ITR (Trib) 474 (Jaipur), wherein the entire procedure of scope of limited scrutiny and its conversion had been described with reference to Instruction No. 7 of 2014 dated September 26, 2014. Since the order was contrary to the Instruction and the law, appeal of the assessee as regards the lack of jurisdiction for rectification under section 154 was allowed and the order of the Assessing Officer quashed.

(ii) Miscellaneous application

Levy of penalty by the Assessing Officer became subject matter of dispute, if at all leviable, whether it will fall under section 271AAA or 271(1)(c). Petition for rectification for considering this issue was filed before the Tribunal, while an appeal was also filed before the High Court as to the correctness of levy of penalty. While the application for rectification was dismissed by the Tribunal as the matter had been admitted for adjudication before the High Court, the Tribunal held that there was no case for entertaining a rectification seeking set aside of the original order and its review, so that the miscellaneous application filed by the assessee was dismissed by the Tribunal in *Asst. CIT* v. *Saviour Builders Pvt. Ltd.* [2020] 77 ITR (Trib) 305 (Delhi).

Post-search assessment

(i) Section 153A

The law that no addition pursuant to a search can be made, where no incriminating materials against the searched person was found was followed in *Dy. CIT* v. *Aryan Future Trading P. Ltd.* [2020] 77 ITR (Trib) (S.N.) 35 (Delhi). In this case, the Tribunal further clarified that merely because the decision of the High Court relied upon by the assessee was the subject matter of further appeal to the Supreme Court, the decision of the High Court does cease to be binding on the assessee especially where the Supreme Court had already dismissed the special leave petition against such appeal.

(ii) Interest under section 234A

In a post-search assessment under section 153A for assessment year 2015-16, interest was charged under section 234A. This charge was confirmed in first appeal. When the matter was taken up to the Tribunal in *J. Sunder* v. *Asst. CIT* [2020] 77 ITR (Trib) (S.N.) 1 (Chennai), the Tribunal pointed out that both sections 234A and 234B are mandatory being consequential in nature. Where the assessee had come out with admission only after detection, the fact that income is voluntarily admitted does not save the assessee from liability under sections 234A and 234B as was held in this case.

(iii) Third party jurisdiction

A pen drive seized during a search from the residential premises of the accountant of CHL contained details of certain cash transactions including a cash loan of Rs. 1.05 crores taken by the assessee on which interest of Rs. 8,31,830 was also shown to have been paid, although the assessee claimed that the accountant had not dealt with any financial transaction by cheque or cash as a finance broker for CHL. The basis on which notice under section 148 was issued and an addition was made of the amount noted in the pen drive was deleted in first appeal as the accountant from whose pen drive the information was gathered was an unrelated party. However, he did not deal with the contention relating to jurisdiction. On the Revenue's appeal to the Tribunal, it was found that the Department failed to establish any connection with the information in the pen drive with either the assessee's business or as a personal transaction of the assessee or that it was a transaction with directors of the assessee-company. The directors were not even summoned for examination. The assessee's denial of any transaction in absence of any incriminating materials found during search, the deletion of addition of Rs. 85,31,830 was upheld by the Tribunal in *Dy. CIT* v. *Mahesh Bansal* [2020] 77 ITR (Trib) 205 (Indore). It was a case of the Department's failure to establish any connection either with the assessee's business or a personal transaction in the absence of any effort to summon the third party in whose case the search was undertaken.

A search had revealed that one of the members of the family had sale deed of a property in his name acquired from a company through its directors. The document seized was inferred as belonging to the assessee, so as to justify jurisdiction arising out of the search in the case of a family under section 153C under which a notice was issued against the assessee. However, liability was restricted to disallowance of foreign travel expenses of Rs. 62,33,699. It was found that jurisdiction under section 153C was justified in the light of what was found during search to which the assessee was a third party. But it was found that the notices were issued for the assessment years 2006-07 to 2011-12 and not for the assessment years 2008-09 to 2013-14 to which the additions related. Notice, therefore, was bad in law with the result the assessment itself was illegal, so that the additions could not be sustained as was decided by the Tribunal in *Bina Fashions N Foods (P.) Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 68 (Delhi) following *BNB Investment and Properties Ltd.* v. *Dy. CIT* [2018] 68 ITR (Trib) 567 (Delhi).

In another case, the assessee was engaged in the business of sale and export of milk and milk products including skimmed milk powder, dairy whitener, milk fat, paneer, besides liquid milk and desi ghee. During search on the basis of information, the disallowance was made for some cash purchases of milk, payment of commission, some entries relating to sundry creditors besides treating some income shown as agricultural income as income from other sources. The additions were partly reduced. On further appeal to the Tribunal, it was found that the completeness of purchases of milk was not faulted as no incriminating materials or documents regarding this matter was found. Disallowance of administrative expenses and commission to the extent of Rs. 11,72,488 charged to profit and loss account was not part of any incriminating material during search, so that it had to be deleted. Apart from lack of merit in additions, notice under section 143(2) was issued beyond the permissible time limit in respect of the post-search assessment under section 153A. A part of expenditure claimed was disallowed as unexplained under section 69C with no independent material or evidence brought on record. Certain loose sheets of papers with notings and jottings do not lead to the inference of undisclosed transaction as no details were available nor did they refer to any names of persons relating to the transactions, so that there was no justification for addition under section 69C as was decided by the Tribunal in *Param Dairy Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) 567 (Delhi) finding that section 69C itself had no application, so that no addition could be made with reference to this section following *Chintels India Ltd.* v. *Dy. CIT* [2017] 397 ITR 416 (Delhi) and *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi).

(iv) Unexplained jewellery

During search of the residential premises of the assessee, jewellery worth Rs. 66,31,229 was found in a locker in a bank. Jewellery was claimed to belong to family members regarding which bifurcation was also given. Since there was no documentary evidence relating to different ownerships, the claim was partly accepted with addition limited to Rs. 10,69,543 as unexplained jewellery, the balance having been accepted. The assessee argued before the Commissioner (Appeals) that the holding of the jewellery was within the permissible limit, which was 600 gms with reference to number of persons in the household. In view of the Board Circular No. 1916 dated May 11, 1994 a further allowance was made for 100 gms and the addition for the balance was sustained in first appeal. The matter was taken up to the Tribunal, which accepted the assessee's explanation that the jewellery found had been received on ceremonial occasions including gifts received on various occasions. The working following the Circular had omitted the assessee's wife's share, who was also a member of family residing in the place searched. This claim having not been controverted, the Tribunal deleted the addition in *Bishan Bansal* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 95 (Delhi) following *CIT* v. *Ratanlal Vyaparilal Jain* [2011] 339 ITR 351 (Guj).

In the same case, a cash of Rs. 50,000 was also found and added by the Assessing Officer. The explanation that it was past savings was not accepted by the Assessing Officer and the Commissioner (Appeals). It was found by the Tribunal that the total cash found was Rs. 3,87,200. The assessee's explanation for an amount of Rs. 50,000 was not accepted. This addition, which was also confirmed in first appeal was confirmed by the Tribunal as substantial benefit had been granted by the Assessing Officer in accepting the explanation for the balance amount found during search, so that addition of Rs. 50,000 was sustained by the Tribunal.

Revision

(i) Section 263

The assessee, during the course of its business, had earned interest on fixed deposits to the extent of Rs. 9,47,04,585 but instead of crediting it to the profit and loss account deducted it from the value of inventories shown in the balance-sheet and in Form 3CD report with the tax auditor certifying such amount as pertaining to "other income" not credited to the profit and loss account. However, the Assessing Officer ignored these facts and accepted the return. Prejudice was treated as having been caused by non-enquiry relating to the amount of interest and issued notice under section 263 in response to which the assessee's explanation was that the assessee was engaged in the business of infrastructure development of commercial projects on land allotted by the Haryana State Industrial Development Corporation with the assessee expected to pay for the land in instalments. It is for making such payments, the assessee raised funds from non-resident shareholders from abroad and that such borrowings were temporarily banked in fixed deposits to earn interest, so that in view of the nexus as between such interest and real estate purchases, there could be no separate assessment of the interest amount as income from interest. Tax, however, has been deducted and the amount deducted had been shown in Form 26AS. There was no failure to disclose the amount of interest and its inclusion in taxable income has also been duly explained. It was, therefore, not a case, where the Commissioner made independent enquiry for arriving at a conclusion that there was non-inclusion prejudicial to the interests of the Revenue. It was under these circumstances, there was no justification for the inference that the order of the Assessing Officer was erroneous and prejudicial to the interests of the Revenue, so that the Commissioner's order was quashed in *Brahma Center Development Pvt. Ltd.* v. *Pr. CIT* [2020] 77 ITR (Trib) 156 (Delhi).

In another case, 100 per cent. depreciation was claimed in a revised return in respect of a power unit and pre-conditioned air unit as against normal 15 per cent. depreciation claimed in the original return. As regards the claim in the revised return that machinery had to be classified as air pollution control equipment eligible for 100 per cent. depreciation, the Principal Commissioner found that the deduction at the enhanced rate of 100 per cent. had been allowed without making due enquiries. Similarly, there was no enquiry on the classification of claim of interest as between interest payable prior and post commencement of business ; the acceptance of the claim was also found by the Commissioner to be without proper enquiry. As for the classification of interest, the break-up between interest relating to pre- and post-commencement of business was not examined in the manner expected by law. It was under these circumstances, the Tribunal found that the revisional order was justified in *Delhi*

Aviation Services Pvt. Ltd. v. *Pr. CIT* [2020] 77 ITR (Trib) (S.N.) 22 (Delhi).

Where an assessment was taken up for limited scrutiny and the return was accepted, the Principal Commissioner purporting to act under section 263 held the order to be prejudicial to the Revenue on the ground that a gain from foreign currency loans for purpose of indigenous assets should have gone to reduce the cost of assets. Since it was not done, notwithstanding the fact that the assessment was done on limited scrutiny, there had been prejudice to the Revenue by non-observance of the requirement of section 43(1). The matter was taken up to the Tribunal, which pointed out that section 43(1) requires adjustment of the cost, where there is any gain or loss on foreign currency loans for purchase of the capital asset for purposes of depreciation thereon. The question whether the gain was on capital or revenue account does not arise in the light of the clear language of section 43(1). The Tribunal found that section 43(1) applies only in respect of capital expenditure or capital gains, an inference which has to be drawn with reference to purpose of foreign currency loans in matters relating to it. Foreign-exchange loss, even where it relates to a loan for acquiring fixed assets, is still a revenue expenditure chargeable to profit and loss account. Section 43(1) nowhere refers to gains or loss on foreign currency loan, the liability on which depends upon foreign currency fluctuations, so that such loss or gain would be on revenue account. There had been no escapement of income in allowing foreign-exchange loss in respect of a loan taken for construction of new building and for acquiring additional equipment, notwithstanding the purpose of loan, the assessment in allowing deduction was not erroneous or prejudicial to the Revenue. The fact that the assessment was done under limited scrutiny makes no difference either to inference on the merits or exercise of jurisdiction under section 263 as was held by the Tribunal in *Baby Memorial Hospital Ltd.* v. *Asst. CIT* [2020] 77 ITR (Trib) 484 (Cochin) after an elaborate review of large number of precedents on the subject.

It was also pointed out in this case that there is a difference between cost of asset and cost for raising money for purchase of asset. Even subsequent acquisition of asset cannot change the price paid. It was for this reason, the Supreme Court, in *CIT* v. *Tata Iron and Steel Co. Ltd.* [1998] 231 ITR 285 (SC), had concluded that fluctuation in foreign exchange rate in repayment of instalments for a foreign loan to acquire an asset cannot alter the actual cost for purposes of depreciation. Any loss incurred on account of fluctuation in rate of exchange does not add to the cost. This decision in *Tata Iron and Steel Co. Ltd.*'s case (supra) supersedes the earlier decision to the contrary in *Sutlej Cotton Mills Ltd.* v. *CIT* [1979] 116 ITR 1 (SC). The Tribunal also referred to the decision to the same effect in *Prakash Leasing Ltd.* v. *Dy. CIT* [2012] 23 taxmann.com 3 (Karn). It also relied upon the amendment to Accounting Standards 11 along with amendment to section 43A pointing out that valuation is a part of accounting system, so as to render the Accounting Standards binding and allowing for further adjustment to cost by way of increase or decrease with reference to profit or loss in change in rate of exchange for acquiring the asset because of Accounting Standards 11 (revised 2003). The revised Standard supersedes the Standard prior to revision. Section 43A relating to foreign exchange rate fluctuation has now to be understood in the light of revised Accounting Standards 11 (2004). Prior to 2004, Accounting Standards 11, 1994 would have application. It is in the light of Accounting Standards, it was found that there was no escapement of income.

In another case, where the Assessing Officer had made an addition of Rs. 7.5 lakhs and this addition was accepted by the assessee because he could not get confirmation from the lender, the Commissioner issued a show-cause notice under section 263 as to why the assessment should not be held to be prejudicial to the Revenue since other unsecured loans and the scope of deemed dividend under section 2(22)(e) had not been examined and that excessive tax deduction at source had been granted besides overlooking the requirement of applying section 43B by allowing liability in respect of professional tax when it was not actually paid during the year. The revision of the order on these facts were clearly found to be evidence of lack of enquiry on the part of the Assessing Officer, so that assumption of revisional jurisdiction under section 263 was upheld. Further, verification of addition of Rs. 7.5 lakhs was also to be considered in the light of the assessee's representation, besides the other deficiencies found by the Commissioner, so that the entire assessments would have to be considered afresh by the Assessing Officer granting the credit for tax deduction, which was failed to be granted in *Anand Lilaram Raisinghani* v. *Pr. CIT* [2020] 77 ITR (Trib) 431 (Mum).

In a claim for relief under section 54F as an abatement of liability for capital gains tax to the extent of investment of Rs. 70 lakhs at an inflated price of 1346 per cent. above the market price, the relief allowed by the Assessing Officer was found to be erroneous and prejudicial to the Revenue for lack of examination of this abnormal difference as regards investment. It was found by the Tribunal that the investments in two information-technology units and two residential units were themselves beyond the permissible period of one year before the sale of capital asset notwithstanding the plea that there was agreement to assign the property within the time limit. The Commissioner in revisional proceedings found that the deduction was allowed under section 54F on incorrect facts. The Tribunal on the assessee's appeal found that the valuation of the land sold as well as cost of acquisition had been referred to the Valuation Officer, but without awaiting his report, the assessment was completed rejecting the relief under section 54F. The response received from the Valuation Officer was not recorded in the assessment order. The claim itself was not examined with reference to law on the subject, so that the revisional order of the Commissioner under section 263 was held justified in *Muzaffer Mahmood Khan* v. *Pr. CIT* [2020] 77 ITR (Trib) (S.N.) 62 (Pune).

(ii) Time limit

In an intervention of a reassessment the revision proposed was beyond the time limit in respect of a matter decided in the original assessment as its limitation runs from the order of the assessment and the mistake was alleged, and not reassessment as was found by the Tribunal in *Shyam Steel Manufacturing Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 37 (Kol) following *CIT* v. *Alagendran Finance Ltd.* [2007] 293 ITR 1 (SC) and *Success Tours and Travels (P.) Ltd.* v. *ITO* [2017] 394 ITR 37 (Cal).

Recovery of tax

Stay of demand

A property belonging to the assessee was attached for non-payment of tax, while the assessee's petition for stay remained undisposed. It was under these circumstances, the Tribunal granted interim stay placing the attachment under suspension till disposal of stay petition in *Cleared Secured Services Pvt. Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 93 (Mum).

Appeals

(i) Monetary limits

Monetary limits for appeals by the Department prescribed in Circulars have to be strictly followed unless it falls within the exceptions provided in the Circular itself. Where the exception has no application, an appeal filed in the case of stakes below the prescribed limit, such appeal is liable to be dismissed as decided in *ITO* v. *Smt. Madhuri Devi* [2020] 77 ITR (Trib) 303 (Delhi)) and *Asst. CIT* v. *Madhyam House Pvt. Ltd.* [2020] 77 ITR (Trib) 307 (Delhi). The limits fixed by Circular No. 3 of 2018 dated July 11, 2018 [2018] 405 ITR (St.) 29 was revised upwards by Circular No. 17 of 2019 dated August 8, 2019 [2019] 416 ITR (St.) 106. The limits apply for all appeals and special leave petitions in respect of all matters pending action, so as to have retrospective application. It was this law which was followed and appeal was dismissed by the Tribunal in this case because the stakes were below the limit.

(ii) Commissioner (Appeals)-Powers

An appeal cannot be dismissed merely because the assessee had not filed written submissions when he had properly disclosed the facts of the case in the statement of facts as part of its appeal as held by the Tribunal in *Tarun Goel* v. *ITO* [2020] 77 ITR (Trib) 133 (Jaipur).

Where the assessee filed an appeal against an estimated income of Rs. 6,52,870 at 12.5 per cent. of purchases treated as non-genuine to the extent of Rs. 52,22,979, but thereafter sought to withdraw the appeal, the Commissioner dismissed the same. But the law requires that even in such cases, where appeal is withdrawn, the matter is required to be decided on the merits. It is in this view, an appeal was filed by the assessee to the Tribunal. This argument was accepted by the Tribunal and the matter was remitted to the Commissioner (Appeals) for a de novo adjudication in *Deekay Gears* v. *Asst. CIT* [2020] 77 ITR (Trib) 150 (Mum) following *CIT* v. *Premkumar Arjundas Luthra (HUF)* [2017] 9 ITR-OL 243 (Bom).

The issue was whether an income received from a hospital, which was constructed by the assessee, a doctor, who also provided the equipment, should be assessed as income from property or income from other sources. The decision was material because the net result was a loss. If the income was to be assessable as property income, such loss could not be set-off against salary income. It could be set-off against salary income only if it is assessed under other sources and not otherwise. The assessee claimed depreciation in respect of hospital building and equipment and returned the net rental income setting it off against the salary income. The Assessing Officer treated it as income from house property allowing standard deduction under section 24(a), but disallowed depreciation and other expenses. This was upheld in first appeal. The Tribunal, however, found that the Commissioner (Appeals) has not decided even the points in dispute giving reasons for his conclusion on each point. This was a requirement, which cannot be avoided as the Commissioner (Appeals) is quasi-judicial authority in deciding appeals before him. When he has not followed this procedure and has not made any analysis on the assessee's submissions on the issues raised by him during the assessment proceedings, his order was found to be unsustainable and, therefore, remitted back to him. Since he had already set aside the assessment, the very basis of penalty got extinguished. The Tribunal, therefore, remanded the matter to Commissioner (Appeals) and levy of penalty afresh in *Jitendra Narsinhbhai Talpada* v. *ITO* [2020] 77

ITR (Trib) (S.N.) 47 (Ahd) following *Roadmaster Inds. of India P. Ltd.* v. *IAC of I. T. (Asstt.)* [2008] 303 ITR 138 (P&H).

Where in a dispute in first appeal relating to disallowance of interest paid for non-deduction of tax at source, the assessee filed Forms 15G and 15H, which spared the need for deduction, though this was a new evidence filed before him, the Commissioner (Appeals) was bound to consider the same on merits after admitting the evidence. If he had any doubt about their genuineness, he could have got it verified from bank. It is under these circumstances, the Tribunal found that there was no case for disallowance of payments for non-deduction of tax under section 40(a)(ia) as decided by the Tribunal in *Hiralal Jain* v. *ITO* [2020] 77 ITR (Trib) 333 (Indore). It was a case, where there was a delay in filing of appeal by 150 days. The delay was explained by an affidavit as arising due to change in auditors. The delay was condoned by the Tribunal in the view that the assessee was not aware even of the order passed against him as explained by him, so that even for this reason, the delay was required to be condoned following the decision of the Supreme Court in *Senior Bhosale Estate (HUF)* v. *Asst. CIT* [2019] 419 ITR 732 (SC). The additions under section 40(a)(ia) were, therefore, directed to be deleted.

Rule 46A permits admission of additional evidence during first appeal subject only to the condition that the Assessing Officer should be given an opportunity to meet it. The Assessing Officer disallowed a number of items of expenditure claimed by the assessee, making an assessment of Rs. 2,96,55,330 against a returned income of Rs. 1,13,930 with another addition of Rs. 1,81,29,128 out of the total amount of sundry creditors running to Rs. 3,25,89,759 for failure to respond to notice for verification regarding genuineness of sundry creditors. The latter addition was partly sustained to the extent of Rs. 16,27,243. The Tribunal had found that the Commissioner (Appeals) accepted there was confirmation of the balance as conceded in a remand report of the Assessing Officer with reference to additional evidence filed by the assessee. Since additional evidence had been admitted after giving opportunity to the Assessing Officer by calling for a remand report from him, the Assessing Officer had sufficient opportunity and the reduction in disallowance was, therefore, upheld with reference to additional evidence rightly accepted as was decided by the Tribunal in *Dy. CIT* v. *NIC Construction P. Ltd.* [2020] 77 ITR (Trib) (S.N.) 78 (Indore).

Penalty

(i) Section 271(1)(c)

Where a diary containing certain entries of advances amounting in all to Rs. 3 crores was seized during survey, this amount of Rs. 3 crores was admitted by the assessee during survey as his undisclosed income and was included in the return filed in the post-survey assessment. This return was accepted subject to a small addition on account of short rental income of Rs. 10,565. Penalty in respect of addition of Rs. 3 crores, having been admitted during survey and included in the return with the entries in the diary by themselves showed them as mere advances and not income, penalty need not have been levied in the light of *Explanation 5A* to section 132 which, however, has no relevance for post-survey assessment under section 133A of the Act. Even if some discrepancies had been found, as long as they are admitted during the course of assessment, there is no case for penalty except for the penalty for addition of short declaration of rental income of Rs. 10,565, which could be levied. There was no case for penalty in respect of the larger addition of Rs. 3 crores in the facts of the case as was held by the Tribunal in *Rajendra Shringi* v. *Dy. CIT* [2020] 77 ITR (Trib) 85 (Jaipur) following *Asst. CIT* v. *Harans Lal Sethi* (I. T. A. No. 455/ Jaipur/2017 dated August 7, 2018) and *CIT* v. *SAS Pharmaceuticals* [2011] 335 ITR 259 (Delhi).

In a group of post-search assessments, action was taken under section 153A during which long-term capital gains of Rs. 10 crores was admitted. *Explanation 5A* inserted by the Finance (No. 2) Act, 2009 with retrospective effect from June 1, 2007 under section 271(1)(c) spared penalty for income voluntarily offered during a post-search assessment. This provision was pointed out as sparing penalty and that the admission was voluntary as required in the provision and that the addition was based upon certain payments and not directly on the basis of incriminating materials, so that penalties were deleted in the group of cases by the Tribunal in *Smt. Lopa Pankaj Dave* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 29 (Ahd) following *Ajay Traders* v. *Dy. CIT* [2016] 7 ITR (Trib)-OL 342 (Jaipur).

(ii) Sections 271(1)(c)/271A/271AAB and 271B

Where an addition for undisclosed income was made in the case of a civil contractor, the penalty for not having filed the audit report under section 44AB was levied under section 271B. In *Harshvardhan* v. *Dy. CIT* [2020] 77 ITR (Trib) (S.N.) 81 (Bang) following *CIT* v. *Babu Reddy* [2010] 38 DTR 147 (Karn), this penalty was found to be not leviable because there was no format of books of account prescribed under the rules for a civil contract, so that section 271A was not applicable and penalty cannot be levied.

In the same case, the law that where the show-cause notice had not struck out the inapplicable part, whether concealment or furnishing of inaccurate particulars, could not be a valid notice following the settled law. Where the Assessing Officer had issued a number of notices to the assessee under section 274, as the applicable part of the notice was vague, it cannot be treated as a show-cause notice, which satisfies the law. The law expects the precise default to be indicated even where the printed form is issued by striking out the inapplicable part. As otherwise, show-cause notice should be treated as vague and penalty cannot be levied, following *CIT* v. *Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 (Karn).

Another issue decided in the same case relates to penalty under section 271AAB on the basis of statement admitting undisclosed income without indicating the manner in which it was derived. Though no statement had been recorded relating to undisclosed income, the assessee had actually specified the manner of deriving income to be from business by working out the gross profit on sale of land after reducing the cost of land and cost of development and thereby indicating how the income was derived. It was in this context, penalty was not leviable. The income itself had been wrongly calculated and the inference of concealment was drawn for which separate penalty of concealment under section 271(1)(c) at 100 per cent. had been levied. It could not also be liable for penalty even for this reason under section 271AAB.

(iii) Section 271(1)(c)/ 271AAB

The issue involved levy of concessional penalty at 10 per cent. under section 271AAB in respect of undisclosed income admitted during search as well as in the return of income filed in pursuance thereof with all the taxes and interest, duly paid on such amount. The issue arose in the case of a manufacturer and exporter of pharmaceutical products, where undisclosed income was admitted and all the conditions under section 271AAB were satisfied. Notwithstanding such satisfaction, penalty was levied, without considering the argument on the merits advanced by the assessee that all transactions were duly entered in the assessee's books, so that there could be no inference of undisclosed income. As regards gifts given by the assessee to medical professionals, it was found that it was not found to be unethical by Indian Medical Council, so that even on this point, there was no case for inference of any improper conduct on the part of the assessee. Most of the additions related to disallowance of expenses, which could not have automatically led to penalty, so that penalty itself, it was found, could not have been levied by invoking section 271AAB, where there was no fault or omission found in the accounts and whatever be the addition, penalty could not have been levied as held by the Tribunal in *Ajanta Pharma Ltd.* v. *Dy. CIT* [2020] 77 ITR (Trib) 555 (Mum).

(iv) Section 271A/271B

The assessee dealing in shares and securities claimed to have suffered a loss of Rs. 1.96 lakhs but did not file a voluntary return one in pursuance of a notice under section 148 served on him. The loss claimed was disallowed as a speculation loss and penalty of Rs. 1,50,000 for the wrong claim under section 271A and for non-filing of audit report under section 271B was levied. Since the assessee did not maintain books, section 271B had no application, so that this penalty was deleted. However, failure to maintain books was by itself an offence, so that penalty was restricted to Rs. 25,000 under section 271A by the Tribunal in *Smt. Mukti Roy* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 20 (Kol) following *Nirmal Kumar Jain* v. *ITO* (I. T. A. Nos. 6696 and 6645/ Delhi/ 2014 dated March 2, 2016).

(v) Section 271D

Penalty of Rs. 14 lakhs was levied on an assessee under section 271D for having accepted Rs. 14 lakhs in cash in violation of section 269SS. The assessee was a senior citizen having heart ailment, who had undergone open heart surgery for which he had incurred liability of Rs. 50,000, Rs. 1,20,000 and Rs. 80,000, respectively, which he had borrowed for meeting such medical emergency. The assessee's explanation that he had received Rs. 3 lakhs from his son and had also received Rs. 2 lakhs and Rs. 3 lakhs from two persons, meant for establishing a school, which were deposited in the assessee's bank account and used for the treatment. Though the explanation was found to be acceptable, the assessee had committed the fault in having all these transaction in cash in violation of section 269SS attracting penalty under section 271D. But then the Legislature also provides relief from penalty, where there is a reasonable cause under section 273B in genuine and bona fide transactions, so that it is a case which was covered by reasonable cause due to emergency and the transaction being bona fide, penalty, it was held by the Tribunal, was not exigible, so that it was deleted by it in *Gourang Chandra Nayak* v. *Jt. CIT* [2020] 77 ITR (Trib) 192 (Cuttack).

(vi) Section 271D/271E

In respect of certain transactions in cash by way of loan and gifts between husband and wife unrelated to any business, the returns were made the subject matter of penalty under sections 271D and 271E for violation of sections 269SS and 269T. The explanation that some of these amounts were gifts, was disbelieved as meant to escape liability by wrongly claiming what was a loan as a gift. When both husband and wife had bank accounts in same bank, the cash transactions as between them in violation of sections 269SS and 269T was clearly found by the Assessing Officer to attract penalty, so that penalty of Rs. 12.50 lakhs each for both under section 271D/271E was levied. The Commissioner (Appeals) confirmed the penalties in the view that there was no reasonable cause shown for the transactions in cash. The explanation of the wife was that her husband has given gift in cash, so that she had repaid the amount also in cash. Penalties were confirmed in first appeal. The Tribunal found that gifts both receipt and repayments indicated that it was more a loan, but the loan was between close relatives, which by itself constituted reasonable cause within the meaning of section 273B, so that penalties were found unsustainable in *Smt. Savita S. Gangadshetti* v. *Jt. CIT* [2020] 77 ITR (Trib) (S.N.) 79 (Bang) following *Smt. Deepika* v. *Addl. CIT* (I. T. A. No. 561/Bang/2017 dated October 13, 2017).

(vii) Section 271F

Section 271F provides for penalty of Rs. 5,000 for failure to furnish a voluntary return under section 139(1) or proviso thereunder. This provision, which was applicable for assessments up to the assessment year 2017-18 was applicable in respect of the failure to file return for the assessment years 2012-13, 2014-2015 and 2015-2016, where voluntary returns were not filed, though the assessee had taxable income. The assessee explained that he was only an employee and that he could not devote himself to the legal obligations under the income-tax law. The assessee pointed out that he had only income from salary from which tax was deducted at source. The assessee also pointed out he had since filed a belated return under section 139(4), which could be taken as one filed under section 139(1) by taking a lenient view. The explanations were not accepted and penalty of Rs. 5,000 was levied for all the years by the Tribunal in *Rajesh Ajjavara* v. *ITO (TDS)* [2020] 77 ITR (Trib) (S.N.) 14 (Bang). But they were deleted in first appeal following the decision of the Bombay High Court in *Trustees of Tulsidas Gopalji Charitable and Chaleswar Temple Trust* v. *CIT* [1994] 207 ITR 368 (Bom), wherein it was felt that section 139(1) to 139(4) were similar to the provision under section 22(1) to 22(3) of the 1922 Act. The assessee was an employee of a public religious trust, so that penalty was spared in this case following *CIT* v. *Kulu Valley Transport Co. P. Ltd.* [1970] 77 ITR 518 (SC). It was also noticed a similar view was taken by a co-ordinate Bench of the Tribunal in *Mrs. Manju Kataruka* v. *ITO* (I. T. A. No. 1955/Kol/2003 dated April 7, 2004).

Another issue which arose in the same case related to power of rectification on the part of the Commissioner (Appeals), where the Commissioner (Appeals) had declined to rectify his order on application by the Assessing Officer under section 154, so that rejection of the rectification petition was another issue in this case. It was decided, where two views are possible involving a debate in interpretation, rectification on such issue is not possible. The Tribunal, however, justified refusal on a different ground that there was no mistake in the order requiring rectification, so that the Commissioner's order was bad in law and unsustainable, but all the same found it just to cancel the penalty, apparently following a decision of the Supreme Court. The penalty levied under section 271F was deleted by the Tribunal.

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