THE
INCOME TAX REPORTS – ONLINE
VOLUME 13 — 2019
(JOURNAL)

LANDMARK CASES

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Constitutional validity of sections 2(22), 10(34) and 115BBDA

Constitutional validity of sections 2(22), 10(34) and 115BBDA was questioned on grounds of discrimination between residents and non-residents in levy of tax on dividend. But it was found that there was no discrimination as claimed since the law dealt with dividend differently in different circumstances without discriminating between residents and non-residents, so that the provisions were constitutionally valid as held by the High Court in *Rajan Bhatia* v. *Central Board of Direct Taxes* [2019] 13 ITR-OL 410 (Delhi). It was pointed out that it is not expedient to have all the laws applicable uniformly to all people as pointed out in *Pannalal Bansilal Pitti* v. *State of AP* [1996] 2 SCC 498. The classification as between persons, therefore, by itself is not sufficient to strike down a provision as held in *Amarendra Kumar Mohapatra* v. *State of Orissa* [2014] 4 SCC 583. There is a greater latitude for Legislature and executive in matters of economic legislation because of the inherent complexities of such laws touching a number of civil rights, so that the courts, as a matter of policy, do not entertain objections on every such impact on the legislation, especially in matters of taxing statutes, relying upon *Sekhawant Ali* v. *State of Orissa*, AIR 1955 SC 116, *State of UP* v. *Deoman Upadhyaya*, AIR 1960 SC 1125, *State of Jammu and Kashmir* v. *Triloki Nath Khosa* [1974] 1 SCC 19, *R. K. Garg* v. *Union of India* [1982] 133 ITR 239 (SC), *State of MP* v. *Rakesh Kohli* [2012] 6 SCC 312 and *Namit Sharma* v. *Union of India* [2013] 1 SCC 745.

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

Accounting

Method of accounting

Where the assessee has followed a method of accounts consistently and such method had been accepted in the past, non-acceptance of such method on a different view is not warranted as held in *Pr. CIT* v. *Vishay Components India Pvt. Ltd.* [2019] 13 ITR-OL 510 (Bom).

In the same case, it was also held that where Transactional Net Margin Method (TNMM) was followed for determination of arm's length price in earlier years and accepted by the Assessing Officer, there cannot be a different view without demonstration of difference in facts for the year for adoption of a different method affirming the decision of the Tribunal in *Vishay Components India P. Ltd.* v. *Addl. CIT* [2016] 45 ITR (Trib) 471 (Pune).

Income

(i) Disallowance under section 14A

Where the assessee itself had disallowed an amount of expenditure as relating to exempt income under section 14A, the Assessing Officer is bound to examine the claim on merits and resort to proportionate disallowance under rule 8D only if the assessee's computation is not acceptable and not otherwise as decided by the High Court in *Pr. CIT* v. *Radha Madhav Investments Ltd.* [2019] 13 ITR-OL 244 (Bom) following *Godrej and Boyce Manufacturing Co. Ltd.* v. *Deputy CIT* [2017] 394 ITR 449 (SC) and *Pr. CIT* v. *Bajaj Finance Ltd.* [2019] 13 ITR-OL 567 (Bom). It was felt that it is necessary that officers are briefed about this position of law, so as to avoid wasteful effort all round.

Section 14A was brought into the statute only from the assessment year 2007-08, so that the disallowance of an expenditure as falling under section 14A is not justified for a year earlier as decided in *CIT* v. *Kerala State Industrial Development Corporation* [2019] 13 ITR-OL 440 (Ker) following *CIT* v. *Essar Teleholdings Ltd.* [2018] 401 ITR 445 (SC).

(ii) Cash credits—Section 68

Where the amount received towards share capital was admitted as bogus and had not been returned or refunded, the addition of such amount under section 68 was upheld in *Alfa Bhoj Ltd.* v. *Deputy CIT* [2019] 13 ITR-OL 218 (Delhi).

Purchase of raw materials for the assessee's business when found to be non-genuine on account of the assessee's failure to establish the genuineness of the transaction, the entire payment was inferable as bogus and,

therefore, rightly warranted addition. Where the addition by the Tribunal was limited to the gross profit thereon, such limitation was found to be unjustified by the High Court in *Pr. CIT* v. *Wadhawan Designs* [2019] 13 ITR-OL 226 (Delhi) following *CIT* v. *Lovely Exports P. Ltd.* [2009] 319 ITR (St.) 5 (SC). It is only in cases where the business could not have been carried on without the impugned purchases, the entire purchases need not be totally disallowed, where only inflation of purchases could be presumed. The case under comment was not one such case.

(iii) Share application moneys (section 68)

Where the Assessing Officer had accepted the credits towards share capital contributions received by the company without proper enquiry as to the genuineness of the credits, the Supreme Court endorsed the decision of the High Court in *Daniel Merchants P. Ltd.* v. *ITO* [2019] 13 ITR-OL 394 (SC), upheld the decision of the High Court in the same case [2019] 13 ITR-OL 393 (Cal) and in *Pragati Financial Management Pvt. Ltd.* v. *CIT* [2017] 394 ITR 27 (Cal) upholding the Commissioner's revisional order under section 263 setting aside the assessment order for erroneously accepting such credits.

In another case of share application moneys decided by the High Court, it was held that the evidence to prove the genuineness of the transactions could not be rejected, merely because multiple corporate bodies were involved in collecting share application money because a single fact is not sufficient to establish a transaction as sham, notwithstanding the burden of proof to prove genuineness being on the assessee, so that the deletion of addition by the Tribunal was held justified—*Pr. CIT* v. *Aditya Birla Telecom Ltd.* [2019] 13 ITR-OL 385 (Bom).

(iv) Income from undisclosed sources (section 69)

An addition on the inference of income from undisclosed sources could be based only on tangible materials, so that even additions on admission once made but retracted cannot be justified merely because the retraction was late as held in *CIT* v. *Dilbagh Rai Arora* [2019] 13 ITR-OL 517 (All).

(v) Income from revocable transfer of assets

In respect of an income of an asset settled by a revocable transfer, the settlee is a representative assessee within the meaning of section 160, so as to require the assessment on him in "like manner and to the same extent as it would be leviable upon and recoverable from the persons represented by him". The application of this section came up for consideration before the High Court in *CIT* v. *Tamilnadu Urban Development Fund* [2019] 13 ITR-OL 371 (Mad), affirming the Tribunal order in *Tamil Nadu Urban*

Development Fund v. *ITO* [2017] 56 ITR (Trib) 37 (Chennai), where the Fund was created by the Government for advancing loans for development of infrastructures providing powers to the Fund to cancel any venture for failure to return the loan. Such income had to be assessed in the hands of contributor and not the assessee under section 161 as was found even in this case, where revocability was permissible after the specified period of three years because it was a case where beneficiaries were identifiable and their interest was spelt out in definite terms in the contributors' agreement. The assessee Fund, therefore, is not liable.

Schedular system of taxation

(i) Business or other sources ?

Interest from deposits made for securing letter of credit for imports or otherwise as margin money deposits for performance guarantee in respect of foreign contracts, was held to be income from Business and not that from other sources—*CIT* v. *Cochin Shipyard Ltd.* [2019] 13 ITR-OL 72 (Ker) following *CIT* v. *Govinda Choudhury and Sons* [1993] 203 ITR 881 (SC).

(ii) Business or house property ?

Where a person lets out shops in a mall, he is not letting out a bare property. He also undertakes to provide amenities and facilities on day-to-day basis for the rent charged, so that the income is rightly assessable as business income and not income from house property.—*CIT* v. *Oberon Edifices and Estates (P.) Ltd.* [2019] 13 ITR-OL 422 (Ker) relying on the decisions in *Chennai Properties and Investments Ltd.* v. *CIT* [2015] 373 ITR 673 (SC) and *Karnani Properties Ltd.* v. *CIT* [1971] 82 ITR 547 (SC).

(iii) Business or capital gains ?

A trust created by employer company for the welfare of its employees, who had participated in a scheme of stock option of the company, acted as compensation committee administering the funds entrusted to it by the company for grant of option to eligible employees. The stock, which was entrusted by the company under the Scheme was held by the assessee-trust in a fiduciary capacity for the benefit of the settlor company. But the income from the funds so entrusted was treated by the Assessing Officer as business income of the assessee-trust. The Tribunal held that the funds and, therefore, its income did not belong to the trust. However, the Revenue took up the matter to the High Court in the view that section 112, which provides for tax on long-term capital gains and section 164, which provides for tax, where the shares of beneficiaries are unknown, should have both been applied and the amount brought to tax. The High Court

pointed out to the conclusion of the Tribunal that the trust was only a special purpose vehicle (SPV) to carry out the special purpose of administering the Scheme on behalf of the settlor company for the benefit of eligible employees and that the trust itself had no right over these funds. In fact, the trust had no right to sell the shares in the free market on its own. The shares handled under the Stock Option Scheme were not stock-in-trade of the assessee-trust, as the trust itself was not in the business of trading in shares. The High Court pointed out that there is no question of law arising out of the order of the Tribunal, so that the conclusion of the Tribunal stood endorsed in *Pr. CIT* v. *Mahindra and Mahindra Employee Stock Option Trust* [2019] 13 ITR-OL 241 (Bom).

International Taxation

Permanent establishment

A business office of a non-resident in India does not become a permanent establishment merely because it has activities of preparatory or auxiliary character as was held in *DIT(IT)* v. *Hyundai Heavy Industries Co. Ltd.* [2019] 13 ITR-OL 522 (Uttarakhand). On this finding rendered by the Tribunal, there could be no substantial question of law as found, while endorsing the decision of the Tribunal on merits by the High Court in this case.

Transfer Pricing

(i) Applicability

Where the assessee had undertaken corporate guarantee to its associated enterprise, the arm's length price as regards guarantee commission was required to be determined. It was pointed out that corporate guarantee is different from bank guarantee, so that amongst the prevailing differences in rates of commission, restriction of rate of commission to 1 per cent. by the Tribunal was upheld by the High Court in *Pr. CIT* v. *Aegis Ltd.* [2019] 13 ITR-OL 266 (Bom).

In the same case, the assessee had subscribed to the preference shares issued by the associated enterprise in respect of income from which the transfer pricing rules were sought to be applied. The stipulated dividend from preference shares was wrongly treated as return on loan or a charge. There was absolutely no scope for adoption of arm's length price in substitution of income from preference shares. Such adoption of notional income is not valid, unless the transaction of investments in preference shares is shown to be sham.

(ii) Choice of method

Where a payment is made for secondment of employees for supporting services to an associated enterprise, the three parties to the tripartite arrangement by which the assessee, the associated enterprise and the beneficiary of supporting services are involved in business or managerial decisions, so that the expenses thereon cannot be lightly disallowed as was wrongly done in this case in respect of reimbursed salary expenditure on expatriate employees of associated enterprises, merely because the payment was on secondment from associated enterprises.—*Pr. CIT* v. *Blue Scope Steel India Pvt. Ltd.* [2019] 13 ITR-OL 322 (Delhi).

(iii) Choice of comparables

In the matter of selection of comparables, the finding of the Tribunal should be treated as one on facts, so that the choice or rejection of comparables by the Tribunal cannot be interfered by the High Court, unless such choice is shown to be perverse.—*Pr. CIT* v. *Pfizer Ltd.* [2019] 13 ITR-OL 348 (Bom) relying upon the decisions in *Rampgreen Solutions Pvt. Ltd.* v. *CIT* [2015] 377 ITR 533 (Delhi) and *Principal CIT* v. *Aptara Technology P. Ltd.* [2019] 410 ITR 100 (Bom).

Exemption

(i) Exemption under section 10(15)

Section 10(15) exempts interest on securities issued by the Central Government, but section 94 provides for tax on interest on securities, where the assessee is not the owner at the time the interest arises, but section 94 cannot have application, when interest on securities itself is exempt under section 10(15) as pointed out in *CIT* v. *Parry Agro Industries Ltd.* [2019] 13 ITR-OL 247 (Ker).

(ii) Section 10A/10B

An assessee, eligible for exemption of income from an export-oriented undertaking under section 10A/10B, had received amounts by way of sale of export quota and interest on margin money deposited in bank for opening letter of credit. Both the receipts were found to have nexus with the assessee's business activity eligible for exemption, so as to merit inclusion of such amounts as part of exempt income.—*Camiceria Apparels India P. Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 193 (Mad) relying upon the decision in *Bajaj Tempo Ltd.* v. *CIT* [1992] 196 ITR 188 (SC).

Charities

(i) Registration

The assessee, an educational institution, declared as an autonomous body by All India Council for Technical Education, had as its object provision for instruction and research in branches of engineering and technology. In pursuance of its objects, it was running a school. On the ground that the bye-laws had not specifically mentioned the school, registration was denied. It was eligible for exemption under section 10(23C)(iiiad) for the approval of which also, it had filed an application, which was referred by the Commissioner. The dismissal of application for registration under section 12AA was reversed by the Tribunal since the objects and the genuineness of its activities satisfied the requirements for registration. On Departmental appeal in *CIT(E)* v. *Beant College of Engineering and Technology* [2019] 13 ITR-OL 685 (P&H), the High Court found the order of the Tribunal granting registration did not have any illegality or perversity for the High Court to interfere.

After the matter of registration under section 12A had become final against the assessee with special leave against the decision of the High Court having been dismissed, a matter relating to validity of initiation of reassessment to withdraw exemption on loss of registration, was decided by the High Court against the assessee solely on the basis of the decision on the loss of registration. When the matter was taken up to the Supreme Court, it was decided in *Kerala Cricket Association* v. *Addl. CIT* [2019] 13 ITR-OL 451 (SC) that the matter has to be decided on merits and not confined merely to registration, so that it was restored back to the High Court for a fresh decision.

(ii) Exemption under section 11

A trust formed for the welfare of poor, aged and incapacitated artistes and their families, qualifies for exemption on registration. Where exemption was denied because of payment of advance for leasehold rights for immovable property for construction of an auditorium, it was held that such payment has to be construed as an application of income towards the objects of the trust, so that it was found that the trust was eligible for exemption under section 11 as held in *Nadigar Sangam Charitable Trust* v. *Asst. DIT(E)* [2019] 13 ITR-OL 501 (Mad) relying upon the decision in *DIT (Exemptions)* v. *Maharaja Agarsen Technical Education Society* [2010] 328 ITR 551 (Delhi).

(iii) Computation of income

The Finance Act, 2018 with effect from April 1, 2019 has inserted *Explanation 3* to section 11(1) rendering section 40(a) or (b) or clause (ia) of clause (a) or section 40A(3) and (3A) applicable in computation of income of a charitable trust or institution. But this prospective amendment being effective from April 1, 2019 is applicable from the assessment year 2019-20, so that these provisions cannot be applied for years earlier to the assessment year 2019-20 as was decided in *CIT* v. *Sri Adichunchanagiri Shikshana Trust* [2019] 13 ITR-OL 353 (Karn) following *CIT* v. *Rajasthan and Gujarati Charitable Foundation* [2018] 402 ITR 441 (SC), *CIT* v. *Rao Bahadur Calavala Cunnan Chetty Charities* [1982] 135 ITR 485 (Mad) and *CIT* v. *Society of the Sisters of St. Anne* [1984] 146 ITR 28 (Karn).

(iv) Approval under section 80G

The factors, which require consideration of the Commissioner for grant of approval under section 80G depends upon the materials presented by the trust or institution eligible for exemption. Where the Tribunal remanded the matter to the Commissioner to decide a matter of application of approval on consideration of materials made available, such remand was upheld by the High Court in *People Cause Foundation* v. *ITAT* [2019] 13 ITR-OL 718 (All) relying upon the decision in *New Cawnpore Flour Mills* v. *CIT* [2005] 275 ITR 45 (All).

Business loss

(i) Fall in value of unquoted shares

Loss arising in fall in valuation of securities held by a bank is admissible, where the market rate is less than the cost as was conceded in *CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker) following *CIT* v. *Nedungadi Bank Ltd.* [2003] 264 ITR 545 (Ker) and *Catholic Syrian Bank Ltd.* v. *CIT* [2012] 343 ITR 270 (SC). In the same case, it was held that valuation of unquoted shares according to guidelines from Reserve Bank for the banks is valid.

(ii) Diminution in value of shares

Loss on account of diminution in value of shares with reference to market value as on the date of balance-sheet is not admissible as a loss for the year nor as a deduction under section 37 nor is such loss entitled to be carried forward. The decision to this effect was upheld by the High Court in *Twenty First Century Management Services Ltd.* v. *ITO (OSD)* [2019] 13 ITR-OL 480 (Mad).

Capital or revenue expenditure

(i) Retrenchment compensation

Where the assessee was running three units in its business, retrenchment compensation paid to one of the units could not be treated as capital expenditure as the payment was in respect of a continuing business, notwithstanding the closure of one of the units as held in *CIT* v. *TCM Ltd.* [2019] 13 ITR-OL 418 (Ker) relying upon *Jayshree Tea and Industries Ltd.* v. *CIT* [2005] 272 ITR 193 (Cal).

(ii) Unrealised security deposit

The assessee paid security deposit towards lease agreement, but could not enjoy its occupancy rights as the premises were sealed by a court order and the assessee had to vacate the premises, but the lessor did not return the entire deposit except for a part of it. The amount which the assessee had to forgo was claimed as admissible expenditure, but the amount forgone was found by the Tribunal to be capital in nature, so that disallowance was affirmed in *Mahle Anand Filter Systems Pvt. Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 406 (Delhi).

Business expenditure

(i) Section 35D

Section 35D provides for amortization of specified preliminary expenses to be amortised on a staggered basis during a period of ten years. Front-end fees paid to a bank or financial institutions to obtain a loan enuring long-term benefit is an item covered by the section, so as to justify amortization under the section as was held in *CIT* v. *Kesoram Industries Ltd.* [2019] 13 ITR-OL 621 (Cal) following *Madras Industrial Investment Corporation Ltd.* v. *CIT* [1997] 225 ITR 802 (SC).

(ii) Interest on borrowed capital

Interest on borrowed capital, when such capital has been re-lent interest free, could not ordinarily justify deduction, but where the lender has interest-free funds, so that any amount lent to its associated enterprise may well be inferred as made out of such funds, deduction of interest under section 36(1)(iii) cannot be denied as held in *Pr. CIT* v. *Aegis Ltd.* [2019] 13 ITR-OL 266 (Bom).

(iii) Bad and doubtful debts

A bank is entitled to the deduction of provisions for bad and doubtful debts written off under section 36(1)(vii) as well as deduction under section 36(1)(viia) in respect of advances made by rural branches of a scheduled bank in *CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker).

Where the Tribunal had remanded the claim for deduction of bad debt for a decision in the light of section 36(1)(vii), which were written off to the extent of excess over the provision already made, the High Court found that no question of law arises on such remand order in *CIT* v. *Bharat Overseas Bank Ltd.* [2019] 13 ITR-OL 367 (Mad).

Amount outstanding against a subsidiary in respect of a transaction for supply of materials on principal-to-principal basis is deductible under section 36(1)(vii) as bad debt, when it is written off.—*CIT* v. *O.E.N. India Ltd.* [2019] 13 ITR-OL 202 (Ker).

(iv) Production cost of film

The expenditure incurred by a producer on production of feature films is wholly and exclusively necessary to be incurred for the assessee's business, so as to be deductible under section 37 as was decided in *CIT* v. *Dharma Productions P. Ltd.* [2019] 13 ITR-OL 443 (Bom). In fact, rule 9A specifically provides for deduction of production cost of feature film in computation of income from business in film production in the hands of producers.

(v) Section 40(a)(ia)

Section 40(a)(ia), which provides for disallowance of payments from which tax is not deducted at source, however, makes an exception in respect of defaults, where the recipient has accounted the receipt of such payment and was paying tax thereon, so that this amendment to section 40(a)(ia) by way of insertion of the proviso being made retrospective, the disallowance of payment in such cases is not justified, where the proviso applies.—*Pr. CIT* v. *Perfect Circle India Pvt. Ltd.* [2019] 13 ITR-OL 78 (Bom) following *CIT* v. *Ansal Land Mark Township P. Ltd.* [2015] 377 ITR 635 (Delhi) and *Hindustan Coca Cola Beverage P. Ltd.* v. *CIT* [2007] 293 ITR 226 (SC).

(vi) Section 40A(3)

Section 40A(3) disallows expenditure in cash by any mode other than account-payee cheque or account-payee draft or by specified electronic means, subject to certain exceptions under rule 6DD. It was inferred that a compelling situation, where it is established, can spare application of this disallowance in *Natesan Krishnamurthy* v. *ITO* [2019] 13 ITR-OL 80 (Mad). It is not rule 6DD, which spares liability where there are compelling circumstances by a Circular of Central Board of Direct Taxes No. 220 dated May 31, 1977 [1977] 108 ITR (St.) 8 but withdrawn from July 25, 1995, so that its application now may be vulnerable.

(vii) Contribution to pension fund – Section 43B

Employer's contribution to pension fund is deductible, even if it is delayed as long as the tax deduction is made before the due date for filing return as per amendment made to the proviso to section 43B(g) with effect from April 1, 2004 to be understood as having retrospective effect, so as to cover the years prior to the assessment year 2004-05.—*CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker) following *CIT* v. *Alom Extrusions Ltd.* [2009] 319 ITR 306 (SC).

(viii) Lease equalization charges

The law that Lease Equalization Charges are deductible from lease rental income as had been decided in *CIT* v. *Virtual Soft Systems Ltd.* [2018] 404 ITR 409 (SC) was adopted in *CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker).

(ix) Payment for acquisition of right to manage a port berth

Payment for acquisition of right to manage and operate a berth in port for twenty years, though accounted by the assessee by splitting it as between the 20 years, can be allowed as a deferred liability incurred during the year, so that the entire amount was allowed during the year as revenue expenditure in *CIT* v. *South India Corporation Ltd.* [2019] 13 ITR-OL 111 (Ker) following *Empire Jute Co. Ltd.* v. *CIT* [1980] 124 ITR 1 (SC) and *Madras Industrial Investment Corporation Ltd.* v. *CIT* [1997] 225 ITR 802 (SC). At the same time, the agreement came to be cancelled in the very next year. Since such right is a capital asset, there is a loss under the head capital gains consequent on extinguishment of such right in capital asset, which has to be determined and permitted to be carried forward as was also decided in this case.

(x) Advance for job work

Advance paid by a holding company to a subsidiary for job work, being part of the consideration for the work, is deductible as business expenditure under section 37 of the Act.—*CIT* v. *O.E.N. India Ltd.* [2019] 13 ITR-OL 202 (Ker).

(xi) Consultancy charges

Where an agreement for sale of rights over audio and video songs was the subject matter of an addendum to the agreement reducing the consideration, it is only the reduced consideration which can be considered for computation of the assessee's income. Expenditure like consultancy charges cannot be reduced because of this reduction in consideration,

unless such expenses are found to be non-genuine.—*Pr. CIT* v. *Supreme Entertainment Pvt. Ltd.* [2019] 13 ITR-OL 333 (Bom).

(xii) Commencement of business

Business expenditure can be allowed only after business has actually commenced. A preliminary work does have a role in fulfilling the purpose of business as was found in a case, where the business was commenced on this reasoning according to the memorandum of understanding in the light of which it was held that the assessee should be treated as having commenced its business, so as to merit deduction of expenses relating to it in *Indian Railway Stations Development Corporation Ltd.* v. *Pr. CIT* [2019] 13 ITR-OL 572 (Delhi) relying upon the decision in *Carefour WC & C India Pvt. Ltd.* v. *Deputy CIT* [2014] 368 ITR 692 (Delhi).

(xiii) Legal and professional fees

Legal and professional fees incurred to implement buy-back of shares from its shareholders does not enhance the capital structure of the company, so that such expenditure is deductible as decided in *Pr. CIT* v. *Bayer Vapi Pvt. Ltd.* [2019] 13 ITR-OL 639 (Guj).

In the same case, club subscriptions paid for Chairman and managing director with expectation that such membership would foster business development is deductible relying upon the decisions in *CIT* v. *Groz Beckert Asia Ltd.* [2013] 351 ITR 196 (P&H) [FB], *CIT* v. *Samtel Color Ltd.* [2010] 326 ITR 425 (Delhi) and *Gujarat State Export Corpn. Ltd.* v. *CIT* [1994] 209 ITR 649 (Guj).

Another issue decided in this case upholds entitlement to depreciation on marketing rights and other intangible assets acquired by the assessee in a slump sale from an unrelated concern under a business transfer agreement.

(xiv) Capital or revenue ?

An expenditure incurred on purchase of a computer to use its software for facilitating its day-to-day business activities, was claimed as a business expenditure of revenue nature on the ground that the longevity of the computer system itself was not so enduring as to justify the inference of capital expenditure. This claim was not accepted by the Assessing Officer, but conceded in first appeal with reference to terms and conditions of licence pertaining to acquisition of this software with the copyright being vested in the supplier and without any enduring benefit therein for the assessee. What assessee has acquired was a mere right to use the software. This finding in first appeal was upheld by the Tribunal. The Departmental appeal was dismissed by the High Court in *CIT* v. *Chona Financial*

Services Pvt. Ltd. [2019] 13 ITR-OL 735 (Mad) on the ground that there was no question of law, which arose out of the order of the Tribunal.

Capital gains

(i) Computation

Computation of capital gains takes into account neutralisation of inflation by the process of indexation notified annually under *Explanation (v)* to section 48 read with *Explanation (b)* of section 55(2) adopting the base date as January 1, 1954, later substituted by 1964, 1978, 1981 and now April 1, 2001. An assessee liable for long-term capital gains is entitled to index his cost. Where the property is acquired before the date specified, the assessee has the option to substitute fair market value as on that date as his cost. Where the property sold is inherited, the assessee is entitled to adopt the cost of his predecessor in title with the option for substitution of fair market value on the respective specified date. It was in this context that where the assessee had inherited a property held as a member of co-operative housing society from his father under his will, the assessee exercised his option to compute capital gains adopting the market value as on April 1, 1981 with indexation thereon, as the father had apparently acquired the property before this date. Since the property was held as a member of co-operative society, which had built up flats on leased land, the Assessing Officer felt that the transfer does not satisfy the requirement of transfer of land and building for purposes of relief under section 54. This objection was found to be untenable since the right to the flat included proportionate cost of land occupied by flat including the land appurtenant thereto under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, so that there could be no objection in law to the assessee claiming the benefit of section 54 on the transfer of the property inherited by him by way of adoption of market value as on April 1, 1981 with indexation thereon, following the decision in *CIT* v. *Manjula J. Shah* [2013] 355 ITR 474 (Bom) as held in *Pr. CIT* v. *Rahul Uday Tuljapurkar* [2019] 13 ITR-OL 561 (Bom).

Where a document of sale showed that the consideration was shared by the seller and a confirming party to the agreement of sale, the capital gains for either of them has to be computed independently on gains respectively made by them. Where the entire amount was charged on the seller, it was held to be wrong in *Pr. CIT* v. *Lalitaben Govindbhai Patel* [2019] 13 ITR-OL 710 (Guj). The Supreme Court has dismissed special leave petition filed by the Department against this judgment [2019] 411 ITR (St.) 37.

(ii) Cost of acquisition

The assessee is entitled to substitution of the market value as on April 1, 1981 in respect of a property acquired before this date at his option. Where the assessee had shown a lesser value in his wealth tax return, he cannot be pinned down to such value, where it is less than market value as on April 1, 1981 as was decided in *CIT* v. *N.P. Abraham (Decd) Rep. by Legal Heirs* [2019] 13 ITR-OL 47 (Ker). In the same case, where the property was transferred to a developer under a development agreement in lieu of land surrendered by way of construction of agreed built-up area over the land retained by the owner, the consideration for the land surrendered is the cost of construction incurred by the developer on the part of land retained by the assessee.

(iii) Application of section 50C

Section 50C deems the guidelines value in respect of a registered sale of property described as stamp value in place of whatever consideration is claimed to have been received. Where the difference between stamp value and the purported consideration was added as undisclosed income in the hands of purchaser, such addition was held unwarranted for the simple reason that section 50C has application only for the seller and not the purchaser. Since it has not been shown that the purchaser had paid any extra amount over what had been declared in the sale deed and recorded in its books of account, the order of the Tribunal upheld the deletion of the addition by the Commissioner (Appeals) referring to the decision of the Tribunal on which Commissioner (Appeals) allowed the assessee's appeal in *Deputy CIT* v. *Virjibhai Kalyanbhai Kukadia* [2012] 138 ITD 255 (Ahd). The High Court also pointed out that the standing counsel for the Revenue had also fairly conceded that the decision of the jurisdictional High Court in *CIT* v. *Sarjan Realities Ltd.* [2014] 220 Taxman 112 (Guj) (Mag.) was against the Revenue. The Departmental appeal was accordingly dismissed in *Pr. CIT* v. *Dharmaja Infrastructure* [2019] 13 ITR-OL 682 (Guj). What could have prompted the Commissioner to file this Departmental appeal in this case to the High Court ?

(iv) Section 50C versus section 54EC

In computation of exemption from capital gains in respect of investments in specified bonds under section 54EC, capital gains against which such investments are set off cannot avoid application of section 50C, where stamp value is higher than the consideration accounted by the assessee. It was so held in *Jagdish C. Dhabalia* v. *ITO* [2019] 13 ITR-OL 431 (Bom).

(v) Transfer on reconstitution of firm

Where a firm with two partners was enlarged with three new partners with the pre-existing partners retiring on payments for their dues including their share of goodwill, the Assessing Officer applied section 45(4), which brings to tax any transfer of a capital asset by way of distribution of capital asset "on dissolution of a firm . . . or otherwise". Reconstitution of the firm in the case before the High Court did not involve any distribution of assets of the firm, so that condition for invoking section 45(4) was absent as pointed out by the High Court. What had happened was only evaluation of the firm's assets and settlement of the claim of retiring partners in respect of their interest in the firm with none of the assets of the firm being distributed. It was under these circumstances, the High Court upheld the Tribunal order reversing the concurrent finding of the Assessing Officer and Commissioner (Appeals) holding that there was transfer of goodwill amounting to distribution of this capital asset on dissolution or otherwise. The assessee had relied on the decision of the High Court in *CIT* v. *Dynamic Enterprises* [2013] 359 ITR 83 (Karn) [FB] in its favour. But the Revenue took up the stand that the erstwhile partners received money brought in by the new partners leaving their right in the property to the incoming partners and that it amounted to "a device adopted by these partners in order to evade payment of profit or gains" purportedly relying upon the decision in *CIT* v. *Gurunath Talkies* [2010] 328 ITR 59 (Karn), which was not found acceptable in *Dynamic Enterprises'* case (supra) as it did not appreciate the distinguishing factor between a transfer and settlement of account. It, therefore, concluded that there was clearly no transfer of any capital asset by the firm to a partner to merit application of section 45(4) and that, therefore, the Departmental appeal had to be dismissed as decided in *Pr. CIT* v. *Electroplast Engineers* [2019] 13 ITR-OL 676 (Bom).

(vi) Exemption for agricultural land

It is the constitutional mandate that agricultural lands do not fall within the purview of a central tax. The issue as to what is an agricultural land has also been settled by the consensus that it should have been used for agricultural purpose at or about the relevant time. Even so, the disputes do arise as it had occurred in this case, where the Assessing Officer felt that where agricultural land is categorized as stock-in-trade by the assessee himself, the income from such sale being business income, it would not be necessary to require further consideration as to whether the lands were agricultural lands. Since the assessee was in real estate business, the Assessing Officer felt that the sole purpose of the assessee in acquiring these lands was to exploit the land for the purposes of his real estate

business. It was also so categorized as stock in his books. The claim of the assessee that these were agricultural lands did not require consideration for this reason according to the Assessing Officer. It was the assessee's claim that land was used for agricultural purpose, a fact accepted in first appeal, apart from the fact that it is classified as agricultural lands in the revenue record of the State Government, so that the claim was allowed in first appeal and the income treated as not liable to tax. The Tribunal upheld this finding and the High Court found that no substantial question arose from the Tribunal decision, which was decided essentially on facts as decided in *CIT* v. *A. Vinod Kumar Reddy* [2019] 13 ITR-OL 726 (Mad).

Incentive deductions

(i) Section 10A

Unrealised export proceeds should also be treated as part of export turnover, as it also becomes part of turnover in determination of the proportionate income entitled to relief under section 10A.—*CIT* v. *Maars Software International Ltd.* [2019] 13 ITR-OL 11 (Mad).

Though deductions under sections 10A and 80A(5) were failed to be claimed in the original return, the claim is required to be allowed, where it is claimed in a revised return.—*Pr. CIT* v. *Oracle (OFSS) BPO Services Ltd.* [2019] 13 ITR-OL 127 (Delhi). In the same case, disallowances of bonus and expenditure under sections 10A, 40(a)(i) and 43B were required to be reconsidered in the proceedings in pursuance of revised return according to law.

One of the amendments to section 10A by the Income Tax (Second Amendment) Act, 1998 with effect from April 1, 1999 relates to the extension of the period of eligibility to exemption from five assessment years to ten years. But such extension is available only where the benefit of extension of five years had not already expired, as was explained by the High Court in *CIT* v. *Midland Latex Products Ltd.* [2019] 13 ITR-OL 364 (Ker) following *CIT* v. *DSL Software Ltd.* [2013] 351 ITR 385 (Karn) and *CIT* v. *Chowgule and Co. Ltd.* [2015] 93 CCH 212 (Bom).

(ii) Section 10AA

Section 10AA like many other incentive provisions are meant to give relief for new industrial undertakings. It follows that merely rehashing by splitting up an existing business or by merely reconstructing it, one cannot avail incentive provisions like section 10AA. An undertaking to be regarded as new, such undertaking should have an independent identity separate from existing ones, providing new employment opportunities with independent increase in revenue. Where the finding is that the new

undertaking was not one created by splitting up or reconstruction even as accepted in two earlier years, there is no reason to take a different view for the year under consideration as was decided in *Pr. CIT* v. *Macquarie Global Services Pvt. Ltd.* [2019] 13 ITR-OL 101 (Delhi) affirming the decision of the Tribunal in *Macquarie Global Services Pvt. Ltd.* v. *Deputy CIT* [2018] 62 ITR (Trib) 666 (Delhi).

(iii) Section 80-IA

In calculation of relief under section 80-IA in the case of an assessee generating electricity, the relief has to be based upon the component of price received towards sale of electricity. But where such sale price is fixed on the basis of the liability to tax to be taken as part of sale price, such tax liability has to be taken as part of sale price for purposes of relief under section 80-IA.—*Neyveli Lignite Corporation Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 65 (Mad).

In another case relating to relief under section 80-IA in the case of a telecommunication service provider, relief in respect of telecommunication service had to be ascertained under the definition in Telecom Regulatory Authority of India Act, 1997. The definition is wide. The assessee, a franchisee of BSNL for operating telephone exchanges and providing basic telecommunication service to its customers is eligible for deduction under section 80-IA. Such deduction is not limited merely to fees for such service because the assessee as a franchisee is not merely a commission agent but carrying on business of providing telecom service, so as to be eligible for relief under section 80-IA as was held in *Sabdhagiri Telecom* v. *ITO* [2019] 13 ITR-OL 68 (Mad) following *CIT* v. *Himanshu V. Shah* (T. C. A. No. 1098 of 2005 dated December 16, 2014) (Guj).

(iv) Section 80-IB

Where an assessee eligible for deduction under section 80-IB for its income from manufacture and export of agro-products was in receipt of subsidies from the Government under Vishesh Krishi and Gram Udyog Yojana meant to compensate the high transport cost and to offset inherent disadvantages attached to such products, such subsidies were held to be entitled to deduction as part of exempt income falling within the exempt period specified under section 80-IB(11) as was decided in *Pioneer Foods and Agro Industries* v. *ITO* [2019] 13 ITR-OL 483 (Bom) following *CIT* v. *Meghalaya Steels Ltd.* [2016] 383 ITR 217 (SC).

(v) Section 80-IC

Where there is a transgression of the condition under section 80-IC(4)(i) requiring use of new machinery because of shift of machinery from its

existing unit, the relief under section 80-IC was denied and such denial was upheld by the Tribunal and endorsed by the High Court in the view that the order of the Tribunal was neither perverse nor illegal as held in *Intec Corporation* v. *Pr. CIT* [2019] 13 ITR-OL 279 (Delhi).

Relief under section 80-IC is 100 per cent. of the income from the industrial undertaking in special category States for the first five years and 25 per cent. for the remaining next five years. Where there is an intervening substantial expansion which makes available 100 per cent. deduction, such deduction can be availed but the period of 10 years does not get extended because of intervening substantial expansion as was decided in *Adley Formulations* v. *CIT* [2019] 13 ITR-OL 598 (SC).

(vi) Section 80P(2)(c)(ii)

Section 80P(2)(c)(ii) spares liability for a primary co-operative society is engaged in specified activities under clause (b) or where the income does not exceed Rs. 50,000 under clause (c). It was found that income from sale of goods under public distribution system of State Governments undertaken by a co-operative society is exempt in *Kodumudi Growers Co-operative Bank Ltd.* v. *ITO* [2019] 13 ITR-OL 86 (Mad) following *Kodumudi Growers Co-operative Bank Ltd. (AA 713)* v. *ITO* [2019] 410 ITR 218 (Mad).

Set-off of losses

(i) Restrictions under section 79

The law providing for carry-forward and set-off of losses and unabsorbed depreciation is subject to conditions in the case of firms and companies not having to undergo any substantial change of interest of partners in the firms and shareholders in a company. In order to avoid losing firms and companies being taken over by tax-paying companies to avail of the benefit of loss, restrictions are placed under section 79 limiting or barring the right to set-off where there is a change in partnership interest of shareholding companies being 51 per cent. or more, unless such change is consequent on death. But even in amalgamation and demergers, 51 per cent. continuation of shareholding in the same hands is a requirement for availing of the benefit of continued set-off. This law, however, has been amended by the Finance Act, 2017 with effect from April 1, 2018 placing a limit to carry-forward and set-off of losses beyond seven years making an exception only in case of death, amalgamation or demergers of foreign companies or in pursuance of Insolvency and Bankruptcy Code, 2016 after a reasonable opportunity is given to the assessee by the Commissioner or Principal Commissioner. But these limitations apply only to private

companies or, in other words, companies in which public are not substantially interested. It was this law, which was applied in a case, where a public company applied 60 per cent. shareholding with amalgamation in the same year. There was 60 per cent. public interest rendering section 79 inapplicable, notwithstanding the fact that it was only subsequent to amalgamation in the same year, so that losses of previous years could continue to be available for set off. In this decision in *Framatome Connectors Berg Ltd.* v. *Deputy CIT* [2019] 13 ITR-OL 401 (Ker), the High Court in deciding the matter also explained the principles behind section 79.

(ii) Loss return

Right to carry forward loss is dependent upon the assessee filing a return within time under section 139(1). A belated return under section 139(3) though valid does not justify the carried-forward loss declared in such loss return as was pointed out in *CIT* v. *Kerala State Construction Corporation Ltd.* [2019] 13 ITR-OL 551 (Ker).

Minimum alternate tax

Section 115JB

Section 36(1)(viia) allows provision for bad and doubtful debts in case of a bank on the basis of guidelines issued by the Reserve Bank of India. The book profits to be computed under section 115JB has also to take into account this deduction, if the corresponding reserves had been added back. This change in law after passing of the order of the Tribunal requires reconsideration of the computation of book profits in the light of the amended law, so that the matter was remanded by the High Court back to the Tribunal in *CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker).

A provision to be reckoned as a charge in the profit and loss account would have to be made for an ascertained liability. It is for this reason that a provision for an upward liability is permissible only where the deduction for this amount is admissible in the computation of income in a regular assessment for deduction in computation of book profits as well as was decided in *CIT* v. *Kerala State Industrial Development Corporation* [2019] 13 ITR-OL 440 (Ker).

Since book profits under section 115JB has to be computed as per accounts under Schedule III of the Companies Act, 2013, but a banking company is not governed by this requirement as it is governed by Banking Regulation Act, 1949, the machinery provision for computation has no application for a banking company before insertion of a proviso to sub-section (6) of section 115JB by the Finance Act, 2011 with effect from April 1,

2012. It could have no application for years earlier to the assessment year 2012-13, since the amendment cannot be construed to be clarificatory, so that the assessee would not be liable for tax under section 115JB prior to amendment as was decided in *CIT-LTU* v. *Union Bank of India* [2019] 13 ITR-OL 655 (Bom) following *CIT* v. *B. C. Srinivasa Setty* [1981] 128 ITR 294 (SC).

Assessment

(i) Notice

A company, which is struck off from the register of companies has no existence, so that it was the usual view that any appeal or any action against such non-existent company was treated as not valid with the result, the merits involved were not being decided. However, in *CIT* v. *Gopal Shri Scrips Pvt. Ltd.* [2019] 13 ITR-OL 397 (SC), the Supreme Court found that the High Court had dismissed the Departmental appeal as infructuous because of non-existence of the company, and held that the High Court was bound to consider the question of law referred to it on merits notwithstanding the non-existence of the assessee, whether appellant or respondent.

(ii) Delay in filing return could be condoned

Where the delay in filing return causes genuine hardship, the Central Board of Direct Taxes under its section 119(2)(b), can condone the delay, where the delay had occurred because of change in auditors, it is a case, where delay ought to have been condoned.—*CBDT* v. *Regen Powertech Pvt. Ltd.* [2019] 13 ITR-OL 108 (Mad) affirming the decision in *Regen Powertech Private Ltd.* v. *CBDT* [2019] 410 ITR 483 (Mad).

(iii) Section 139AA—Requirement of linking Aadhaar with PAN

Section 139AA mandates linking of Aadhaar with Permanent Account Number (PAN), but even where it was not so linked, the Supreme Court directed the return to be accepted for assessment year 2018-19 but made it necessary for assessment year 2019-20 in *Union of India* v. *Shreya Sen* [2019] 13 ITR-OL 156 (SC).

Reassessment

(i) Valid

Where the tax liability of a firm was settled by the Settlement Commission, notice of reassessment to bring the consequent liability of the partner in pursuance of such settlement of tax was held valid. It was incidentally found that this was not a matter, which could be rectified under

section 155(1), which permits rectification only in respect of completed assessment of a partner, as was decided in *Mrs. Nahid Shaffi* v. *ITO* [2019] 13 ITR-OL 206 (Ker).

Information received subsequent to assessment indicated that the contributions to share application monies, which were accepted as genuine in the original assessment, were from accommodation entries provided to the assessee, so that jurisdiction for reassessment on such information was held valid in *Kalsha Builders Pvt. Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 600 (Bom). It was pointed out in this case, sufficiency of reasons, which prompted reassessment is not a matter for a court to judge.

(ii) Not valid

Where a notice was issued under section 153A on the basis of the statement recorded under section 132(4) ten years after expiry of maximum time limit of eight years, but permissible up to sixteen years after extension of the time limit, the notice was found to be invalid though within sixteen years, because the time limit for valid reopening after maximum eight years had already expired, so that a dead jurisdiction cannot be revived. The proceedings were, therefore, quashed in *Brahm Datt* v. *Asst. CIT* [2019] 13 ITR-OL 52 (Delhi) following *K. M. Sharma* v. *ITO* [2002] 254 ITR 772 (SC) and *S. S. Gadgil* v. *Lal and Co.* [1964] 53 ITR 231 (SC).

In another case, where reassessment proceedings were taken on the presumption of contravention of section 68 and section 269SS in earlier years in respect of cash credits and share capital contributions solely based upon failure to explain the credit in a later assessment year, the notice was quashed in *CIT* v. *Sahara India Mutual Benefit Co. Ltd.* [2019] 13 ITR-OL 41 (Cal).

The condition for jurisdiction for reassessment beyond the four-year time limit is that the escapement of income should have arisen on account of failure of the assessee to disclose fully and truly all material facts. Where it was concurrently found that there was no failure in this regard, the finding below that the reassessment made in pursuance of a notice under section 148 was without jurisdiction and, therefore, rightly set aside was affirmed by the High Court in *CIT(E)* v. *Marhatta Chamber of Commerce Industries and Agriculture* [2019] 13 ITR-OL 92 (Bom) relying upon the decision in *City and Industrial Development Corpn. of Maharashtra Ltd.* v. *Asst. CIT* (W. P. No. 1568 of 2013, dated March 24, 2014).

In a matter where a claim for deduction was examined in the original assessment and allowed, reassessment after four years to withdraw

deduction would not be justified, so that notice under section 147 was held to be invalid in *HSBC Bank (Mauritius) Ltd.* v. *Deputy CIT(IT)* [2019] 13 ITR-OL 118 (Bom).

Where the assessee had not filed objection to jurisdiction against the notice under section 148, a writ petition cannot be filed. Even where such objections have been filed, it is only where the order of the Assessing Officer does not accept the objections in an order in writing, the validity of objections to jurisdiction can be examined and meanwhile will not be entertained by the High Court on a writ petition. A writ merely on the basis of notice was, therefore, dismissed in *Cenveo Publisher Services India Ltd.* v. *Union of India* [2019] 13 ITR-OL 328 (Bom) relying on the decisions in *Asian Paints Ltd.* v. *Deputy CIT* [2008] 296 ITR 90 (Bom), *CIT* v. *Chhabil Dass Agarwal* [2013] 357 ITR 357 (SC) and *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC).

Rectification

Its scope

Rectification under section 154 is meant to correct an error which is apparent from the records. Where the assessee was allowed deduction for its manufacturing profits under section 80-I in respect of its business in blending tea, it was found that the allowance granted to the assessee claimed in its return was an error because blending tea is not manufacture according to the ruling of the court in *Appeejay Pvt. Ltd.* v. *CIT* [1994] 206 ITR 367 (Cal), a binding precedent from the jurisdictional High Court, which was also followed in *Brooke Bond India Ltd.* v. *CIT* [2004] 269 ITR 232 (Cal), so that the deduction of relief under section 80-IC for a manufacturing business was an error apparent on the face of the record. The application of section 154 for withdrawal of deduction was, therefore, held valid by the High Court in *Hindustan Lever Ltd.* v. *Joint CIT* [2019] 13 ITR-OL 358 (Cal). Blending in different proportion may result in different tastes and commercially different products. It is a question of fact in each case of blending, whether the blending in the instant case was an exercise which resulted in a different commercial products because blending by itself is a process, which may or may not amount to manufacture, unless relevant facts are found. In this case, facts were not found, so that it could not be a matter of rectification, since on-going debate of tea blending has to be taken as manufacture or not depending on facts of each case on the conclusion therefrom.

Waiver of interest

(i) Delay in payment of tax

Where the assessee was subject to interest for delay in payment of tax under section 220(2), he claimed waiver under section 220(2A). This petition was dismissed on the ground that the assessee was not able to specify any justification with reference to the three conditions regarding delay caused due to (1) genuine hardship, (2) circumstances beyond the control of assessee, and (3) in circumstances where the assessee has co-operated with any enquiry relating to assessment or any proceedings relating to recovery. A mere statement that the levy of interest had caused hardship to the assessee could have hardly been acceptable for waiver of interest. It was so held by the Chief Commissioner, while rejecting the petition for waiver in *Mansukhlal Pitalia* v. *Pr. CIT* [2019] 13 ITR-OL 670 (MP). It is difficult to imagine that any of these reasons for the delay to justify waiver was not present in the assessee's case. But the reason given was not any one of them, so that the assessee suffered probably because the petition as framed did not bring such reason to justify waiver, so that the assessee has only to blame himself.

(ii) Interest - Section 234C

Section 234C provides for interest by an assessee for the period for which monies were withheld from the Government. Merely because assessee was otherwise meeting heavy liabilities, it does not mean that assessee is entitled to be spared from liability under section 234C as was held in *CIT* v. *Catholic Syrian Bank Ltd.* [2019] 13 ITR-OL 18 (Ker).

Post-search block assessment

(i) Jurisdiction

The law relating to post-search assessment that jurisdiction under section 153A is confined to incriminating materials found during search, was followed in *Pr. CIT* v. *Dipak J. Panchal* [2019] 13 ITR-OL 713 (Guj).

(ii) Parallel proceedings are not barred

For years for which block assessment is made, there can be other regular proceedings, if they had been initiated validly. In other words, there can be parallel proceedings against which there can be no bar as was decided in *T. T. V. Dinakaran* v. *Deputy CIT* [2019] 13 ITR-OL 25 (Mad) following *Dayanidhi Maran* v. *Asst. CIT* [2018] 12 ITR-OL 715 (Mad). Such an interpretation has to be accepted as based upon principles of constructive interpretation.

(iii) Section 153A

Post-search block assessments are based on materials found during search. Unaccounted stock inferred from a diary and the copy of the balance-sheet furnished by the assessee to the bank were discovered during search justifying jurisdiction for a post-search block assessment under section 153A as decided in *CIT* v. *Orma Marble Palace (P.) Ltd.* [2019] 13 ITR-OL 171 (Ker). However, the method of decoding the figures in the seized diary to arrive at the unaccounted stock being erroneous, such error was held to require to be corrected. In the same case, it was also found that post-search enquiry recording statement of directors, employees and purchasers in matters having nexus with seized materials cannot be faulted and that the materials gathered during such enquiry can be legitimately relied upon by the Assessing Officer.

(iv) Third-party jurisdiction

Where cash of Rs. 38 lakhs found in the premises during a search in the course of another, but attributed to the assessee as a payment of "pakadi" for vacating the premises in which the assessee had earlier carried on his business and later the business of his wife and brother. The assessee, however, denied having paid the amount explaining that there was no occasion for him to make the payment as pakadi because the premises belonged to a trust to which he handed back the premises. It was the trust, which had later entered into a fresh agreement with the present occupant, so that he could not have been paid the amount. In the light of these circumstances, the addition was deleted in first appeal and such deletion was confirmed by the Tribunal and upheld by the High Court in *CIT* v. *C. M. Ravi* [2019] 13 ITR-OL 740 (Ker) in the view that the entire assessment was based upon a sworn statement of another person without any corroboration of any evidence, so that it could not have been acted upon. The owner of the premises had also not been examined nor was there any further enquiry regarding the admission.

In another case in a matter of action under section 153C consequent on search of another, the question of jurisdiction arose, where the search itself was found subsequently to be invalid in *Pr. CIT* v. *Dilip Avtar Construction Pvt. Ltd.* [2019] 13 ITR-OL 744 (Guj). It was found that the requirements of law as to the satisfaction of the Assessing Officer having jurisdiction over the searched person that the materials seized belong to a third party representing his undisclosed income and the requirement of communication thereof along with the seized material, had been met. The subsequent development regarding the validity of search could not alter the consequences of seizure and the satisfaction regarding the seized

materials enjoined by law. The language of section 153C in respect of satisfaction was different from the one expected under section 158BD. The question of limitation was raised on the ground that the handing over of seized material was belated with reference to the date of initiation of search under section 132. But it was found that the relevant date is not the date of search, but the date on which the accounts and documents or assets seized came to the possession of the Assessing Officer, who had received the books of account and documents. It was pointed out that while validity of authorization was imperative under section 153A, what is important for jurisdiction under section 153C was the satisfaction and the handing over and receipt of seized materials. The invalidity of search itself as found later, therefore, would make no difference to jurisdiction in this case as was decided following *Pooran Mal* v. *Director of Inspection (Investigation)* [1974] 93 ITR 505 (SC) and *Gunjan Girishbhai Mehta* v. *Director of Investigation* [2017] 393 ITR 310 (SC).

Recovery of tax

(i) Stay of disputed demand

An application for stay of disputed demand requires a decision from the Assessing Officer under section 220(6) on exercise of his judicial discretion. He may be guided by the Circulars and guidelines of the Central Board of Direct Taxes, but these are not by themselves binding in view of judicial discretion vested on him, so that he has to apply his mind to the application for stay and pass a speaking order indicating his decision with reasons therefor as was held in *Shriram Finance* v. *Pr. CIT* [2019] 13 ITR-OL 541 (Mad).

(ii) Attachment of bank account

Where the assessee is a defaulter having considerable immovable property, there is no need for attachment of his bank account, where such attachment comes in the way of the need for meeting the day-to-day expenses of the assessee including expenses of medical treatment of himself and his aged mother as held in *Darius Sammotashaw* v. *Deputy DIT (Inv.)* [2019] 13 ITR-OL 557 (Bom). It would appear that in such cases, it was for the assessee to satisfy the Assessing Officer, that the arrears will be met out of his considerable other assets, so that he may be spared the agony of attachment of his bank account. But the attachment itself could not possibly have been questioned merely because assessee has got other means for payment of tax in arrears.

Refund

(i) Time limit

A claim for refund has to be made within the stipulated time limit, but where it is delayed, such delay could be condoned when failure to condone would cause genuine hardship. The Central Board of Direct Taxes is empowered to condone the delay under section 119(2)(b), where the delay was explained to be on account of inadvertence of auditor, so that the delay should have been condoned in the light of the legislative intent behind the power of condonation vested in the Central Board of Direct Taxes. Where the condonation plea was rejected, the Board was directed to condone the delay by the High Court in *G.V. Infosutions Pvt. Ltd.* v. *Deputy CIT* [2019] 13 ITR-OL 164 (Delhi) following *Indglonal Investment and Finance Ltd.* v. *ITO* [2012] 343 ITR 44 (Delhi).

(ii) Interest

Section 244A(1A) confers a right to interest on delayed refunds. Such right is a substantive right as it imposes a statutory obligation on Revenue to pay interest for the period of delay, which has to be reckoned not from the first day of the assessment year in which tax was deducted at source, but reckoned from the date of payment of tax as was decided in *Pr. CIT* v. *Kumagai Skanska HCC Itochu Group* [2019] 13 ITR-OL 158 (Bom).

Interest for delayed refund has to be reckoned from the date of appellate order granting the refund. Where there was no delay on the part of the assessee in making the claim for refund, there can be no restriction of the period with reference to the date of appellate order. Such restriction was found to be erroneous in terms of section 244A(2) in *Pr. CIT* v. *State Bank of India* [2019] 13 ITR-OL 343 (Bom).

Revisional jurisdiction

Not justified

Where there is an intervening appellate order before the matter was taken up by the Commissioner for revisional jurisdiction under section 263, there is no assessment order to be revised. Once it becomes subject matter of appeal, there is no longer any jurisdiction for the Commissioner against the assessment order under section 263 because the assessment order ceases to exist once it gets merged with the appellate order. It was so decided in *Pr. CIT* v. *Oil India Ltd.* [2019] 13 ITR-OL 253 (Gauhati).

Matters on which the Assessing Officer had not made any enquiry like interest earned on security deposit and foreign exchange gain due to fluctuations in rates of foreign exchange from forward contracts in respect of

purchase of plant and machinery, are matters of inference, whether it is capital or revenue. Where the Assessing Officer has accepted non-liability, there is no case for revision because the mere fact of non-enquiry does not justify the inference that the order is erroneous and prejudicial to the Revenue in the context of both the items referred in this case were directly connected and incidental to construction of plant, which is a capital asset, so that such income would also be capital receipt not liable to tax. It is under these circumstances, revision was held unjustified in *Pr. CIT* v. *Coastal Gujarat Power Ltd.* [2019] 13 ITR-OL 607 (Bom) affirming the decision of the Tribunal in *Coastal Gujarat Power Ltd.* v. *ITO* [2017] 8 ITR (Trib)-OL 683 (Mumbai).

Tax deducted at source

Disallowance under section 40(a)(ia)

Though there was a delay in deposit of tax deducted at source, the assessee had paid interest for the delay of two days in this case and had also filed a statement from the payee offering to pay the tax on the sum received from the assessee as required under proviso to section 201(1), so that there could be no disallowance under section 40(a)(ia) as decided in *CIT* v. *Bhanot Construction and Housing Ltd.* [2019] 13 ITR-OL 208 (Delhi) relying upon the decision in *Allied Motors (P.) Ltd.* v. *CIT* [1997] 224 ITR 677 (SC).

Appeal

Monetary limits

In order to avoid frivolous appeals involving nominal stakes, the Board had fixed minimum monetary limits for Departmental appeals. Where the stakes in an appeal fall below the limit, it will not be taken up by the Department in appeal or further appeal. Where it was taken up and the order in appeal had been passed, such order was set aside by the High Court in *Bhagavathy Velan* v. *Deputy CIT* [2019] 13 ITR-OL 704 (Mad). In the same case, the other issue related to an amount of shortfall in payment of consideration for purchase of a flat from a substantial shareholder, the assessee in this case. The part of consideration, which was outstanding, was understood as a loan or advance, so as to attract application of section 2(22)(e).

Tribunal's Powers

Rectification

Where a cross-objection in respect of an appeal questioning the validity of a reassessment was filed, it was dismissed as infructuous because the

appeal itself was allowed by deletion of the addition in the reassessment. But the Revenue had taken up the matter to the High Court with no appeal by the assessee against dismissal of cross-objection. Since, however, the High Court had reversed the Tribunal decision, the assessee believed that the cross-objection, which was earlier filed but dismissed as infructuous, can now be entertained in the light of this further development. The assessee's application for rectification in the cross-objection was not entertained not on the ground that there was no mistake apparent from the records requiring rectification, and that the assessee should not have awaited the outcome of Departmental appeal for filing rectification. It was felt that it was a conduct amounting to "forum shopping" which was held to be impermissible after finality had already been reached. It was also found to be invalid on the basis of doctrine of merger. It is true that since the Tribunal's order had become the subject matter of the decision of the High Court, there was no subsisting order of the Tribunal, which could be rectified as found in *Pr. CIT* v. *N. R. Portfolio Pvt. Ltd.* [2019] 13 ITR-OL 583 (Delhi). But the comment on "forum shopping" is rather odd, because a taxpayer who feels that he is a victim of a mistake is bound to avail of any available avenue for remedy. There is nothing like "forum shopping" as long as the forum now chosen is permissible under the law.

High Court

(i) Condonation of delay

A delayed appeal can be condoned by the High Court on acceptance of explanation for the delay. Where it is not so condoned, but the same issues were subject matter of appeals already pending before it for other years, there is no reason why delay should not be condoned as decided by the Supreme Court requiring the High Court to condone the delay and decide the matters already pending in appeal as was decided in *Anil Kumar Nehru (Through Power of Attorney Ankit Agrawal)* v. *Asst. CIT* [2019] 13 ITR-OL 1 (SC).

The High Court can condone the delay in an appeal made to it, where such delay is explained to its satisfaction, but such exercise has to be done reasonably. Where the High Court declined to condone the delay in a case, where assessee explained that the delay was caused by ailment of their chairman of the company with death following such ailment and that the son had to understand the matters, which took time, but the Supreme Court found the explanation to justify condonation, so that the Supreme Court remanded the matter to the High Court for a decision on merits in *Aakash Lavlesh Leisure Pvt. Ltd.* v. *ITO* [2019] 13 ITR-OL 381 (SC).

(ii) Powers

The High Court is vested with power and duty to deal with substantial question of law, so that if there is none, any appeal or other reference to it on such questions would have to be dismissed in limine. If there is one, such a question has to be framed first before answering it. These are the expectations by the Supreme Court from the High Court, which were repeated in *Ryatar Sahakari Sakkarre Karkhane Niyamit* v. *Asst. CIT* [2019] 13 ITR-OL 626 (SC).

Since power of the High Court is limited to questions of law, a reference made to it on a matter solely confined to facts can be dealt with only if the finding contested is perverse and not otherwise.—*Nangal Spun Pipe Co. Pvt. Ltd.* v. *CIT* [2019] 13 ITR-OL 630 (P&H). The decision was rendered in this case on a matter of disallowance under section 40A(3) in respect of a loan or deposit in cash exceeding the limit thereunder, so that where it is not covered by an exception under rule 6DD or reasonable cause otherwise, the disallowance is justified.

(iii) Power to review/recall

The High Court has got the power and in fact a duty to correct any error apparent on record in its judgment, so that the High Court upheld the recall order and rejected special leave petition against it in *McKinsey Knowledge Centre India Pvt. Ltd.* v. *Pr. CIT* [2019] 13 ITR-OL 649 (Delhi).

Writ

Not maintainable

Where the assessee had sold some paintings by way of auction and the Assessing Officer brought the profit on sale to tax, the assessee objected to the levy on the ground that it did not have ownership of most of the paintings, but it was not accepted; the matter was taken by way of writ with a prayer to quash the auction proceedings. Since there was no material to contradict the evidence available on the presumption of ownership of the paintings under auction, writ petition could not be entertained. Even otherwise, where validity of assessment was questioned by way of a writ petition, the High Court held that such writ petition cannot be entertained in view of alternate remedy available to the assessee by way of regular appeal as held in *Camelot Enterprises P. Ltd.* v. *TRO* [2019] 13 ITR-OL 488 (Bom).

Appeal to Supreme Court

For expunging adverse remarks

Where the Assessing Officer adjusted the refund due by outstanding demand for the assessment year 2003-04 to the extent of Rs. 62 lakhs and for the assessment year 2009-10 to the extent of Rs. 90,92,528, the assessee claimed that the demand notices for these two years have not been received, so that adjustment was erroneous. Since the Assessing Officer declined to rectify his order on the ground that the assessee must have received the order because an appeal against penalty for the assessment year 2003-04 had been filed by the assessee, on penalty consequent on the assessment for the year, which could not be done unless the order of assessment had been received. The assessee thereupon filed a writ petition. The High Court asked for evidence of service of demand notice, but since they were not produced before it, but an adjournment, so as to enable the Department to trace the records, was asked for. The High Court was not impressed by the argument that the records were not readily available and that efforts were being made to trace them. It, therefore, required the Deputy Commissioner concerned to be present in the court along with all the records.

The Deputy Commissioner was then present though he was not holding charge of the same jurisdiction at the relevant time. He admitted that evidence of service of notice is not available in the records. The High Court, therefore, felt that the adjustment of the demands was unwarranted and that when the assessee pressed for refund in absence of service of any demand notice, it should have been allowed. The Deputy Commissioner present claimed that he had not been responsible because there were other officials dealing with the file and that, at any rate, the failure of service was not intentional or deliberate.

The High Court has recorded, that it noticed that the Deputy Commissioner overreached the authorities and powers of the court by frequently interrupting the counsel of the Department by his frequent instructions preventing the counsel from performing his duty. The High Court felt that his official version amounted to assertion, "I have to presume that once the demand is raised, it must have been duly served or steps in relation thereto are taken by other officials in the Department". The High Court felt that such attitude amounts to a conduct compounding the lapses and errors and sends a wrong message, which cannot be tolerated. The cost of Rs. 1.5 lakhs was levied requiring the payment to be met by the officer present and his predecessor and that the superiors should enter their lapses and errors in their annual confidential report recording their inefficiency and that they

should also initiate requisite steps to include denial of promotion and monetary benefits in accordance with law, so as to weed out such "dead-woods". It was because of these comments against the officers that a special leave for appeal was filed by the Deputy Commissioner concerned for expunging the adverse remarks and imposition of cost, besides the directions to record their conduct in their confidential report, apart from denial of promotion including monetary benefits.

The Supreme Court held that the adverse remarks and directions were not justified especially since no notice to the persons concerned was issued before these directions. These comments and directions "were wholly unnecessary having regard to the lis before the High Court". The adverse remarks were, therefore, expunged in *Sanjay Jain* v. *Nu Tech Corporate Service Ltd.* [2019] 13 ITR-OL 314 (SC). At the same time, it was clarified that its order shall not affect the rights of the parties, the assessee and the Department, on the merits of the case.

Settlement Commission

(i) Levy of interest

Levy of interest omitted to be levied can be charged by the Settlement Commission, where such levy is warranted in respect of any proceedings pending on or after June 1, 2015 under section 245D(4). Such powers are available for all the assessments pending as on that date, whether the application for settlement was filed before that date or not, as decided in *Orchid Infrastructure Developers Pvt. Ltd.* v. *Union of India* [2019] 13 ITR-OL 137 (Delhi).

(ii) Duty of Settlement Commission

Settlement Commission too can resort to estimate on best-judgment basis. Where the precise data is not available, inference of income on estimate is warranted. Where such estimate was made, the matter was taken to the High Court questioning the order of Settlement Commission by way of writ, which was dismissed by the High Court after pointing out it was for the assessee to furnish proper accounts, so that where it is not so done, the Settlement Commission can make further enquiry and come to its own conclusion. It was in this view, writ was dismissed by the High Court in *EMTA Coal Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 233 (Cal) affirming the decision of the single judge in *Asst. CIT* v. *EMTA Coal Ltd.* [2017] 398 ITR 1 (Cal).

(iii) Revision

When the assessment for a year becomes the subject matter of settlement by the Settlement Commission, such assessment can no longer be

the subject matter of any alteration either by the assessee or the Assessing Officer. Where the assessee asked for exclusion of subsidy, which according to it was a capital receipt, on the ground that it was erroneously offered for tax, the Commissioner rejected the petition. On a writ petition by the assessee before the High Court, it was held that in view of finality on settlement, the application by the assessee was misconceived and, therefore, rightly rejected as decided in *Mandhana Industries Ltd.* v. *Pr. CIT* [2019] 13 ITR-OL 286 (Bom).

(iv) Admission of a petition

Admission of a petition for settlement has to be decided by the Settlement Commission after hearing the Commissioner on his objections, if any, to be raised by way of a report. Right to raise objections is limited solely at the stage of admission, so that where objection to admission was sought to be raised during the hearing of the petition, it could not be entertained as was decided by the Settlement Commission with reference to section 245D and affirmed by the High Court in *Akshar Developers* v. *ITSC* [2019] 13 ITR-OL 453 (Guj).

Penalty

(i) Exigible

Disallowance of depreciation on non-existing goods would justify penalty in a case, where such depreciation was claimed in respect of a transaction of lease and transportation of goods, which was found to be sham or bogus.—*Sterling Holiday Financial Services Ltd.* v. *Asst. CIT* [2019] 13 ITR-OL 338 (Mad).

Penalty was imposed on two counts. One was the inference of excessive claim of deduction under section 10B, which was found to be admissible because the disallowance on similar lines had to be set aside by the Tribunal for an earlier year following the decision of the jurisdictional High Court in *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98 (Karn). The second objection was that there was excess stock, which was also explained by the assessee as one on account of wrong entries in the books of account and not on any actual excess and that since this excess stock shown in the closing stock becomes the opening stock of the succeeding year, the tax effect is nil, so that the Tribunal found that there was no justification for inference of concealment in this matter as well. But the Revenue argued before the Tribunal that the penalty was justified on the basis of the decision of the Supreme Court in *MAK Data (P.) Ltd.* v. *CIT* [2013] 358 ITR 593 (SC), which was found to be inapplicable as it was a case where no explanation was offered, so that the High Court described the decision cited as

"diagonally opposite to facts of this case". It is under these circumstances, the High Court, in *Pr. CIT* v. *Deccan Mining Syndicate Pvt. Ltd.* [2019] 13 ITR-OL 691 (Karn), held that the reliance placed by the Revenue on the decisions in *Union of India* v. *Dharamendra Textile Processors* [2008] 306 ITR 277 (SC) and *CIT* v. *Atul Mohan Bindal* [2009] 317 ITR 1 (SC) also do not help the Revenue as there is no finding in these cases since there was no explanation at all from the assessee. It is under these circumstances, the appeal by the Revenue was dismissed.

(ii) Not exigible

Where a claim of a loss was disallowed, penalty proceedings were also initiated for claiming such loss. The matter of determination of loss was subject to a petition of rectification, which was subsequently allowed. The assessee-company had also become defunct subsequently due to the continuing losses. Under these circumstances, penalty was deleted by the Tribunal as such penalty could not have been levied without examining the circumstances in which loss was claimed. Such penalty by the Tribunal was upheld by the High Court in *Sheetal Diamonds Ltd.* v. *ITAT* [2019] 13 ITR-OL 378 (Bom).

Where the assessee had taken the view that receipt on sale of leasehold rights was a capital receipt not liable to tax as capital gains on legal advice, it omitted to include the same in the return, but brought the particulars of these receipts to the notice of the Assessing Officer by way of a note accompanying the return; there could be no penalty merely because the Assessing Officer found the explanation for the omission not acceptable, as found by the Tribunal and endorsed by the High Court in *Pr. CIT* v. *Bharatkumar Maneklal Parikh* [2019] 13 ITR-OL 616 (Bom).

Prosecution

(i) Wilful attempt to evade tax

Prosecution was launched, while the related matter was remanded thereafter, where the Commissioner (Appeals) had himself given substantial relief with tax payable being reduced from what was determined by the Assessing Officer in the assessment. It is not a case, where prosecution was justified because of mere estimate of income as was decided in *Sayarmull Surana* v. *ITO* [2019] 13 ITR-OL 4 (Mad) relying upon the decision in *CIT* v. *Bhupen Champak Lal Dalal* [2001] 248 ITR 830 (SC). The High Court, in this case, inferred the meaning of the word "wilful" from *P. Ramanatha Aiyar's The Law Lexicon*, as under :

> "The question whether an act or omission is wilful arises often in criminal than in civil causes ; since in the former the general principle

requiring the presence of mens rea excludes from criminality, acts done accidentally and unintentionally and even acts done intentionally under honest but mistaken belief in the existence of facts which, if true, would have made the acts lawful or excusable."

(ii) Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (The Black Money Act)

Section 50 of the Black Money Act would justify prosecution for failure to disclose foreign assets. Notwithstanding the fact that action had been taken under section 153A both for assessment and penalty, prosecution is not precluded, where it is justified under the statute. It was so held in *Shrivardhan Mohta* v. *Union of India* [2019] 13 ITR-OL 272 (Cal). Incidentally, it was pointed out that provisions of a statute would require strict interpretation under the law.

End of Volume 13