LANDMARK CASES

S. Rajaratnam[1]

Income

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

The assessee was the managing director of a company S holding about 75 per cent. of share capital with his wife holding another 15 per cent. A search revealed that the assessee had paid Rs. 11 crores to his wife as a personal loan and paid another Rs.11.05 crores to S on various dates with S in turn paying Rs. 10.8 crores to the assessee's wife. It was explained by S that assessee had made a deposit of Rs. 10 crores with company S as a loan at interest of 5 per cent., which was in turn given to the assessee's wife at 5.25 per cent. The Assessing Officer inferred that the assessee had paid in all Rs. 11.05 crores through S. Since the assessee was an interested person in the company and the payment was one due to personal commitment to his wife, it could not have been a commercial transactions in the course of business between assessee and S, though the assessee claimed that the payment of interest was reflected in his accounts, but it was found that these were journal entries without actual payment. It was inferred that S was an intermediary used as a conduit pipe to avoid deemed dividend under section 2(22)(e), so that the entire amount of Rs. 29,78,154 declared as payment made on behalf of the assessee's wife was considered dividend apart from the entire sum of Rs. 11.05 crores inferred as personal benefit to the assessee's wife also covered under section 2(22)(e). In first appeal, the addition of Rs. 10.80 crores was upheld as deemed dividend but on the other amounts partial relief was granted. The argument that it was a money-lending transactions was not accepted in that S was a separate entity assessed separately, so that there was no business activity in the ordinary course as between them to avoid tax on intercorporate deposit as deemed dividend.

The addition on account of deemed dividend was accepted in first appeal, but the Tribunal deleted the same on the ground that the assessee had no control over S treated as an intermediary. Interest has been treated as an advance by way of intercorporate deposits made by the company and such interest has been assessed by the same Assessing Officer without any adverse observation with the assessee accounting for interest received from S, while S had accounted for interest received from his wife, with the

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assessment in the name of wife completed accepting her return. Taking all these facts into consideration section 2(22)(e) was held inapplicable.

The matter was taken up to the High Court by the Revenue in *CIT* v. *Basant Poddar* [2019] 412 ITR 529 (Karn). But the High Court dismissed the Departmental appeal on the finding that all transactions were routed through banking channels. They were business transactions accepted at face value in the case of all parties, so that after all such acceptances in the assessments of all the parties to the transactions, a doubt is inappropriate, so that the concurrent finding in first appeal and the Tribunal that there was no deemed dividend in this case was upheld by the High Court referring to the decision followed by the Tribunal in *Nandlal Kanoria* v. *CIT* [1980] 122 ITR 405 (Cal), where it was held that a bona fide transaction cannot lead to the inference of deemed dividend and that the inference has to be drawn from facts of the case, where the transactions are normal business transactions through banking channels and not by misconstruing them as journal entries as was done in this case before the High Court.

(ii) Cessation of liability under section 41(1)

Section 41(1) provides for taxation of business liability, which has ceased in the year of such cessation. The assessee in timber business and later engaged in recruitment of manpower for foreign countries had large number of business creditors and such credits were carried forward from year to year. The Assessing Officer presumed that liabilities for the amounts have ceased to exist and made an addition of about Rs. 59 lakhs which was concurrently confirmed in first appeal and the Tribunal. The assessee filed further appeal to the High Court, which found that the concurrent finding of three authorities below that sundry creditors ceased to be creditors in law could not be reversed. The amounts due to the creditors were no doubt a trading liability, which had apparently ceased as they were not shown to be in force, so that whether such cessation is de facto or de jure, section 41(1) has application as held in *West Asia Exports and Imports (P) Ltd.* v. *Asst. CIT* [2019] 412 ITR 208 (Mad) following *CIT* v. *T. V. Sundaram Iyengar and Sons Ltd.* [1996] 222 ITR 344 (SC) and *Gujtron Electronics (P.) Ltd.* v. *ITO* [2017] 397 ITR 462 (Guj).

(iii) Cash credits – Section 68

Where the assessee had received contributions towards share capital on private placement basis, the matter would have to be considered as one warranting enquiry under section 68 as regards the identity of the contributors and their creditworthiness, to judge the genuineness of the receipts. The law is clear that there is a legal obligation on the assessee to prove their genuineness and the Assessing Officer is duty-bound to examine their identity and creditworthiness. Such a duty is all the more expected of the Assessing Officer in the light of the practice of conversion of unaccounted money through the cloak of share capital or share premium, so as to warrant careful scrutiny of such receipts. In this case, the amount received was towards contribution of Rs. 190 per share as against the face value of Rs. 10, the total contribution being Rs. 17.6 crores received as share subscriptions from companies in Mumbai, Kolkata and Gauhati. The enquiries by the Assessing Officer revealed that each company was investing amounts ranging from Rs. 90 to 95 lakhs, the companies themselves having only meagre income. The entire amount was, therefore, brought to tax as unproved, but the addition was deleted in first appeal and such deletion was upheld by the Tribunal and the High Court. It was on the Departmental appeal in *Pr. CIT* v. *NRA Iron and Steel Pvt. Ltd.* [2019] 412 ITR 161 (SC) that the Supreme Court found that the Assessing Officer had conducted detailed enquiries, which showed that amounts were received from independent legal entities with some of the investor companies found to be non-existent, while those who were found had negligible income indicating lack of financial capacity to invest such large amounts, besides lack of explanation for reason to subscribe to such shares at such high premium. The fact that Income Tax File Numbers were cited could not by itself justify acceptance in view of other facts found. The matter has to be judged from all the facts relating to the entire transactions, which clearly indicated that neither identity nor creditworthiness of investor company had been proved, so that the Supreme Court reversed the decision of the High Court, as the law decided by the High Court could not be legally sustained as decided ex parte in absence of representation on behalf of the assessee.

(iv) Unexplained investment – Section 69

The assessee had received three cheques as advance rent amounting to Rs. 13 lakhs for letting out commercial space but the property was never occupied, so that such amount should have been either returned or forfeited, but it was merely carried forward from year to year. Enquiry revealed that the company, which gave the advance, had a director, who was also the director of the assessee company. The rental agreement itself was never produced before the Assessing Officer, though required by him. The monies were received through bank account, but there was no confirmation letter regarding the payments. The purported advance was brought to tax to the extent of Rs. 12,49,000, which remained with the assessee. However, it was deleted in first appeal and such deletion was upheld by the Tribunal. On Departmental appeal, which was heard ex parte on amicus curiae submissions, it was found that once the rental agreement was not acted upon, the argument of the Revenue was that the assessee had not furnished any explanation as to why the amount was not returned, when it was evident that the creditor had not enforced its right and allowed it to lapse by taking no action within the three-year time limit, the Tribunal's order was reversed and the order of the Assessing Officer restored. The argument on behalf of the assessee in its appeal to the High Court were that the proposed addition was not included in the show-cause notice and that the three-year time limit does not defeat the right of recovery and the source was clearly supported by entries in the books of account. It was, however, found by the High Court that the matter had been discussed in the order in detail, so that there is no question of lack of opportunity. Irrespective of the law, whether recovery was time barred, the fact remains that it had become the property of the assessee even at the time the assessment was taken up, the three-year period having expired, so that it may not have been possible to the party to enforce return of amount as the party had not kept up to its part of the contract. It was under these circumstances, it was found that the amount has to be treated as income of the assessee, whether as cash credits under section 68 or unexplained expenditure under section 69, so that the addition by the Assessing Officer was restored by the High Court in *CIT* v. *Amritha Cyber Park (P) Ltd.* [2019] 412 ITR 199 (Ker) following *CIT* v. *T. V. Sundaram Iyengar and Sons Ltd.* [1996] 222 ITR 344 (SC).

(v) Diversion by overriding title

Where a co-operative society engaged in the business of manufacture of sugar purchased sugarcane from member growers, extra payment was made with reference to the price fixed by the State Government estimating the price on the basis of yield of sugar content in the sugarcane manufactured in the area. This extra payment, it was felt, has an element of profit, which is shared between the assessee and the growers, so that the entire payment of extra amount was added by the Assessing Officer in the view that it is either profit or at any rate, the payment was excessive or unreasonable within the meaning of section 40A(2). The Commissioner (Appeals), however, deleted the addition as it is a payment for purchase fully allowable being a component of price and that the same amount was paid both to members and non-members, so that there could be no inference of any excess payment. The Tribunal confirmed the order in first appeal and the High Court endorsed the same in *CIT* v. *Manjara Shetkari Sahakari Sakhar Karkhana Ltd.* [2008] 301 ITR 191 (Bom). On Departmental appeal, the Supreme Court in *CIT* v. *Tasgaon Taluka Sahakari*

Sakhar Karkhana Ltd. [2019] 412 ITR 420 (SC) held that the statutory minimum price is decided by the Central Government at the beginning of the season, but an additional amount was determined by the State Government after taking into account all the factors, so that any shortfall in the price initially fixed is allowed as extra price. The production of sugar is covered by Essential Commodities Act, 1955 and the price is determined under Sugarcane (Control) Order, 1966, so that it is a statutory price, leading to the contention that there could be no disallowance under section 40A(2) or otherwise. The payment was also governed by taking into consideration the expected extent of sugar from sugarcane supplied, the market price of sugar and the return to growers in the light of the income they would earn by growing alternate crops, so that such price reasonably fixed could not be disallowed. It was decided in *Maharashtra Rajya Sahkari Sakkar Karkhana Sangh Limited* v. *State of Maharashtra* [1995] Supp. (3) SCC 475, that the price based upon recovery is the optimum price to which supplier is entitled, so that the difference between the statutory minimum price and State advisory price is nothing but profit. After considering the arguments from both sides, it was held by the High Court that the price is fixed for different areas depending upon different qualities or varieties of sugarcane. What the grower gets is an additional sugarcane price over and above the minimum price, so as to be deductible.

The Supreme Court felt that there is an undoubted element of profit in the extra payment though not the amount of the entire difference between statutory minimum price and the State advisory price. The Assessing Officer would have to take into account the manner in which the business is carried on, the modalities and manner in which additional price is decided for deciding the element of profit, if any. The fact that the same price is paid for purchase from non-members, which is a necessary consideration for application of section 40A(2), is not relevant for considering, whether there is profit element. This exercise had not been undertaken, so that the Supreme Court quashed and set aside the decision of the High Court and remanded the matter to the High Court to refer the matter to respective Assessing Officers for determining the profit element in the additional cane price for disallowance.

It would appear that in the case of computation of purchase price of sugarcane supplied by the members, there could be no disallowance of the price, irrespective of whether there is profit because what it pays, from its point of view, is for purchase. The argument on behalf of the Revenue was "that in view of the above facts and circumstances, the High Court was not justified in holding that the excess amount of expenditure on sugarcane purchase price was a charge of profit, i.e., diversion of profit and not appropriation of profit". This interesting argument the answer to which appears to favour assessee rather than the Department has not been discussed in the judgment. What is parted with by the assessee for whatever reason, cannot be part of profits, if any, which are retained, having been diverted at source, so that it is no longer available to the sugar mill as taxable profits and treated partly as profit and not as price in the hands of members. Even for this reason, the decision should have been different.

(vi) Interest from bank deposits out of share capital

Where an assessee earned income even before the business has commenced from deposits made out of capital contributions from Reserve Bank of India, it was taxed by the Assessing Officer as income from other sources, but deleted in first appeal. The matter was taken by the Revenue to the Tribunal citing the decision in *CIT* v. *Bokaro Steel Ltd.* [1999] 236 ITR 315 (SC) overlooking the fact that this decision was distinguished by the Supreme Court in *Tuticorin Alkali Chemicals and Fertilizers Ltd.* v. *CIT* [1997] 227 ITR 172 (SC) to hold that interest income from deposits made out of share capital could not be taxed as income from other sources on the ground that interest income was earned prior to the commencement of business during the construction period itself and that such income would go to reduce the capital cost as decided in *CIT* v. *Karnataka Power Corporation* [2001] 247 ITR 268 (SC) and *CIT* v. *Karnataka Urban Infrastructure Development and Finance Corporation* [2006] 284 ITR 582 (Karn). It was, therefore, clear that the decision in first appeal follows the settled law on the subject and the Departmental appeal was accordingly dismissed by the Tribunal in *ITO* v. *Bank Note Paper Mill India P. Ltd.* [2017] 56 ITR (Trib) 266 (Bang).

The matter was, however, taken by the Revenue to the High Court. In fact, the counsel for the Revenue fairly conceded that this view taken by the Tribunal accords with the Supreme Court decision in *CIT* v. *Shree Rama Multi Tech Ltd.* [2018] 403 ITR 426 (SC), so that the High Court in *Pr. CIT* v. *Bank Note Paper Mill India Pvt. Ltd.* [2019] 412 ITR 415 (Karn) affirmed the aforesaid decision of the Tribunal. The High Court took the occasion to highlight the tendency to file unnecessary Departmental appeals causing concern and anguish, even on matters covered by decisions of the jurisdictional High Courts or the Supreme Court of India. It recorded a note of caution for revenue authorities concerned indicating its expectation that appeals will be filed after bona fide application of mind and only where substantial question of law arises after recording appropriate reasons therefor.

Transfer Pricing

(i) Comparables

The business of investment advisory services to its associated enterprises is not functionally comparable with the business of one M, which had declared a solitary stream of income under the head advisory fee in respect of which it was found that details of segments in the diversified fields were not available, so that it was not possible to infer whether it had non-binding advisory investment services, so as to be comparable with the assessee's case. It was seen that M had diversified activities with its financial advisory services mentioned as having been the business of M not revealed by the facts made available to the Tribunal, so that the decision of the Tribunal not accepting M as a comparable was upheld by the High Court in *Pr. CIT* v. *NVP Venture Capital India Pvt. Ltd.* [2019] 412 ITR 335 (Bom).

(ii) Right of appeal

Transfer pricing is determined on the basis of expert valuation by the Transfer Pricing Officer vetted in an appeal to the Dispute Resolution Panel consisting of a collegium of three Commissioners with further right of appeal to the Tribunal, which is the highest fact-finding body. This process of determination of arm's length price based upon most appropriate method with reference to comparables should not merit an appeal to the High Court on this exercise in determination of the arm's length price, which is essentially based on facts, unless the finding is ex facie perverse and unsustainable exhibiting total non-application of mind on the part of the Tribunal. It is in the light of this law, it was held that no question of law arose in the matter brought before it in *Pr. CIT* v. *Kirloskar Toyota Textile Machinery P. Ltd.* [2019] 412 ITR 359 (Karn) following *Pr. CIT* v. *Softbrands India P. Ltd.* [2018] 406 ITR 513 (Karn).

Charities

(i) Educational institution

A society, engaged in educational purposes, claimed exemption under section 10(22), but the Tribunal found that such exemption was not available because it had objects other than education. It was also found that it acquired immovable property in the name of persons managing the society, defeating the claim of exemption . The High Court, in *Sree Chithra Educational, Cultural and Film Society* v. *Deputy DIT (E)* [2019] 412 ITR 76 (Ker), found that though the assessee was running an educational institution, it could not be accepted as existing solely for educational purposes and not for profit. It was further found that acquisition of property in the name of individuals indicated that the funds were used for self-aggrandizement, rejecting the explanation that the acquisition of property in their names was an inadvertent and innocuous mistake. The fact that it had income from cultural activities also showed it was not meant solely for educational purposes, so that denial of exemption under section 10(22) was upheld. Where the society was admittedly found to be running an educational institution, the decision could have probably been different, if the individuals were holding the property for the benefit of the society. At any rate, it is open to the assessee to seek registration and claim exemption under section 11, after correcting the mistake in respect of property of society in the names of individuals.

(ii) Application of income

The requirement of a minimum application of 85 per cent. of income to qualify a charitable trust or institution for exemption became the subject matter of interpretation on the issue, whether any excess distribution in an earlier year can be set off in reckoning the minimum distribution for a succeeding year. The answer of the Tribunal was in favour of the appellant confirming the Tribunal order allowing such set off, while dismissing the Departmental appeal in the view that the computation of income has to follow the principles of accounting, so that adjustment of the excess in one year in a later year in the context of the provision applicable for charitable trust or institution being a benevolent one, the appellant was held entitled to such adjustment in *Pr. CIT* v. *Chalassani Education Trust* [2019] 412 ITR 343 (Karn) following *CIT* v. *Society of the Sisters of St. Anne* [1984] 146 ITR 28 (Karn) and *CIT (Exemptions)* v. *Ohio University Christ College* [2018] 408 ITR 352 (Karn).

Business

(i) Sales tax payment/expenses on repairs

The assessee had paid an amount of Rs. 88 lakhs towards sales tax, but it was refunded in pursuance of the decision of the jurisdictional High Court. Since the matter was taken up by the State Government to the Supreme Court, the assessee continued to treat the sales tax liability as a contingent liability. The disallowance made of this amount was deleted because of the ruling decision in favour of the assessee, subject to the remark that in case State Government succeeded in appeal to the Supreme Court, it could always be allowed as a deduction. In view of this safeguard for the assessee, the High Court found no reason to interfere with the Tribunal order, subject to the direction that the final decision will accord with the decision of the Supreme Court in *South India Corporation Ltd.* v. *Asst. CIT/CIT* [2019] 412 ITR 239 (Ker).

In the same case, another issue which was decided was the deductibility of expenses on repairs to the office building by using plaster of paris, so that it was inferred by the Tribunal that the expenditure had benefit of an enduring nature to the assessee's business justifying capital expenditure, so as to be not deductible.

(ii) Abortive expenditure

The assessee launched a textile project, different from its regular business of manufacture of poly-vinyl chloride, caustic soda and shipping, incurring expenditure, but the project was abandoned. The expenditure incurred in the abortive project was treated as capital expenditure as concurrently found by the Tribunal and the authorities below on the ground that what was revenue expenditure at the time of starting the new business has to be treated as capital expenditure, when such business does not come into existence. The High Court differed from the Tribunal finding that the proper test is whether the new line of business was under unity of control, management and the funds, which should be taken as decisive and where there is such unity the new activity does not constitute a new and different business. The reality that control, management, interconnection, interlacing, independence, common fund, etc., are the decisive factors for a decision were overlooked, necessitating the quashing of the Tribunal's order of disallowance and allowance of the amount as revenue expenditure rejecting the Department's argument that this line of argument was not raised before the authorities below. The High Court referred to a number of cases following *Jay Engineering Works Ltd.* v. *CIT* [2009] 311 ITR 405 (Delhi) and *Produce Exchange Corporation Ltd.* v. *CIT* [1970] 77 ITR 739 (SC) and distinguishing the decision in *E.I.D. Parry (India) Ltd.* v. *CIT* [2002] 257 ITR 253 (Mad) for its conclusion. The High Court also referred to the tests to be applied for inferences, whether capital or revenue expenditure in *Tamilnadu Magnesite Ltd.* v. *Asst. CIT* [2018] 407 ITR 543 (Mad) referring to *Empire Jute Co. Ltd.* v. *CIT* [1980] 124 ITR 1 (SC) and the English decision in *John Smith and Son* v. *Moore (H. M. Inspector of Taxes)* [1930] 12 TC 266. It also commented that the pre-operative expenses are generally of revenue nature and it could not be disallowed by a wrong test, which is not decisive as decided in *Chemplast Sanmar Ltd.* v. *Asst. CIT* [2019] 412 ITR 323 (Mad).

(iii) Lump-sum amount paid for right to use trademark

Lump-sum amount paid for right to use trademark cannot be construed as capital expenditure as was found in the matter of a licence agreement granting exclusive right to use the trademark "Hilton" in India for ten years in connection with domestic sale of goods with this trademark, subject to payment of royalty, the licence itself being terminable on 12 months notice or 30 days in case of breach of agreement. The payment in this case amounting to Rs. 1 crore for the exclusive right to use the trademark with the approval of the Reserve Bank of India. A further payment of Rs. 1 crore more was made under second licence agreement, which extended the use of right for an unlimited period. The Assessing Officer inferred enduring benefit and, therefore, disallowed the payment as capital expenditure, but deduction was allowed in first appeal in the view that the right to use trademark can only be revenue expenditure, the payment being connected with business operations and enabled efficiency and profitability. The Tribunal found that there were two agreements, one for use of trademark and the other for sale of shareholding, so that the payment was not solely for use of trademark without a clause for renewal to be in force for an unlimited period, so as to constitute enduring benefit to justify disallowance as capital expenditure. The assessee's further appeal was allowed by the High Court in *Hilton Roulunds Ltd.* v. *CIT* [2019] 412 ITR 436 (Delhi) by construing the agreement as granting only permission and approval of use of trademark, which merely facilitated the assessee's business, so that there was no right of a capital nature acquired by the assessee. The second agreement was no different except there were further terms and conditions for which the second payment was made. There were not much differences between the agreements, both being for the right to the use the name "Hilton", such right being non-exclusive and royalty-free because of the charge of a lump sum. The payment being for the mere advantage of carrying on the business and not for acquiring any patent right over the name "Hilton", the expenditure was held to be of revenue nature as was found after review of case law on the subject with Commissioner (Appeals) having followed the decision of the Supreme Court in *Madras Industrial Investment Corporation Ltd.* v. *CIT* [1997] 225 ITR 802 (SC) applying the test laid down by the Supreme Court in *Empire Jute Co. Ltd.* v. *CIT* [1980] 124 ITR 1 (SC) followed in *Alembic Chemical Works Co. Ltd.* v. *CIT* [1989] 177 ITR 377 (SC) and *CIT* v. *Madras Auto Service (P.) Ltd.* [1998] 233 ITR 468 (SC) and also applying the test laid in an English decision of House of Lords in *Atherton* v. *British Insulated and Helsby Cables Ltd.* [1925] 10 TC 155 (HL) and *Commr. of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1965] 58 ITR 241 (PC). Two more decisions of the jurisdictional Delhi High Court were also relied upon are *Fedders Lloyd Corporation Ltd.* v. *Fedders Corporation* ILR [2005] I Delhi 478 and *Formula One World Championship Ltd.* v. *CIT (International Taxation)* [2017] 390 ITR 199 (Delhi).

The High Court in this case laid down the following tests for the inference as to whether the expenditure is merely for right to use, so as to be revenue expenditure or an assignment to justify disallowance as capital expenditure as under :

(i) Whether the user acknowledges the licensor's right and title over the mark ?

(ii) Whether it is a mere right to use the mark or it was a transfer/assignment of a permanent nature ?

(iii) Whether the manner of use is specified and restricted and the effect thereof on the rights of the user ?

(iv) Whether the payment made by the User is one-time, fixed running royalty or a percentage of sales, with or without investment made by the licensor on marketing and advertising ?

(v) Whether the licensor has right of supervision and control over the use of the mark ?

(vi) Whether sole and exclusive right was conferred on the user and the effect thereof ?

(vii) Whether the user can further transfer his rights to third party, with and without consent of the licensor and the effect thereof ?

(viii) Whether the licensor had the right to terminate the licence and if so, under what circumstances ?

(ix) Whether upon termination by the licensor, the user has to stop use of the mark ?

(x) Whether or not the right to sue is given and conferred on the user ?

(xi) Whether there is a transfer of goodwill of the business and/or goodwill in the mark ?

(xii) Whether there are multiple users of the same mark ?

Business expenditure

(i) Bogus purchases

Where an addition was made of certain purchases inferred to be bogus, the Commissioner (Appeals) remanded the matter to the Assessing Officer for verification with the supplier, but the Tribunal countermanded the order in first appeal in the context of such verification being impossible, since the supplier had not filed the return. The matter was taken up by the Revenue to the High Court, where it was found that irrespective of the fact of supplier having been assessed or not, the matter requires to be examined on available facts, thereby remanding the matter to the Tribunal for a decision afresh in *Pr. CIT* v. *Meerut Roller Flour Mills (P) Ltd.* [2019] 412 ITR 155 (All).

From the fact of creditors being carried over many years in respect of purchases from these persons, a doubt arises whether the sales relating to the purchases represented by credits were really made. After some further enquiry, the Assessing Officer came to the conclusion that the balances totalling Rs. 2.71 crores were not genuine because the transactions were bogus, so that the entire amounts were added by the Assessing Officer, but the Commissioner (Appeals) restricted the addition to the extent of 25 per cent. as representing the profit element on the inferred bogus sales. The matter went further on appeals by both the parties to the Tribunal, which upheld the order in first appeal. It was found by the High Court that the Commissioner (Appeals) had followed the decision in *Vijay Proteins Ltd.* v. *CIT*, which had incidentally become final as special leave petition filed by the assessee against this judgment was dismissed by the Supreme Court [2018] 409 ITR (St.) 3. The High Court, in this case in *Pr. CIT* v. *Nandkishor Huaschand Jalan* [2019] 412 ITR 357 (Guj), therefore, upheld the order of the Tribunal overruling the Revenue's reliance for disallowance of the entire amount in *N. K. Industries Ltd.* v. *Deputy CIT* [2017] 8 ITR-OL 336 (Guj). The High Court distinguished this case on the ground that the entire turnover were positively bogus, while the addition in this case was made on the basis of large number of creditors carried over the years.

(ii) Disallowance of cash payments under section 40A(3)

Section 40A(3) disallows payments for expenses in excess of Rs. 20,000 made by means other than account-payee cheques or account-payee bank draft or by electronic system through a bank account. The provision should apply even in a case, where payment in respect of transactions which are genuine and bona fide, but rule 6DD(j), when it was in force would consider cases, where it was not practicable or would have caused genuine difficulty to payee rendering this section inapplicable. But this sub-rule is no longer in force having been withdrawn from July 25, 1995. This omission was overlooked, when the same sub-rule was followed by the High Court in *M. K. Agrotech P. Ltd.* v. *Addl. CIT* [2019] 412 ITR 351 (Karn) treating the payments as not disallowable in the light of what is not practicable and what could have caused genuine difficulty under rule 6DD(j) without referring to withdrawn rule, but assuming rule 6DD generally would accept non-application of the section from the point of view of practicability as wrongly understood from the decision in *Attar Singh Gurmukh Singh* v. *ITO* [1991] 191 ITR 667 (SC) as laying down exception on the basis of practicability, while it had merely upheld the constitutionality of section 40A(3) pointing out that the object behind the provision is to prevent use of unaccounted money or reduce the chances to use black money for business transactions approving incidentally the decision of the High Court in *Mudiam Oil Company* v. *ITO* [1973] 92 ITR 519 (AP). The High Court in the instant case, however, felt that the very fact that the amount ultimately reached the payee and that this renders all the other objections insignificant. This decision has understood the provision too liberally, so as to defeat the very purpose of the provision.

However, if the assessee himself makes the payment to payees' bank account, it has been held that there is no violation of section 40A(3) in *CIT* v. *Smt. Shelly Passi* [2013] 350 ITR 227 (P&H), because in such cases, the assessee himself acts as an agent of the payee. Apparently these were not the facts in this case under comment since what is accepted is that the transaction in the assessee's case relying on the omitted sub-rule (j) in rule 6DD and in assuming that the two decisions referred to in *Attar Singh Gurmukh Singh's* case (supra) and *Mudiam Oil Company's* case (supra) had held that section 40A(3) does not come in the way of deduction as the terms of section 40A(3) are not absolute and that where the payment is made out of disclosed income, there is no opportunity to create black money, so that the application of section 40A(3) need not be applied, so that this decision understands the law too widely, so as to render section 40A(3) to be ineffective by placing extra responsibility on the Assessing Officer to go into questions of practicability and the issue of presence or absence of black money not warranted either by section 40A(3) or rule 6DD now extant.

(iii) Deduction only on actual payment – Section 43B

Section 43B provides for certain specified deductions only on actual payment. Interest payable to a bank is one of specified items under clause (e) of section 43B. *Explanation 3C* inserted by the Finance Act, 2006 with retrospective effect from April 1, 1989 would rule out the inference of conversion of such interest into a loan or borrowing as actual payment under section 43B. It is in the light of this retrospective amendment, the disallowance in a case, where interest was claimed to be paid on conversion of such interest into a loan, disallowed by the Assessing Officer, but allowed by the Commissioner (Appeals) and such allowance upheld by the Tribunal with Departmental appeal dismissed by the High Court, but the Supreme Court in *CIT* v. *Gujarat Cypromet Ltd.* [2019] 412 ITR 397 (SC) reversed the decision of the High Court (reproduced in the judgment of the Supreme Court) in the light of retrospective amendment in *Explanation 3C,* inter alia, approving the decision in *CIT* v. *M. M. Aqua Technologies Ltd.*

[2015] 376 ITR 498 (Delhi), *CIT* v. *Pennar Profiles Ltd.* [2015] 376 ITR 355 (T&AP) and *Eicher Motors Ltd.* v. *CIT* [2009] 315 ITR 312 (MP).

(iv) Burden of proof

Burden of proof in the context, where genuineness of business expenditure is in dispute, has been examined by the High Court, which came to the conclusion that where the assessee had proved genuineness of 8 out of 13 purchases, it is a case, where the burden shifts to the Assessing Officer. But the Revenue questioned this decision before the High Court, which found that the assessee had done whatever could be done even in respect of five purchasers by giving their addresses. The fact that the sellers did not respond to the notices of the Assessing Officer could not justify the inference that such purchases were not genuine as inferred by him in his remand report. In such cases, the Assessing Officer was bound to make further enquiry as regards the five purchases, where the sellers were not produced by the assessee nor had they responded to the Assessing Officer's call. Where the assessee had given addresses of sellers along with their Permanent Account Numbers, the burden is on the Assessing Officer to make further enquiry before concluding these purchases were not genuine. In view of the fact that burden has shifted to the Revenue in such cases, an adverse inference could not have been drawn merely because of the fact that it is not possible for the assessee to produce the five sellers, since he has no powers to ensure their presence, while the Assessing Officer has the necessary powers, which he failed to exercise, so that the addition on account of these purchases were not accepted by the Tribunal, a conclusion, which was upheld by the High Court in *Pr. CIT* v. *Chawla Interbild Construction Co. Pvt. Ltd.* [2019] 412 ITR 152 (Bom).

(v) Compensation payments

An assessee, engaged in business of construction and sale of commercial space, developing a 17 storied building in New Delhi following the completed-contract method of accounting, had issued allotment letters to prospective purchasers in pursuance of agreements incurring liability by way of compensation to those allottees, who went back on the agreements, because the building had undergone some changes on account of conditions imposed by New Delhi Municipality as to the usage of lower ground floor. Liability was incurred by way of compensation because they had bargained for the flats, which have now become different and, therefore, not acceptable. The Assessing Officer found that the assessee had actually paid the compensations and the recipients had accounted the same as on capital account offering capital gains to tax after indexation of cost of acquisition.

The Assessing Officer, however, disallowed the compensation payments as capital expenditure, but it was allowed by the Commissioner (Appeals) in one of the appeals out of six appeals on the same issue. The Tribunal accepted the assessee's claim of payment as revenue expenditure for all the years. This was one of the issues on which the High Court, in *Gopal Das Estates and Housing Pvt. Ltd.* v. *CIT* [2019] 412 ITR 489 (Delhi), confirmed the order of the Tribunal. There was also other following issues decided in this case.

Interest and guarantee commission : The Assessing Officer felt that interest on borrowings were not at all used for the assessee's business, but were diverted to a sister concern without charging interest, so that he disallowed the interest. It was held by the High Court that the assessee was following completed-contract method, so that the payment of interest and guarantee commission would have to be allowed as revenue expenditure under this method as stipulated by Accounting Standards 2. This decision of the High Court does not deal with the objection that the amounts did not relate to business of the assessee.

Service charges after completion of the project : Service charges incurred after completion of project was treated as part of capital work-in-progress. It was held that expenses incurred after completion of project is rightly claimed as deductible expenditure and, therefore, allowed by the Tribunal.

Rent collected on behalf of owners : Rent collected on behalf of owners from flats was not accounted by the assessee as it was paid to the flat owners. The High Court held that the amount was collected on behalf of flat owners and have been in fact accounted by them in their returns. The assessee had shown payment of such rent to the owners. Tax had been deducted at source and there was a debit of tax paid as made on behalf of the owners. The attempt on the part of the Assessing Officer later to bring the amount to tax by initiating proceedings under section 154 was found to be not correct as section 154 could not have application on a debatable inference, which would not constitute a mistake apparent from records.

Capital gains

Cost of acquisition

Where the assessee became liable for capital gains on sale of books to University of Chicago from an inherited library, the question arose as to the determination of cost to be adopted in such a case, where it was not possible to obtain proof of actual cost. The assessee was entitled at its option to adopt prevailing market rate as of April 1, 1981 as cost. It was not possible to ascertain the cost as on that date nor was the assessee in a position to give any information regarding the same due to his old age. The deduction of cost estimated by the assessee as on April 1, 1981 after indexation was not accepted. The adoption of estimated cost at 30 per cent. of sale proceeds as cost by the Assessing Officer was enhanced to 40 per cent. in first appeal. The Tribunal found that an estimate was unavoidable in absence of particulars. Where there had already been two estimates, it did not find it appropriate to make a third estimate, so that it did not interfere with the estimate made in first appeal relying upon the judgment in *Ved Prakash* v. *CIT* [2004] 265 ITR 642 (P&H), a decision against which special leave petition was dismissed by the Supreme Court. The High Court upheld the order of the Tribunal as it had no reason to differ from the estimate of 40 per cent. of sale price as cost as decided in first appeal. But then, there was the issue of indexation of cost, which one would have thought would be automatic under the statute, where value as on April 1, 1981 is adopted. But the High Court accepted the argument of the Revenue that the cost allowed was on estimate as on the date of sale and not on April 1, 1981, so that the question of indexation does not arise. Since the cost allowed on estimate could have only been the price estimated on date of supply of the books to the University, the assumption that the estimate of cost was the price prevailing on date of sale overlooks the fact that, if it were so, the deduction should have been 100 per cent. of sale price and not 30 per cent. or 40 per cent. of such sale price. There has, therefore, been a misdirection on facts, so that the decision of the High Court in *Vallikannu Nagarajan* v. *Deputy CIT* [2019] 412 ITR 299 (Mad) upholding the decision of the Tribunal would need review or rectification on the question of indexation.

Incentive deductions

(i) Sections 10(23G)

The assessee providing long-term finance is entitled to the deduction for bad and doubtful debts under section 36(1)(viia) or under section 36(1)(viii). Where the defaulting borrowers were made liable for default interest in respect of default in redemption, the question arose whether such interest could be exempt under section 2(28A), so as to enable the assessee to get deduction under section 36(1)(viii) and exemption under section 10(23G). Since the amounts payable were described as liquidated damages, the question arose whether it will qualify for deduction/exemption meant for interest under these sections. It was found that deduction under section 36(1)(viia) and (viii) are independently allowable and that the liquidated damages also being interest will qualify for exemption under sections 2(28A) and 10(23G) of the Act as decided in *Infrastructure Development Finance Co. Ltd.* v. *Asst. CIT* [2019] 412 ITR 115 (Mad).

(ii) Exemption under section 10A

In determination of export profits eligible for exemption under section 10A, the question that arose was whether relief should be reckoned with reference to gross turnover or net turnover after exclusion of expenses. It was pointed out by the High Court in *Pr. CIT* v. *Sasken Communication Technologies Ltd.* [2019] 412 ITR 468 (Karn), that the steps for determination of the export turnover is to determine the gross turnover, whether the export is done directly or through other exporters after fulfilling the conditions for inclusion of such other exports, subject, however, that only exports realised in foreign exchange brought into India would required to be considered. Subject to satisfaction of all the three conditions , the exemption will be reckoned by understanding the export turnover as one after the deduction of expenses, so that exemption is computed with reference to the net export turnover. It follows that what is excluded from export turnover would have to be excluded from total turnover. It was this working, which was followed by the Assessing Officer. In the process, a dispute arose whether the amount of compensation received by the assessee on termination of export/service contract should be treated as part of total turnover or reduced therefrom. The Assessing Officer reduced such amount. It was held in first appeal that the compensation being capital in nature, it is only such reduced amount on which exemption will be available. The Tribunal found that the compensation is also a business receipt and should have been considered to be eligible for inclusion of export turnover.

Another matter in dispute is whether expenses to be allowed in reckoning of export turnover have to be limited to those incurred in foreign exchange. Such exclusion was upheld by the Tribunal. As regards setting off brought-forward losses in computing deduction under section 10A, it was held, the losses from deemed export on account of sale to another unit in Software Technology Park should also be considered, a contention which was accepted by the Tribunal. The matter was taken up by the Revenue to the High Court. The decision of the Tribunal was upheld pointing out that expenses incurred in foreign currency alone has to be reduced from the total turnover, while the compensation amount received on termination of export/service contract should be considered as eligible profits of business for exemption. No distinction has to be made as between exports to another unit located in Software Technology Park and to outsiders. It was in this view, the set off decided in favour of the assessee by the Commissioner (Appeals) was also upheld following the decision of the jurisdictional High Court in *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98 (Karn) and *CIT* v. *Hewlett Packard Global Soft Ltd.* [2018] 403 ITR 453 (Karn) [FB].

(iii) Section 10B

The condition under section 10B meant for exemption for export-oriented undertaking is that it should be a new venture not formed substantially by transfer of building or machinery previously used. This condition was found to be violated because the assessee was using building and machinery taken on lease from its sister concerns. Since lease is also a transfer for purposes of section 10B(2), the benefit of exemption under section 10B was denied and such denial was upheld by the High Court in *Stabilix Solutions (P) Ltd.* v. *ITO* [2019] 412 ITR 82 (Ker). The argument of the assessee was that the business of the assessee being manufacture of computer software dependent upon intellectual input rather than tangible resources, the lease of premises, computers and peripherals should be taken as not coming in the way of benefit of section 10B. However, in view of finding of the Tribunal to the contrary, the High Court upheld the denial of exemption under section 10B in this case.

(iv) Section 10A/10B

Exemption is available under section 10A/10B for 100 per cent. export-oriented undertakings. The question arises, how the exempt income has to be computed, whether after setting off past losses and unabsorbed depreciation or before it. The matter has been decided requiring set off before reckoning exemption in *CIT* v. *Yokogawa India Ltd.* [2017] 391 ITR 274 (SC). The Supreme Court with reference to the cardinal principles of interpretation of taxing statute as understood in *Cape Brandy Syndicate* v. *IRC* [1921] 1 KB 64 pointed out that one has to look merely at what is said and that "there is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". On such principles, while reading the section and the instruction from the Departmental Circular No. 794 dated August 9, 2000 [2000] 245 ITR (St.) 21, the law is that the income has to be computed for the year after setting off past losses under sections 70, 72 and 74. This law requiring set off prior to deductions/exemptions, notwithstanding substitution of deduction by exemption under section 10A/10B continues as for set-off of carried-forward loss and unabsorbed depreciation before incentive reliefs before and after the substitution. The decision in *Yokogawa India Ltd.'s* case (supra) would also justify for prior set off, though it may have the effect of reducing the deduction/exemption. It is in the light of this law, the matter was remanded to the Assessing Officer in *Intimate Fashions (India) P. Ltd.* v. *Asst. CIT* [2019] 412 ITR 615 (Mad) for a fresh consideration setting aside the order passed in first appeal and the Tribunal to be decided after opportunity to assessee and after considering all the decisions in accordance with law. The purport of ruling is clearly one, which would require set-off of losses before reckoning exemption under section 10A or 10B, unless there is further development of law.

(v) Section 80AB

Section 80AB requires any deduction under Chapter VI-A to be computed on a standalone basis limited to the income from the undertaking for which the relief is meant only to the extent of such income in the gross total income of the assessee. Where deduction was claimed in respect of income from a hotel under section 80HH, the application of this law was explained by the Supreme Court in *Vijay Industries* v. *CIT* [2019] 412 ITR 1 (SC). In computation of eligible relief, the provisions of sections in Chapter VI-A, have to be strictly construed, bearing in mind the limitation under section 80AB, notwithstanding reference to gross total income under section 80A to mean that the relief is limited to the income which forms part of gross total income and not to the entire gross total income, though the computation has to start from gross total income. This would be the undisputable inference, when section 80HH is read with section 80A.

The Supreme Court, in *Motilal Pesticides (I) Pvt. Ltd.* v. *CIT* [2000] 243 ITR 26 (SC), followed its own decision in *Cloth Traders (P.) Ltd.* v. *Addl. CIT* [1979] 118 ITR 243 (SC) in respect of a claim for relief under section 80M by understanding section 80M to be not different in language from section 80HH. But the Supreme Court, in the present case, found that this inference was erroneous as the language of sections 80HH and 80M are different, so that the decision in *Motilal Pesticides'* case (supra) was overruled in this decision. Discussing the scope of section 80AB, it was pointed out that this provision effective from April 1, 1981 was intended to ensure that the liberal view in *Cloth Traders'* case (supra) may not be applied to enlarge the reliefs spelt out in the respective provisions. Since the section is not made retrospective, it cannot have any application for any assessment before the assessment year 1981-82. In the result, it was held that the relief under section 80HH should be computed before making the deductions for depreciation and investment allowance. It is under these circumstances, the decisions of the High Court in *Vijay Industries* v. *CIT* [2004] 270 ITR

175 (Raj) and *Vijay Solvex Ltd.* v. *CIT* [2014] 367 ITR 382 (Raj) were both reversed.

The Supreme Court also referred to the view taken in the Circular No. 281, dated September 22, 1980 [1981] 131 ITR (St.) 4 to conclude, that the new law will have only prospective application from assessment year 1981-82 and that the deduction has to be from gross profits and gains before computing the income from sections 30 to 43D because the assessment before it relates to a year prior to when section 80AB came into effect. It is in this view, it was held, that after section 80AB neither the decision in *Cloth Traders'* case (supra) nor the decision in *CIT* v. *Kotagiri Industrial Co-operative Tea Factory Ltd.* [1997] 224 ITR 604 (SC) would not have application.

(vi) Relief under section 80HHC

Section 28(iiid) provides for determination of profits on transfer of the right under Duty Entitlement Pass Book (DEPB) Scheme being the entitlement under the Duty Remission Scheme in pursuance of Export and Import Policy under section 5 of Foreign Trade (Development and Regulation) Act, 1922. In application of this clause under *Explanation (baa)* of section 80HHC, the deduction of 90 per cent. from the DEPB amount should be of the sale value after deducting its face value of the DEPB credit as was understood by the High Court in *Gold Line Exports* v. *ITO* [2019] 412 ITR 465 (Mad). The assessee's computation of eligible amount under section 28(iiid) on the basis that the cost of such DEPB would have to be reckoned, was approved by the Tribunal following the decision of the Supreme Court in *Topman Exports* v. *CIT* [2012] 342 ITR 49 (SC), which reversed the decision in *CIT* v. *Kalpataru Colours and Chemicals* [2010] 328 ITR 451 (Bom).

(vii) Section 80-IA

A claim for deduction under section 80-IA is available for a period of ten years from the year chosen for the relief out of first fifteen years as prescribed under section 80-IA, even as explained in Board Circular No. 1 of 2016 dated February 15, 2016 [2016] 381 ITR (St.) 1, 2. The initial assessment year for which the relief was claimed in respect of its business, was a year of loss during the year, so that the relief under section 80-IA from the eligible undertaking as ascertained was notionally carried forward for the purposes of claiming deduction under section 80-IA. This first year chosen by the assessee as the first year of commencement of the eligible business had to be accepted, so that it was held that the assessee was entitled to reckon this year for deduction under section 80-IA, though not availed of in view of the loss during the year, but it was entitled to carry it forward for adjustment against the profit in the succeeding year as decided in *South India Corporation Ltd.* v. *Asst. CIT/CIT* [2019] 412 ITR 239 (Ker).

Relief by way of deduction under Chapter VI-A being limited to the profit of eligible business, it has to be computed by assuming that the eligible undertaking is the only source of income. Where assessee had three units but only one of them was eligible for relief under section 80-IA, such relief will be limited to profits of that unit alone. The argument for denial of relief even for such unit on the ground that the assessee kept a consolidated balance-sheet and profit and loss account as canvassed by the Revenue was unsuccessful before the Tribunal and was equally unsuccessful before the High Court as well in *CIT* v. *Bannari Amman Sugars Ltd.* [2019] 412 ITR 69 (Mad) distinguishing the decision in *Synco Industries Ltd.* v. *Assessing Officer (Income-tax)* [2008] 299 ITR 444 (SC) on the ground that it was a case where all the units were eligible for relief.

Where the assessee has two units, one at Chennai and the other at Pondicherry, but only one of them is in the manufacture and trade of uninterrupted power supply (UPS) systems eligible for relief under section 80-IA, the income has to be independently computed, where there are common expenses as between them, so that relief for eligible undertaking under section 80-IA is restricted only to its profits, which had admittedly to be computed on a standalone basis. The assessing authority modified the allocation following certain principles of proper apportionment and attribution of expenditure as between the two undertakings for arriving at relief for eligible undertakings under section 80-IA. The Assessing Officer's allocation of expenses was upheld by the Tribunal. The High Court found that since the Tribunal order was not perverse, the relief as found by the Tribunal could not be interfered with as decided in *CIT* v. *Swelect Energy Systems Ltd.* [2019] 412 ITR 291 (Mad).

(viii) Section 80-IB

The assessee, a manufacturer and trader in electronic and electric equipment, had claimed deduction under section 80-IB from the assessment year 2005-06. The Assessing Officer took the view that the industrial undertaking had commenced production after the sunset of March 31, 1995, so that the deduction, which is available for those industrial undertakings that commence production for years beginning with April 1, 1991 and ending with March 31, 1995, will not be available to the assessee in the view that it commenced production after the prescribed time. It was also further inferred that the turnover limits for the inference of a small-scale industry was also exceeded, so that it was not a small-scale industry and even on this account, it was found ineligible. Though the deduction had been allowed initially under section 143(1), the assessment was reopened under section 147 to disallow the claim. It was, however, allowed in first appeal and such allowance was affirmed by the Tribunal. The Departmental appeal to the High Court in *Pr. CIT* v. *Eltek SGS Pvt. Ltd.* [2019] 412 ITR 41 (Delhi) was dismissed, affirming the order of the Tribunal on the ground that all the requirements of eligibility were satisfied, so as to merit the deduction following *Kedarnath Jute Mfg. Co. Ltd.* v. *CIT* [1971] 82 ITR 363 (SC).

(ix) Section 80-IC

Where an assessee entitled to deduction under section 80-IC makes a substantial expansion of its industrial undertaking already availing of the benefit of section 80-IC, the question that arises is, would this expansion have the effect of extending the period of relief, so as to extend the time limit available for substantial expansion under section 80-IC. This issue came up before the Supreme Court in *Pr. CIT* v. *Aarham Softronics* [2019] 412 ITR 623 (SC). Benefit of section 80-IC is available for ten years, while benefit of substantial expansion is also available for the same period of ten years. There is overlapping of benefit, when the expansion takes place within the first ten year of the undertaking. The cap under section 80-IC(6) placing a total limit of ten years under both the provision though not on the quantum for computation, where eligibility is available, would mean that notwithstanding substantial expansion, the period of relief is not extended in the case of intervening substantial expansion. This was the understanding of this decision by the High Court applying the decision of the Supreme Court in *Commissioner of Customs (Import)* v. *Dilip Kumar and Co.* [2018] 9 SCC 1. The High Court judgment, it was held, accords with the principles of interpretation, so that the Supreme Court agreed with the decision of the High Court placing a total limit of ten years for relief under section 80-IC as any other interpretation would do violence to the language of the section.

In other words, while the assessee would be entitled to the benefit of section 80-IC on substantial expansion, the deduction at 25 per cent. after the first five years will now be substituted by the enhanced relief to 100 per cent. because of the substantial expansion. But the total period of relief taking into consideration both sections 80-IB and 80-IC cannot exceed ten years from its first initial assessment years under section 80-IC. A contrary view in *CIT* v. *Classic Binding Industries* [2018] 407 ITR 429 (SC) was, therefore, found necessary to be reversed. The decision that the benefit cumulatively under sections 80-IB and 80-IC cannot exceed the first ten years of the undertaking even as held in *Stovekraft India* v. *CIT* [2018] 400 ITR 225 (HP), stands affirmed and the contrary view in *Admac Formulations* v. *CIT* [2018] 409 ITR 661 (P&H) reversed.

Assessment

Best judgment assessment

The assessee delayed filing return repeatedly asking for more time causing undue delay, which was also unexplained. The Assessing Officer passed the amendment order ex parte just a week before the expiry of time limit. The assessee filed an appeal before the Commissioner (Appeals), which was dismissed. The assessee went to the Tribunal on further appeal raising an additional ground that non-issue of notice under section 143(2) before passing the order vitiated the amendment. The High Court found that the Department waited unduly long for 20 months merely issuing two letters to the assessee, but not pursuing them. There is no explanation on the part of the Assessing Officer for his indifference in waiting too long for the assessee to file a voluntary return, when the time limit for filing voluntary return had long since expired. Even the letters addressed had not been served on the assessee at its registered office, but served on authorized representative or Chartered Accountant. The Tribunal, however, admitted the additional ground and remanded the matter to the Commissioner (Appeals). The Departmental appeal to the High Court questioning the remand order stating that its objections even after admission of additional ground should have been considered by the Tribunal. But the High Court found that the Tribunal had given reasonable time for the Department and had given adequate reasons for its order of remand to Commissioner (Appeals), so that the Department could raise all its objections before him. The remand order was, therefore, upheld by the High Court dismissing the Departmental appeal in *Pr. CIT* v. *J Jay TV Pvt. Ltd.* [2019] 412 ITR 285 (Mad). It is recorded in this judgment that it was the argument of the Revenue that the assessee cannot take advantage of his own default, so that additional ground need not have been entertained merely on the possibility of compliance under section 143(2), if it had been served. The High Court held that even this argument could be raised before the Commissioner (Appeals) during remand proceedings in accordance with law.

Reassessment

(i) Valid

Where materials were found against a third party indicating that it was not a genuine company and that the assessee was doing business in the name of such dummy company, as found after investigation, the reassessment notice against the assessee after recording the above reasons for reassessment, which were also communicated to the assessee, the validity of the notice was upheld in *Etiam Emedia Ltd.* v. *ITO* [2019] 412 ITR 87 (MP). It was incidentally pointed out that all that is required is "reason to believe" for a valid reassessment jurisdiction and that sufficiency of such reasons is not a matter, which could be gone into by the High Court.

(ii) Not valid

Where a non-resident from Cyprus, an investment holding company, had offered its Indian income from interest at 10 per cent. as provided under Double Taxation Avoidance Agreements between India and Cyprus after furnishing all details, it was accepted in the assessment after scrutiny by the Assessing Officer. It was verified and found after four years that rate of tax on interest should have been 20 per cent. as the benefit of 10 per cent. tax was not available to the assessee because it was not the beneficial owner of such income. Since, however, the notice was after four years in a matter, where all materials had been furnished during the original assessment, the notice under section 148 was held unsustainable in *Precilion Holdings Ltd.* v. *Deputy CIT (IT)* [2019] 412 ITR 43 (Bom).

Where notice under section 148 was issued in respect of a claim for deduction under section 80-IC on the inference that it was incorrectly computed excessively, the challenge to the validity of notice was raised on the ground that the deduction was the subject matter of enquiry, so that there can be no reopening on this matter merely for the reason that certain aspects of deduction had not been considered. The disallowance of the claim by an amount of Rs. 11.49 crores as against the claim of Rs. 33.67 crores under these circumstances could not have been considered for reassessment as was decided in *Pr. CIT* v. *Century Textiles and Industries Ltd.* [2019] 412 ITR 228 (Bom). Special leave petition by the Department was dismissed by the Supreme Court [2018] 408 ITR (St.) 59.

Rectification

Fringe Benefits Tax

The scope of powers of rectification was discussed by the Bombay High Court in *Pr. CIT* v. *Aristo Pharmaceuticals Pvt. Ltd.* [2019] 412 ITR 112 (Bom) in a matter of deductibility of expenses incurred on sales promotion in supply of free samples and articles with the name and logo of the assessee to distributors and doctors. The amount, which was allowed, was withdrawn by treating such expenses as incurred for making gifts as liable for fringe benefits tax, though the computation for this tax had been accepted in the original assessment. The disallowance by exercise of powers of rectification under section 154 was found to be invalid in that rectification cannot include review. A mistake to be rectified should be patent, glaring, obvious or self-evident. Since the law would cover only mistakes apparent on the face of the record, where the inference is debatable or two opinions are possible, it is not a matter, which can be covered under rectification powers as has been laid down by the Supreme Court in *T. S. Balaram, ITO* v. *Volkart Brothers* [1971] 82 ITR 50 (SC) and the High Court in *Sidhramappa Andannappa Manvi* v. *CIT* [1952] 21 ITR 333 (Bom). It is under these circumstances, it was found that since the computation of fringe benefits tax had been done in original assessment after scrutiny, the modification in the guise of rectification was not warranted, so that the Tribunal's order to this effect was upheld by the High Court in this case.

Search and seizure

Return of seized assets

During a search, the assets, belonging to the assessee and his wife by way of cash, jewellery and fixed deposit receipts, were seized. The assessment was made after substantial addition resulting in a demand of about Rs. 20 lakhs, which was reduced to Rs. 9.25 lakhs on rectification. This reduced demand was much smaller in value of assets seized. The High Court on a writ petition ordered that after adjusting outstanding tax with interest, the balance of fixed deposit amounts/National Savings Certificates, besides jewellery are bound to be returned. The return was directed within two weeks from the date of hearing/judgment in this case in *Sandeep Raghunath Gupta* v. *Deputy CIT* [2019] 412 ITR 203 (Guj).

Block/post-search assessment

Warrant of authorisation

A search warrant does not become invalid merely because the warrant of authorisation authorised more than one officer for search. The further question that arose in this case in *K. V. Padmanabhan* v. *Asst. CIT* [2019] 412 ITR 55 (Ker) related to a case of search, which started on March 16, 2001, but the date on which the search was completed for purposes of ascertaining whether post-search assessment was completed in time in the light of the fact that the post-search block assessment has to be within the prescribed time limit reckoned from the last date of completion of search. In the light of the fact that a panchnama is prepared at the close of search at every premises, the last panchnama indicating closure of such panchnama can be taken as date of completion of search. The search, except in respect of an almirah for which the key was not available, had been completed on March 16, 2000. But where there was a restraint order in respect of an almirah, which was searched on a later date, the question arose whether the completion of search was postponed till the restraint order was acted upon and the verification of the almirah was completed on April 4, 2000, on which day a panchnama was also drawn, while the assessment order was passed on April 24, 2002. Even if the proceedings and restraint order are valid as continuation of search was to be taken as completed on April 4, 2000, the assessment order on April 24, 2002 was not barred by limitation. But the Madras High Court in *A. Rakesh Kumar Jain* v. *Joint CIT* TC(A) No.1240 of 2006 dated September 25, 2012 had held following the view of the Karnataka High Court in *CIT* v. *T. S. Chandrashekar* [2009] 221 CTR (Karn) 385 and *CIT* v. *S. K. Katyal* [2009] 308 ITR 168 (Delhi) that a panchnama, which resulted in seizure alone could be relevant and not one as found, where there was no seizure in pursuance of the restraint order, which was revoked in the latter case. The High Court found that where there is only one search ordered, merely availability of the panchnamas for each place searched is not by itself relevant, except the last of the panchnamas where there had been a seizure. Unless a fresh authorization has been issued, any subsequent panchnama could have no relevance as was found by the Madras High Court in *Rakesh Kumar Jain's* case (supra). The Kerala High Court, after discussing this decision, found that these decisions though justified on other respects could not be accepted as regards time limit, which cannot depend on the extended activity based upon restraint order. But this decision in *Rakesh Kumar Jain's* case (supra) was held in this (*K. V. Padamanabhan*) case to be not correct and, therefore, dissented from. The statute according to the High Court recognizes only the panchnama on completion of search and not on any search, which is not statutorily recognised. For this proposition holding in favour of validity of the order, the High Court distinguished the decisions relied upon by the Revenue in *C. Ramaiah Reddy* v. *Asst. CIT (IMV)* [2011] 339 ITR 210 (Karn) and *CIT* v. *Anil Minda* [2010] 328 ITR 320 (Delhi), where the panchnama in a case, where a second authorisation was issued, could also be accepted, so that a second search could not be linked with the time limit with reference to the first searches. It was pointed out that the function of the panchnama is to list all the things seized in the course of search. A later panchnama, where nothing was found could not be relevant. It was held that the assessee cannot, by alleging fresh facts, be allowed to challenge the facts, which were found by the Tribunal, so that the assessment was found to have been made in time.

Revisional powers

(i) Justified

In a case, where the assessee was in receipt of amounts due to share capital to the extent of Rs. 21 crores at a premium relating to which the Commissioner was of the opinion that this matter should have been enquired into in detail by the Assessing Officer. The assessee in reply to show-cause notice issued by the Commissioner asked for adjournment due to the death of the father of the senior authorized representative of the assessee for a hearing on December 9, 2013 with request for adjournment filed only on December 12, 2013. The request for adjournment was declined and the share capital received at a premium was directed to be re-enquired in the manner directed by him and instructions of Central Board of Direct Taxes. The assessee contended that the rejection of the prayer for adjournment was not communicated to it before passing the order under section 263. The assessee filed an appeal to the High Court against the order of the Commissioner under section 263. It was this petition to the High Court, which was entertained, though no direct appeal lies to the High Court against the order of the Commissioner. It could have probably been entertained on a writ petition. A regular appeal to the Tribunal is the remedy under the law. But the High Court entertained the application and found that the request for adjournment was made two days after the date of hearing on December 12, 2013 while the hearing was on December 10, 2013, so that the assessee could not be heard complaining about the refusal for adjournment. There has been no violation of the principles of natural justice. The other objection made on behalf of the assessee was as to the direction to re-enquire in a manner following the instructions of the Central Board of Direct Taxes, when Central Board of Direct Taxes itself has no jurisdiction in such matters. The Commissioner's guidelines as to how the Assessing Officer should proceed with enquiry did not vitiate the order in any manner as he had directed the Assessing Officer to pass a speaking order after providing reasonable opportunity to the assessee and verifying with the subscribers. The guidelines did not contain any mandate as to how the Assessing Officer should decide the issue. It was under these circumstances, the High Court in *AIM Fincon Pvt. Ltd.* v. *CIT* [2019] 412 ITR 539 (Cal) dismissed the assessee's appeal as it involved no substantial question of law.

(ii) Not justified

Where an assessee had claimed deduction under section 80-IB by a revised return, it was failed to be considered by the Assessing Officer, but was allowed by the Commissioner (Appeals) on the assessee's appeal. Consequent on a search of the assessee's premises, there were reassessment proceedings under section 153A, when the allowance under section 80-IB was raked up by the assessee asking for a larger relief of Rs. 11.89 lakhs as against original deduction allowed of Rs. 70,651, but it was rejected as the assessee was not entitled to claim reduction of income in a reassessment meant only to tackle escaped income. The Commissioner acting under section 263 sought to revise the assessment by disallowing the entire claim and his order was confirmed by the Tribunal. The matter was taken up to the High Court, which found that the assessment made by the Assessing Officer had merged with the appellate order, so that there was no surviving assessment order, possible for revision under section 263. The objection against allowance of deduction under section 80-IB was that no separate accounts for the eligible undertaking under section 80-IB apart from lack of audit and the failure to file audit report along with the return. There were, therefore, omissions to follow the fundamental requirements stipulated in section 80-IB, so that the deduction was questioned by the Commissioner under section 263. The High Court pointed out that the Tribunal failed to consider that the deduction under section 80-IB had already reached finality. The order under section 153A could not have, therefore, been revised when the deduction under section 80-IB had been allowed in the earlier order and not the order sought to be revised. The limitation for revision under section 263 against such earlier order had already expired. There could be no jurisdiction for the Commissioner when an assessment order has also meanwhile merged with appellate order as decided in this case in *Skyline Builders* v. *CIT* [2019] 412 ITR 182 (Ker).

In another case, where the assessee had filed a return declaring income from property as well as income from other sources, the return was accepted in respect of both the sources after scrutiny. The Commissioner, acting under section 263, inferred that annual value of the property was understated on comparison with annual value of another property even without considering the difference in location between the two properties as evidenced from the fact that there was no reference to their location. The deduction of expenses in computation of property income, which was also faulted by the Commissioner had been allowed after due enquiry. Merely because of different belief on the part of the Commissioner, his assumption of jurisdiction is not justified in a case, where there has been full enquiry by the Assessing Officer before the assessment. Where it is not a case of no enquiry or no germane enquiry, there can be no revision as was held in *Aryan Arcade Ltd.* v. *Pr. CIT* [2019] 412 ITR 277 (Guj).

In a still another case, revisional powers were sought to be exercised where the Assessing Officer was content with the addition of Rs. 2.15 crores surrendered by the assessee during a survey. The Commissioner, acting under section 263, found that the surrender itself should have been taken as an admission of incorrectness of books of account, so that the gross profit should have been estimated at a figure higher than what was admitted at Rs. 1.35 crores against which the Commissioner inferred that it should have been Rs. 1.84 crores. The addition was inadequate even in another matter of estimate of cost of construction of a building regarding which Rs. 1.35 crores was surrendered. Similarly, addition for unexplained investment in stock limited to Rs. 70 lakhs surrendered was also treated as one which justified the inference that the order was erroneous and prejudicial. The Tribunal, however, quashed the revisional order, so that the Department was before the High Court, which considered the order passed by the Commissioner in detail to be clearly pointing out the errors and omissions on the part of the Assessing Officer, so that the High Court reversed the Tribunal order pointing out there was no illegality or perversity in the Commissioner's order. The High Court, apart from setting aside the Tribunal order, felt that it is a fit case, where it is necessary to ensure that the Assessing Officers making proper scrutiny of such cases and passing an order supported by reasons, should not make an assessment "in a slipshod or cursory manner" merely stating "that the books of account produced and test checked" as had been done by the Assessing Officer in this case. It, therefore, directed the Registry of the court to forward a copy of its order to the Central Board of Direct Taxes for necessary instructions to all Assessing Officers not to deal with post-survey-and-search cases on the basis of a mere surrender of income by the assessees, but ensure proper scrutiny before passing a reasoned order, in *Pr. CIT* v. *Venus Woollen Mills* [2019] 412 ITR 188 (P&H).

In yet another case, the matter of revision related to section 35D. Section 35D provides for amortisation of preliminary expenses relating to expenses on public issue of shares by a company over a period of five years. The claim under section 35D for such amortization was allowed by the Assessing Officer, but such allowance became the subject matter of revisional jurisdiction on the part of the Commissioner in the view that it was wrongly allowed. It was the assessee's case that it was establishing an industrial undertaking, when shares were issued, so that the claim fell within the scope of section 35D and that the claim of Rs. 3.28 crores at one-fifth of such expenditure aggregating to Rs. 16.39 crores was in order, relying upon the decision in *CIT* v. *Emirates Commercial Bank Ltd.* [2003]

262 ITR 55 (Bom), which is also a case of a bank, which could be entitled to deduction in the view that banking is also an industry in the light of the fact that even sharebroking has been understood as industry in HSBC Securities and Capital Markets (India) Pvt. Ltd. (1384/M/2000). At any rate, amortization was allowed by the Assessing Officer after calling for an explanation from the assessee, so that there was no scope for revisional jurisdiction. It was under these circumstances, the Tribunal held that the Commissioner's view, apparently a better view, would still not justify his jurisdiction. The High Court dismissed the Departmental appeal, so that the matter in *Pr. CIT* v. *Yes Bank Ltd.* [2019] 412 ITR 459 (SC) was taken up to the Supreme Court, which held that the Departmental appeal has to be decided afresh, sending it back to the High Court, because the High Court did not frame a question of law, which is substantial in a matter, which was not dismissed in limine. In fact, the High Court did not decide the issue on merits at all. After having noted an argument as regards application of section 35D to a bank, this argument was also not adjudicated upon, when such applicability to a bank was the subject matter pending in further appeal in a case, where the High Court has decided in favour of the assessee in *Emirates Commercial Bank Ltd.'s* case (supra). It is for these reasons, the Supreme Court felt it necessary to remand the matter back to the High Court on merits in accordance with law after following the proper procedure in framing the substantial question of law arising in the dispute. It was, however, made clear by the Supreme Court that it had not made any decision on merits and that it is for the High Court to decide on merits uninfluenced by any of its observations.

A decision taken by the Assessing Officer should have been found to be erroneous or prejudicial to the Revenue for purposes of jurisdiction of Commissioner to exercise his powers under section 263. It is the settled law. In a matter relating to non-compete fee, whether it should be taxable or not and whether trademark has to be treated as self-generated asset, so as to be not liable to tax on transfer for capital gains tax were both issues on which the Assessing Officer had decided in favour of the taxpayer. His conclusion was a plausible view. The question in this case was taxability or otherwise on distribution of assets on dissolution of partnership and receipt of compensation for non-competition and on assignment of trademark "Kwality" for Rs. 1.85 crores out of total consideration of Rs. 3.70 crores. There was no liability to capital gains. The adoption of cost of acquisition on the basis of market value as on April 1, 1981 for purposes of taxing the assumed profits on assignment of trademark was also faulted on the ground that the adoption of cost at fair market value as on January 1, 1954 was on exercise of the option by the assessee, but in the absence of exercise of such option, the reckoning of the capital gains on the basis of value as on January 1, 1954 as though the assessee had exercised the option was also untenable following the decision in *PNB Finance Ltd.* v. *CIT* [2008] 307 ITR 75 (SC). The receipt of non-compete fee and assignment of trademark were not taxed by the Assessing Officer after enquiry. The Commissioner, however, took a different view on both the matters of taxability of compensation and receipt from transfer of trademark holding them to have been wrongly exempted.

The Tribunal agreed with the assessee's claim that the trademark was self-generated, so as to be not liable to tax following *CIT* v. *B. C. Srinivasa Setty* [1981] 128 ITR 294 (SC), so that it was not taxable. As for non-compete fee, it also related to assignment of trademark, so that this too was exempt. An agreement for non-competition for which compensation was paid results in sterlisation of the profit-making apparatus, so as to be a capital receipt, so as to be not taxable as decided in *Guffic Chem (P.) Ltd.* v. *CIT* [2011] 332 ITR 602 (SC). It was, therefore, held that there was no scope for exercise of jurisdiction under section 263 and the Tribunal accordingly allowed the assessee's appeal. It was taken up to the High Court in *CIT* v. *Sunil Lamba* [2019] 412 ITR 480 (Delhi) in appeal by the Department only to be dismissed on both counts as the decisions taken by the Assessing Officer were plausible ones and the Departmental appeal was accordingly found to be lacking in merits. Section 55(2)(a) meant to neutralize this decision by requiring adoption of nil cost for self-generated assets by a prospective amendment by the Finance Act, 2001 with effect from April 1, 2002 applicable only from the assessment year 2002-03 could not have been applied for earlier years as was decided following *CIT* v. *Associated Electronics and Electrical Industries (Bangalore) Pvt. Ltd.* [2016] 6 ITR-OL 471 (Karn) and *Birla Sunlife Asset Management Co.* v. *Deputy CIT* [2011] 7 ITR (Trib) 586 (Mumbai).

Apart from the merits of the assessee's claim allowed by the Assessing Officer in favour of the assessee, it was found that there was no jurisdiction for the Commissioner in respect of the receipts because they were disclosed by the assessee in Part IV of the return in the assessment year in question, so that there was no failure of disclosure on the part of the assessee.

It was in the above reasoning that the High Court held the order under section 263 to be lacking in jurisdiction in matters of debatable issues, following the law laid down by the Supreme Court in *Malabar Industrial Co. Ltd.* v. *CIT* [2000] 243 ITR 83 (SC) reiterated in *CIT* v. *Max India Ltd.*

[2007] 295 ITR 282 (SC) and the decision of the jurisdictional High Court in *Pr. CIT* v. *Delhi Airport Metro Express Pvt. Ltd.* [2017] 398 ITR 8 (Delhi).

In still another case of exercise of revisional powers under section 263 in a matter of purchase transactions found to be non-genuine, where the seller delivered the goods to the assessee's customer on his account to a third party, it was felt that the assessee should have accounted for higher profit, because he was saved from incurring transportation expenses. He, therefore, estimated an additional 4 per cent. gross profit on the gross total turnover of Rs. 4.33 crores. The assessee filed an appeal and the matter was pending before the first appellate authority. But the Commissioner meanwhile issued notice under section 263 in the view that the Assessing Officer should have disallowed the entire purchase of Rs. 4.33 crores instead of limiting the addition on the basis of gross profit ratio merely to Rs. 9.57 lakhs. Even before the assessee could reply to the show-cause notice issued by the Commissioner, the first appellate authority held that even the addition to gross profit was not justified. The assessee filed a detailed reply pointing out to this development as well as merits questioning the jurisdiction of the Commissioner in a matter of an assessment, which has already got merged with the appellate order, so that there was no subsisting order of the Assessing Officer, which could be subject to the Commissioner's jurisdiction under section 263 even as decided in similar circumstances by the jurisdictional High Court in *CIT* v. *Nirma Chemicals Works P. Ltd.* [2009] 309 ITR 67 (Guj), so that the order of the Commissioner was found to be lacking in jurisdiction in *Haryana Paper Distributors Pvt. Ltd.* v. *Pr. CIT* [2019] 412 ITR 515 (Guj).

In one more case on the same subject, a claim was made by the assessee for exemption under section 10(20) applicable for local authorities in the view that the assessee claiming the exemption was engaged in the charitable activities of slum clearance, so as to merit the exemption. This claim was allowed, but became the subject matter of revision by the Commissioner on the ground that the assessee was not a local authority. The only objection raised was that the Commissioner cannot initiate a fresh enquiry and that the assessee had one more aspect for exemption, which was not considered by the Assessing Officer. The order of the Assessing Officer had already got merged with the appellate order as in the case in the immediate preceding paragraph, so that there was no assessment order subsisting at the time action was taken under section 263. This finding of the Tribunal in favour of the assessee was upheld by the High Court in *CIT (E)* v. *Slum Rehabilitation Authority* [2019] 412 ITR 521 (Bom) following *CIT* v. *Smt.*

A. S. Narendrakumari Basaheba [1989] 176 ITR 515 (Bom), *CIT* v. *Nirma Chemicals Works P. Ltd.* [2009] 309 ITR 67 (Guj) and *Haryana Paper Distributors (P) Ltd.* v. *Pr. CIT* [2019] 412 ITR 515 (Guj). It is surprising that the constitution of the Authority has not been the subject matter of representation of either party or considered in the conclusion of the Tribunal or the High Court. If the assessee in this case was a State undertaking as is common in such cases, the assessee should have qualified for exemption on merits, so that the question of jurisdiction should not have arisen.

Tax deducted at source

(i) Section 192

Where the assessee was running a hospital availing the services of consultants to whom payments were made, the question that arises is whether the payment could be construed as salary for which tax is required to be deducted under section 192 as held in *Pr. CIT (TDS)* v. *National Health and Education Society* [2019] 412 ITR 404 (Bom). At any rate, it was the view of the Assessing Officer that consultancy services would fall under professional services covered under section 194J. A part of the payment relating to drug handling charges would have the character of commission falling under section 194H. But the assessee had deducted tax at lesser rate on all these payment applicable to works contract under section 194C. The Assessing Officer proceeded under section 201(1) and (1A) to collect interest and penalty though relief was partly allowed in first appeal and the Tribunal taking the view that there was no employer-employee relationship as between hospital and consultant, so that section 192 would have no application following *CIT (TDS)* v. *Grant Medical Foundation (Ruby Hall Clinic)* [2015] 375 ITR 49 (Bom).

But the services rendered to the call centre of the hospital providing customer information and fixing appointments with the hospital were more in the nature of works contract, so that there could be no complaint with tax deduction under section 194C as had been decided in first appeal and upheld by the Tribunal. It was noticed that one of the consultants arranged to supply a particular drug not available in the market, raised an invoice consisting of two parts : one for cost of the material and the other for service charges. This payment was rightly found to be covered under section 194C. But in respect of managerial services, the payment would be professional fee under 194J, but it was found in first appeal that the payment was purely in the nature of reimbursement, a conclusion which was approved by the Tribunal with the High Court finding that there is no question of law arising on such finding.

(ii) Salaries to Christian nuns and missionaries

Salaries of Christian nuns and missionaries had not been brought to tax since it is nothing more than a living allowance paid to the nuns and other teachers belonging to the Order of the Congregation of Franciscan Missionaries of Mary belonging to Roman Catholic Church. They take a vow under the Code of Canon Law, which prohibits nuns to own any property including salary, so that the income is understood as not belonging to them conceded by Circular No. 1 of 1944 dated January 24, 1944 accepting exemption for these persons even where they draw salary from the Government as made clear to the schools by an Instruction from Director of Public Instructions. A similar Circular confirming exemption was issued on September 30, 1961 (wrongly given as September 31, 1961) on representation from Madras Catholic Educational Council. However, the Pay and Accounts Officer, in a query addressed to Principal Chief Commissioner, doubted the correctness of non-deduction of tax at source. This provoked a clarification issued by Principal Commissioner Chennai on October 7, 2015 pointing out that the Board Circulars are found to be not binding on reconsideration of the instructions issued. This reversal led to the Society of Mary Immaculate (T.N.) filing a writ petition on which a single judge held that the instruction for tax deduction at source issued by Director of Treasury and Accounts in respect of salary paid to this class of persons satisfied the exemption in the light of the Circulars. The matter was, therefore, taken to the Division Bench by the Income-tax Department in *UOI* v. *The Society of Mary Immaculate (Tamil Nadu)* [2019] 412 ITR 545 (Mad), where the High Court elaborately dealt with the matter. The following arguments were accepted for reversal of the decision of the single judge, so as to bring the salary paid to nuns and priests also to tax.

(1) The provisions of Income-tax law are dry, plain and simple, apolitical and a religious in character. None of the provisions have anything to do with other religion or any other special status of the person in receipt of salary. The issues that arises under the law is solely with reference to the statute. Tax deduction provision in section 192 from salary does not envisage determination of liability in the hands of the recipient, so that tax has to be deducted from all payments of salary under section 192.

(2) The salary is received by the individuals and not by the Congregation and it was also not an instance of diversion by overriding title in the light of the law laid down by the Supreme Court in *CIT* v. *Sitaldas Tirathdas* [1961] 41 ITR 367 (SC) in favour of the Church as the teachers who are missionaries continue to enjoy the right over the salary paid to them.

(3) The first Circular dated January 1, 1944 issued prior to Independence is vaguely and too narrowly worded to cover only fees received by missionaries, though the caption of the Circular was broad enough as it referred to taxes on salaries. Again the law had undergone a change thereafter with 1961 Act overriding the old Act, 1922. In fact, it is so clarified by the Circular dated February 26, 2016 and April 7, 2016 clarifying the Circulars would not cover salary and pension payable to nuns and missionaries working as teachers in schools.

(4) The State Government which bears the salary payment in Government schools is not bound by any religious tenets or the Canon Law. The religious freedom guaranteed by articles 25 and 26 of the Constitution does not cover taxation of salary, which is paid to individual nuns and missionaries, who may continue to be members of Church or may have left it on taking up the teaching profession on their own volition. If tax is not deducted at source, the person who makes the payment without deduction will be guilty of violating the income-tax law and may be liable even for prosecution. Neither the Income-tax Department nor the State Government has anything to do with the religious character of institution served by the teachers, whether they are nuns or missionaries. The law, which understood "sanyas" as civil death has been repeatedly found to be having limited application as the Canon Law itself drawn from scriptures, customs or decisions of Church bodies or scriptural applicable only for religious practices observed by the Church as explained by the Supreme Court in *Most Rev. P. M. A.Metropolitan* v. *Moran Mar Marthoma* [1995] Supp (4) SCC 286 followed in a number of cases including the one from jurisdictional High Court in *Roman Catholic Society* v. *Regional P.F. Commissioner, Madras* [2002] 2 MLJ 608.

It is on the above arguments, which were accepted by the High Court, the judgment of the single judge was reversed. The decision, which upsets a practice that has been in force for more than seven decades, has now to give way to the law in force as understood by the Madras High Court. The High Court, while deciding to allow the appeal of the Union of India, realized the subversion of an accepted practice and wanted the judgment to apply "prospectively" and not for past period. This judgment was rendered on March 20, 2019 in the matter of tax deduction at source. Probably, it can reasonably be considered effective from April 1, 2019 so as to be effective for assessment year 2020-21, but such an interpretation, unless accepted by the Central Board of Direct Taxes, will create an uncertainty on the minds of the officers. An early clarification is, therefore, necessary as to the prospective date from which the tax will be payable by these nuns and missionaries of Catholic Church drawing salaries as teachers.

Tribunal's powers

(i) Jurisdiction

An educational society located at Moga falling within the Amritsar Bench of the Tribunal filed an appeal before the Chandigarh Bench against the refusal of registration under section 12AA. The Chandigarh Bench of the Tribunal allowed the assessee's appeal, but the Department questioned its jurisdiction by the High Court, which pointed out that it was not concerned with the merits of the decision because the merits, right or wrong, is immaterial for a decision on jurisdiction. The order passed by the Chandigarh Bench was, therefore, null and void and was dismissed and the matter was sent to Amritsar Bench for disposal in *CIT (E)* v. *Baba Amarnath Educational Society* [2019] 412 ITR 234 (P&H) following *Pandurang* v. *State of Maharashtra* AIR 1987 SC 535.

(ii) Powers of the President

In a writ petition requiring the court to direct the Tribunal to decide a pending appeal before it in an expeditious manner before a specified date by making interim arrangement to ensure balance of equities, a single judge did specify such a date besides requiring payment of 20 per cent. more of the disputed tax pending appeal, though 55 per cent. of the same had already been paid. After the decision of the single judge, the assessee, the appellant, requested the President of the Tribunal to constitute a Special Bench and transfer the appeal to a Bench outside Bengaluru alleging a hostile approach on the part of the members of Bengaluru Bench. Both the requests were rejected by the President. The matter was again taken up before the single judge against the order of the President. But it was dismissed on the ground that the direction for disposal of the appeal within the time specified should bring a finality, while observing that both the parties should co-operate with the Tribunal for early disposal of the appeal.

It is under the above circumstances, the matter came before the Division Bench in *Google India Pvt. Ltd.* v. *Deputy CIT (IT)* [2019] 412 ITR 372 (Karn). The High Court observed that the President had already considered the petition to the extent that a touring Bench has been constituted for hearing the case at Bengaluru, though the transfer of the appeal to another Bench was rejected. The High Court felt that the administrative powers of the President in matters relating to transfer of an appeal or creation of a Special Bench need not be interfered with, so that it affirmed the decision of the single judge with the observation that the constitution of the Special Bench was not the subject matter of single judge, and that it is for the President to constitute the Special Bench as he alone is so empowered. This request has not been the subject matter of judgment of the single judge, so that it was not dealt with by the High Court also as was made clear. Considering the fact that it was an important appeal involving a demand of Rs. 129 crores, one would think that the request for constitution of the Special Bench could have been accommodated, so that the complaint regarding any hostile approach would be minimised, when a matter is decided by the majority by the three-member Special Bench. But it was felt that it is not for the High Court to sit in appeal over the administration of the President. The writ petitioner, for its case, cited the decisions in *ITAT* v. *Deputy CIT (Assessments)* [1996] 218 ITR 275 (SC), *Ajay Gandhi* v. *B. Singh* [2004] 265 ITR 451 (SC) and *President, ITAT* v. *A. Kalyanasundaram* [2005] 279 ITR 305 (Mad), but the High Court did not deal with any of them in the view that a little clarification of the order of the single judge would suffice.

Settlement Commission

(i) Jurisdiction of the High Court

Where the Settlement Commission, as part of the settlement effected by it under section 245D(4), waived interest chargeable under sections 234A, 234B and 234C, the waiver was questioned by the Department successfully before the High Court in *ITO* v. *Settlement Commission* [2017] 8 ITR-OL 84 (Guj). But on further appeal by the assessee, it was decided by the Supreme Court that as regards the matter of chargeable interest, the Supreme Court has already laid down the law in *CIT* v. *Anjum M. H. Ghaswala* [2001] 252 ITR 1 (SC) that Settlement Commission does not have the power to reduce or waive interest under sections 234A, 234B and 234C, such powers having been left by the statute to be decided by the Central Board of Direct Taxes under section 119 of the Act. However, in *Brij Lal* v. *CIT* [2010] 328 ITR 477 (SC), it was held, the waiver of interest under these sections is not possible in settlement cases. Terminal point for levy of interest is, however, only up to the date mentioned under section 245D(1) on admission and not its final order under section 245D(4). The High Court judgment in respect of the claim for waiver of interest was set aside by the Supreme Court in the aforesaid decisions holding the Settlement Commission had no power to pass order regarding waiver of interest and, therefore, rectification of order under section 154, which was not also otherwise unavailable for the Settlement Commission, as its order of waiver had already been set aside by the High Court. The order of the Settlement Commission dated August 11, 2000 waiving interest was, therefore, set aside remanding the matter back to Settlement Commission in the light of two decisions of the Supreme Court on the subject without expressing its opinion on the merits of the matter, in *Kakadia Builders Pvt. Ltd.* v. *ITO* [2019] 412 ITR 128 (SC).

(ii) Admission of application

A settlement petition can be entertained only where there is full and true disclosure of income offered in the settlement petition. The petition was rejected where the Settlement Commission found the lack of a full and true disclosure, but the matter was taken up by the petitioner by a writ petition in *Moin A. Qureshi* v. *CIT* [2019] 412 ITR 243 (Delhi) on the ground that there was no opportunity before rejection of the petition. The High Court found that there was no lack of opportunity as the Settlement Commission had dealt with all the contention raised by the assessee. There was a clear finding that the assessee was a beneficial owner as indicated by certain documents under the protection of a bank in Singapore. This fact was clearly admitted by him before the Singapore authorities, apart from the fact that certain assets in London property allegedly owned by his brother-in-law actually belonged to him. The writ petition was, therefore, dismissed after citing a large number of cases for the conclusion, which was even otherwise manifest on the facts recorded, which justified such dismissal.

Where an applicant for settlement before Settlement Commission admits income in addition to what was disclosed in the petition for settlement, the issue was whether such disclosure would mean that the initial disclosure was not full and true, so as to be invalid under section 245C. In such a case, the question was whether the Settlement Commission could proceed with the settlement. The objection of the Commissioner was that it could not be proceeded with. Since his objection was not acted upon, the Commissioner took up the matter before the High Court in *CIT* v. *Settlement Commission (IT and WT)* [2019] 412 ITR 387 (Ker). The High Court felt that the matter had already been pending for a long time and found that such offer of additional income was not unusual and did not necessarily render the initial application defective. The decision not to reject the petition in absence of any objection on the part of the Commissioner could not be challenged, as held by the Supreme Court in *Ajmera Housing Corporation* v. *CIT* [2010] 326 ITR 642 (SC). However, this decision could not be taken as an authority for acceptance of additional income in all cases without endangering the validity of the initial petition. The High Court also pointed out to two decisions of the Bombay High Court in *CIT* v. *ITSC (No. 1)* [2014] 365 ITR 68 (Bom) and *CIT* v. *ITSC (No. 2)* [2014] 365 ITR 87 (Bom), wherein a contrary view that the power to decide the validity of application need not await the final hearing and its order. It is this decision with which the High Court found itself in agreement. It found that where additional income is voluntarily offered, it may not prejudice the settlement proceedings, where the petition itself was not rejected. Further in the case before it, where admission of additional income was made after the Commissioner's report, the Settlement Commission required the assessee's representative, the Assessing Officer and Additional DIT (Inv.) to sit together and reconcile the irreconciliable issues before the next hearing. In this case, the assessee had merely accepted the addition proposed by the Commission to settle the matter once and for all. This was done even before the joint sitting was advised by the Settlement Commission. It is true that additional admission beyond what was admitted in the original petition would prima facie render the disclosure not full and complete . But where Commission proceeded with the hearing even after the admission of additional amount, the Commissioner filed appeal to the High Court questioning non-dismissal of petition. A single judge decided not to interfere during the course of proceedings before the Settlement Commission and that any error in exercise would be looked into at the proper time and not at the preliminary stage, while conceding the difficulty in dismissing every case of addition of offered income. It was this order of the single judge, in *CIT* v. *Settlement Commission (IT & WT)* [2014] 369 ITR 606 (Ker), which was set aside. The High Court, however, found that the matter has been long pending, so that it was considered proper that the assessee be permitted to file an appeal against assessment orders within 30 days from the date of receipt of a copy of the judgment as the assessee had already offered the additional income admitted before the Settlement Commission in the returns filed before the Assessing Officer after such disclosure, so that the matter of additional income could be considered on merits in regular course, thereby protecting the rights of the Revenue and applicant.

High Court

Powers

The High Court has to decide any substantial question of law only after framing such question as is posed before it or on recording the reasons in the case, where the appeal itself is not admitted. Any other course would render the High Court judgment vulnerable. It is because the lis between the parties must be spelt out and the decision should be one giving the reasons or grounds for it in support of its decision. The parties have the right to expect the High Court to give reasons for its conclusion, so that it can decide whether the High Court order is legally sustainable. It is this law, which was laid down regarding powers of the High Court in *CIT* v. *Rashtradoot (HUF)* [2019] 412 ITR 17 (SC) following *State of Maharashtra* v. *Vithal Rao Pritirao Chawan* [1981] 4 SCC 129, *Jawahar Lal Singh* v. *Naresh Singh* [1987] 2 SCC 222, *State of U.P.* v. *Battan* [2001] 10 SCC 607, *Raj Kishore Jha* v. *State of Bihar* [2003] 11 SCC 519 and *State of Orissa* v. *Dhaniram Luhar* [2004] 5 SCC 568 and reversing the decision of the High Court reported along with the decision of the Supreme Court.

Where a Departmental appeal has been filed in disregard of the Circular dated February 9, 2011 [2011] 332 ITR (St.) 1 fixing the monetary limit below which an appeal need not be filed, the High Court will be justified in not entertaining such appeal within the monetary limit revised by Circular dated July 11, 2018 [2018] 405 ITR (St.) 29. The Supreme Court, in *CIT* v. *Surya Herbal Ltd.* [2013] 350 ITR 300 (SC), had held that monetary limits had to be followed except in cases of two exceptions, viz., where the dismissal on the basis of monetary limit would have cascading effect or where common principles are involved in subsequent group matters or a large number of matters. Where neither conditions are satisfied, the appeal has to be dismissed. But when the assessee himself offers to withdraw the appeal, the withdrawal of such appeal could be permitted, as was held in *CIT* v. *P. C. Naidu* [2019] 412 ITR 378 (Karn).

Penalty

(i) Not exigible

An assessee had claimed relief under section 80-IC for the eighth year at 100 per cent. in view of the intervening substantial expansion, which by itself gives a fresh lease of life for 100 per cent. deduction for five years from the date of such expansion. The assessee understood that it was entitled to 100 per cent. deduction with reference to this understanding of law. But it was a mistaken view in that in respect of an industrial undertaking already in existence, such substantial expansion does not give a fresh lease of five more years for 100 per cent. Since it was in its eighth year, it was entitled only to 25 per cent. Apart from this restriction as regards rate of relief, the Assessing Officer initiated penalty proceedings. But in first appeal, it was held that there was no inaccurate particulars furnished by the assessee nor has there been any concealment of income. The claim, though wrong, was based upon the bona fide belief as to its eligibility. It was in this context, the concurrent finding in first appeal and the Tribunal, that penalty was not leviable, was upheld by the High Court as the finding of the Tribunal did not give rise to any substantial question of law as held in *Pr. CIT* v. *Virgo Industries* [2019] 412 ITR 146 (P&H).

Where the assessee claimed depreciation on loaders which were purchased during the year, but put to use only on the last day of the previous year, but withdrew the same during the course of assessment proceedings on being questioned by the Assessing Officer. However, penalty was levied for the wrong claim. It was, however, deleted in first appeal. But the Tribunal restored the levy of penalty. The High Court pointed out to the order in first appeal that the assessee's withdrawal of the claim is not tantamount to admission of a wrong claim. The claim was certainly not shown to be on account of mens rea or guilty animus on the part of the assessee. The explanation for the claim was not found to be false. The fact was that the loaders were available for use in the port even before the last date. In fact, where an asset is kept ready for use, it should be taken as good use amounting to partial user, so as to merit depreciation under section 32. It was under these circumstances, the restoration of penalty levied by the Assessing Officer overruling the decision in first appeal was reversed by the High Court directing the refund of the penalty along with interest, if it had already been recovered. In coming to this conclusion, the High Court, in *B. Loganathan* v. *ITO* [2019] 412 ITR 642 (Mad), followed the law on penalty as decided in *CIT* v. *Geo Tech Construction Corporation* [2000] 244 ITR 452 (Ker), *Principal CIT* v. *Larsen and Toubro Ltd.* [2018] 403 ITR 248 (Bom), *Principal CIT* v. *Larsen and Toubro Ltd.* [2018] 408 ITR (St.) 22 (SC), *CIT* v. *Refrigeration and Allied Industries Ltd.* [2001] 247 ITR 12 (Delhi), *CIT* v. *Mahabaleshwar Gas and Chemical P. Ltd.* [2008] 170 Taxman 38 (Delhi) and *CIT* v. *Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158 (SC).

(iii) Section 271D

Where a penalty was proposed to be levied under section 271D for violation of section 269SS in acceptance of a loan by means other than account-payee cheque or account-payee draft or by the use of electronic clearing system through a bank account, the assessee urged reasonable cause, which had prompted the acceptance of the loan under the circumstances, entering such loan by journal entries in its books. The High Court found that there was clearly a default under section 269SS warranting penalty under the law as interpreted by the jurisdictional High Court in *CIT* v. *Triumph International Finance (I) Ltd.* [2012] 345 ITR 270 (Bom). But as found in the same case, a reasonable cause should excuse the default. The objection of the Revenue that the entries by which the acceptance of loan was brought into the account were many unlike in Triumph International's case (supra), where there was only one single entry. It was found by the High Court that the number of entries is not relevant for judging the reasonableness of the assessee's explanation and, therefore, the penalty was cancelled in a group of cases in *CIT* v. *Ajitnath Hi-Tech Builders Pvt. Ltd.* [2019] 412 ITR 316 (Bom) affirming the decision of the Tribunal in *Lodha Builders P. Ltd.* v. *Asst. CIT* [2014] 34 ITR (Trib) 157 (Mumbai). The Supreme Court dismissed the special leave petition filed by the Department against this judgment [2018] 409 ITR (St.) 14.

(iv) Section 271E

Penalty is leviable under section 271E for violation of section 269T for repayment of any loan or deposit or any specified advance not received by account-payee cheque or account-payee draft or by the use of electronic clearing system through a bank account. The law, however, provides for an appeal against such levy. But the assessee took up the matter to the High Court by way of a writ petition on the ground that the levy of penalty was beyond the permissible time limit, so that it involves a question of jurisdiction. The High Court held the order time-barred with reference to time limit for passing the order under section 275(1)(c) because show-cause notice was issued on November 27, 2014, but the order was passed on September 21, 2016 clearly beyond six months after the end of the financial year. There was an order of rectification dated November 26, 2015 in this case, but the law does not give any condonation because of intervening rectification. The penalty order was, therefore, quashed in *Karnail Singh* v. *Union of India* [2019] 412 ITR 305 (Patna) following *Principal CIT* v. *Mahesh Wood Products Pvt. Ltd.* [2017] 394 ITR 312 (Delhi).

(v) Sections 271D and 271E

In a case of default both in respect of receipt and repayment of loan, there was violation of sections 269SS and 269T, so as to attract sections 271D and 271E, where the amounts were received and returned in cash. Writ petitions against penalty under sections 271D and 271E on the ground that they were time-barred, were dismissed since the proceedings initiated are required to be completed within six months from the end of the month in which penalty proceedings are initiated and not from the date of assessment order as wrongly understood by the Assessing Officer, so that they were time-barred. Further it is the Joint Commissioner, who is empowered to initiate proceedings, but where it was initiated by the Deputy Commissioner, the proceedings were found to be invalid even for this reason as held in *Nitin Agrawal* v. *Joint CIT* [2019] 412 ITR 309 (MP).

Prosecution

Grant of bail

Grant of bail is eligible for a person apprehending arrest on merits. But such apprehension must be based upon reason to believe, so that where a mere certificate for recovery of tax under section 222 and thereafter a notice under rule 73 of the Second Schedule were issued, there is no charge against the assessee of commission of any non-bailable offence and, hence, no justification of apprehension of immediate arrest, so as to invoke jurisdiction under section 438 of the Criminal Procedure Code, 1973 as was decided on a petition under rule 73 of the Second Schedule. It is under these circumstances that the petition under section 438 of the Criminal Procedure Code, when the constituents of the section are not attracted, was dismissed as not maintainable in *M.A.Zahid* v. *Asst. CIT (OSD)* [2019] 412 ITR 135 (Karn).

Wealth-tax

Charge of tax

Wealth-tax is not leviable on stock-in-trade of business. The application of this law came up in a case, where the assessee had acquired urban land and sold it after a decade showing the asset as its investment in its income-tax return, leading the Assessing Officer to infer that it was liable for wealth-tax. Since even a single instance can constitute business as adventure in the nature of trade, it could well be stock-in-trade, but the decision has to depend upon the surrounding facts and circumstances and not in isolation. The Tribunal had found that the land purchased on July 30, 2007 was the subject matter of a joint development agreement executed on July 31, 2007. There was no development in the property. The assessee was having only this property and no other, so that the inference of business does not follow. The authorities held it to be assessable as investment dismissing the assessee's claim that it was meant to be stock-in-trade. The finding of the Tribunal in the Revenue's favour holding the land to be liable to wealth-tax was taken up to the High Court by the assessee in a group of cases in *Devineni Avinash* v. *Pr. CIT* [2019] 412 ITR 28 (T&AP), which upheld the lack of evidence to treat the land as stock-in-trade of the assessee, except for the self-serving statement of the assessee and that the Tribunal finding holding the land liable to wealth-tax does not give rise to any substantial question of law, and dismissed the appeals.

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