LANDMARK CASES

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Accounting

(i) Income from undisclosed sources

An assessee in real estate business had purchased a land, the cost of which as per books was Rs. 11.95 crores, but the consideration as per sale deed was only Rs. 4.35 crores. The difference was claimed to have been paid to one M, who had first entered into an agreement for purchase of this land from 12 owners before sale to the assessee for the sum of Rs. 11.95 crores and that he had made payments to the said land owners in cash at the time of agreement to the extent of Rs. 61 lakhs as advance, so that the total consideration claimed was correct. This was accepted and addition made by the Assessing Officer was deleted by the Tribunal. The High Court dismissed the Departmental appeal on the ground that there was nothing to discredit the assessee's claim for the payments though recorded by way of accommodation entries as payment of commission. The decision of the High Court in *CIT* v. *Prestige City Developers P. Ltd.* [2019] 415 ITR 149 (Raj) in favour of the assessee became the subject matter of special leave by the Department, which was dismissed by the Supreme Court [2018] 406 ITR (St.) 36.

In another case, the assessee had entered into an agreement on January 27, 2003 for sale of properties, which had come to the hands of the assessee from various persons, through a trust under an agreement handing over possession, so as to attract liability for part performance. He entered into an agreement for sale on June 28, 2004. However, the sale deeds were executed at the instance of sellers directly by the trust to these persons. The Assessing Officer, on comparison of the amounts specified in the agreement for sale and what had been accounted by the trust, found a difference for the three years under consideration amounting in all to Rs. 71.50 lakhs, Rs. 66.15 lakhs and Rs. 18.98 lakhs, which were reduced in first appeal to Rs. 15 lakhs each for the first two years and Rs. 20 lakhs for the third year. But the Tribunal confined the additions for the three years to Rs. 50 lakhs without any basis. On Departmental appeal, the High Court held that the

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Assessing Officer had proceeded on mere surmises and conjectures and had not recovered any materials to show that any income was generated in addition to what was disclosed. It was held that the expectation that the assessee had to prove that he had not received any extra payment was one which required the assessee to prove a negative, though an estimation would be justified, where facts warrant the same. It was found that there was no justification for estimate of any additional income in this case. A request for remand was also declined as such remand would add to multiplicity of litigation.

As regards another addition in the same case of undisclosed income from Abu Dhabi, the deletion by the Tribunal was upheld. So was the addition for income from sale of timber and demolished part of the factory building. But the addition for capital gains made by the Assessing Officer was restored subject to the modification made by the first appellate authority granting partial relief. It was so decided in *CIT* v. *N. Sheikh Ahmed Haji* [2019] 415 ITR 32 (Ker) relying upon the decision of the Supreme Court in *CIT* v. *Balbir Singh Maini* [2017] 398 ITR 531 (SC) for the proposition that the doctrine of part performance is possible of application only if the agreement is registered in the light of the amendment made to Registration Act, 1908 in the year 2011.

(ii) For banks

Where a bank governed by the Reserve Bank of India regulations had an outstanding unrecognized balance in branch accounts, such balance was required to be taken to reserves through profit and loss account subject to the regulations of the Reserve Bank, that the claim in respect of these entries, if any, should be honoured, while it should not meanwhile be declared as dividend. It was so held in *State Bank of Bikaner and Jaipur* v. *Dy. CIT* [2019] 415 ITR 193 (Raj). However, the judgment is subject to grant of special leave to the Department [2019] 413 ITR (St.) 319.

Income

(i) Contract amount, which is retained

Income is taxed either on accrual or receipt on the basis of the method of accounting regularly followed by the assessee in the light of section 145 of the Act. Retention of a part of the contract amount to ensure that there are no defects in execution of the contract is not uncommon. Such retained amount does not accrue to the assessee, unless and until it is released after satisfactory completion of contract. It was this law, which was followed in *CIT* v. *Chandragiri Construction Co.* [2019] 415 ITR 63 (Ker).

(ii) Remission or cessation—Section 41(1)

Section 41(1) provides for taxation of an amount of remission or cessation of a liability as income. This provision was sought to be applied in respect of carried-forward cash credits, which were inferred by the Assessing Officer to be non-genuine during the course of a scrutiny in a subsequent year. Since the assessee was unable to produce proofs by way of confirmation from creditors or even their present addresses, he presumed that the liability towards these creditors were not in force. Since, however, the amounts were carried over and no benefit was shown to have been derived by the assessee in respect of these credits especially in the light of the fact that the assessee had written off these amounts in a later year during which year the amount was offered for tax, the addition under section 41(1) made by the Assessing Officer during the year was deleted in first appeal, but restored by the Tribunal and had, therefore, become assessee's appeal to the High Court in *Dattatray Poultry Breeding Farm Pvt. Ltd.* v. *Asst. CIT* [2019] 415 ITR 407 (Guj). The High Court, after review of the facts of the case and the law on the subject, found that the order of the Tribunal suffers from various infirmities and, therefore, not justified in application of section 41(1) for the additions especially in the context of the fact that the assessee itself wrote off these amounts in a later year and offered such amount to tax in that year.

(iii) Cash credits—Section 68

An addition of Rs. 60 lakhs was made as unexplained cash credits and confirmed in first appeal on disbelieving the version of the assessee that this amount of Rs. 60 lakhs was deposited by his mother out of sale of a property for a consideration of Rs. 74 lakhs. The mother had not accounted the sale in her return. The conveyance deed also showed consideration only of Rs. 14 lakhs, which was confirmed by the purchaser. But the Tribunal found that the assessee had meanwhile filed a return admitting the additional amount, so that the addition confirmed in first appeal was reversed by the Tribunal. The High Court, in *CIT* v. *Harri Joseph* [2019] 415 ITR 181 (Ker), however, found the story of borrowing of Rs. 50 lakhs from the mother sought to be supported by her return only after having been questioned, when the mother had not voluntarily returned the corresponding capital gains in her own case, the amount remained undisclosed by the assessee. The benefit of admission after six years by the mother admitting the income could not have been accepted. The Supreme Court has dismissed special leave petition filed by the assessee against this decision [2019] 414 ITR (St.) 8.

In another case, where the assessee had credited itself with cash sales to the extent of Rs. 3.12 crores only for one month in September 2006 during the year, while cash sales were mere Rs. 1.94 crores for the same month in 2007, the assessee's version was disbelieved and additions were made and concurrently upheld in first appeal and the Tribunal. It was under these circumstances, the argument of the assessee before the High Court that the additions were not sustainable on the ground that the assessee's accounts have not been rejected was raised, but found unacceptable as there was no satisfactory explanation for such extent of cash sales only during a particular month during the year rendering the assessee's story improbable. It was under these circumstances, the additions sustained by the Tribunal was upheld by the High Court in *J. M. J. Essential Oil Company* v. *CIT* [2019] 415 ITR 17 (HP) following *CIT* v. *Reliance Petroproducts P. Ltd.* [2010] 322 ITR 158 (SC).

Where the explanation for cash credit was concurrently accepted in first appeal and the Tribunal especially in the context of the fact that similar explanation for such an addition for preceding years was accepted by the Assessing Officer himself and the Settlement Commission, it was held that no question of law arises out of the Tribunal order, so that the Departmental appeal was accordingly dismissed by the High Court in *CIT* v. *T. B. Kunhimahin Haji* [2019] 415 ITR 491 (Ker).

(iv) Interest relating to enhanced compensation

Interest relating to enhanced compensation for compulsory acquisition of land is not interest in its ordinary sense under section 2(28A) of the Act, which no doubt widens the scope of the term "interest". But the cumulative effect of section 56(2)(vii) and section 145A(b) would be that it is not an income in its ordinary sense to be taxable as interest income, so that it has to be taxed as income from other sources in the year of receipt as held in *Puneet Singh* v. *CIT* [2019] 415 ITR 215 (P&H).

(v) Undisclosed income

Where the amounts deposited in cash of Rs. 20,49,420 and Rs. 14.4 lakhs in his bank account was explained by the assessee as made out of his salary income, which was his only source, the entire amounts were added by the Assessing Officer and the additions were affirmed in first appeal. The Tribunal, however, reappreciated the evidence and reduced the addition by Rs. 5 lakhs out of the first addition, while retaining the second addition of Rs.14.4 lakhs. The matter was taken up by the assessee in *Parveen Kumar* v. *CIT* [2019] 415 ITR 241 (P&H) to the High Court. Where the Tribunal affirmed the addition of Rs. 15,49,420 after reduction of Rs. 5 lakhs on the

finding that Rs. 14,40,000 was made in a joint bank account of the assessee and his maternal grandfather in cash, which was found to be not satisfactorily explained, so as to be unacceptable on such a self-serving capital account considering his meagre rental income of only Rs. 3,630 per month. Since the view taken by the Tribunal was a possible view, the additions affirmed by the Tribunal were sustained since evidence considered by the Tribunal could not be further reappreciated. It was in this context, the assessee's appeal was dismissed.

International taxation

(i) Determination of arm's length price

Any decision of the Tribunal as regards determination of arm's length price in an international transaction should be treated as one on fact including the circumstances when the issue raised is whether certain comparables were rightly accepted or otherwise. Since the finding is one on fact, there can never be a substantial question of law to deal with such complaints as held in *Pr. CIT* v. *GXS India Technology Centre Pvt. Ltd.* [2019] 415 ITR 354 (Karn) following the decision in *CIT* v. *HCL Technologies Ltd.* [2018] 404 ITR 719 (SC) affirming the decision in *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98 (Karn). It was further pointed out that in such cases unless there is ex facie perversity in the finding of the Tribunal, the court would not interfere. Only circumstances like treaty shopping, base erosion and profit shifting (BEPS) and transfer of shares in tax havens as in *Vodafone's* case, would warrant interference of the High Court and not otherwise. A mere dissatisfaction with the finding of facts by the Tribunal can hardly ever constitute sufficient cause for the court to interfere.

(ii) TDS

Where the assessee-bank engaged in banking business governed by the Banking Regulation Act, 1949 raised capital abroad by issue of Global Depository Receipts engaging a bank in UAE for providing the necessary services and to act as a global co-ordinator and lead manager of the bonds resulting in successful realization of 5.17 crores in US Dollars against which the UAE agency was paid USD 20,09,293, which in Indian rupees amounted to Rs. 90.83 lakhs. The Assessing Officer felt that tax was required to be deducted at source from this payment, a view affirmed in first appeal, but the Tribunal allowed the assessee's appeal and the High Court endorsed the Tribunal's conclusion pointing out that the services of the UAE bank were rendered outside India with collections too

outside India. The services were purely commercial in nature, so that they could not be brought within the meaning of the expression "technical service", so as to attract section 9(1)(vii)(b) read with *Explanation* to section 9. It was so decided in *CIT (IT)* v. *IndusInd Bank Ltd.* [2019] 415 ITR 115 (Bom).

Charities

(i) Cancellation of registration

Where registration already granted to a society as a charitable institution was cancelled for the reason that the acceptance by the assessee of a bid for execution of work awarded by the Railways in a competitive tender was treated as commercial in character, though the tender was mainly for helping poor and the marginalised sections for obtaining employment as an activity in the nature of a general public utility for encouraging employment of poor person, so that this object was specifically added on to its objects. But the Commissioner felt that this activity was not in pursuance of an object of public charitable activity and consequently cancelled the registration. The argument of the Revenue that the utilisation of the amounts of Rs. 3 and 4 crores for the two years 2008-09 and 2009-10 was an infringement of second proviso to section 2(15) because the limit in the then second proviso provided for the aggregate value of the receipts from the activities referred to therein at Rs. 25 lakhs or less. The matter was taken up by the assessee to the Tribunal, on the ground that the provision related to monetary limits, which may be relevant for exemption and not for registration or its cancellation and that the assessee-society, however, continued to be eligible for exemption with reference to its activities. The object of providing employment to the poor has always been its object and that this object was so far not faulted. The Tribunal, therefore, remanded the matter to consider the monetary limit afresh. The matter was taken up to the High Court by the Revenue. Meanwhile the assessee submitted miscellaneous application to the Tribunal, pointing out that its activity to help the poor was also covered by the object of poor relief, so that it should qualify for exemption, if not on the ground of being an object of general public utility at least on the ground of relief of poor. The Tribunal on the miscellaneous application withdrew its earlier order and posted the case for fresh hearing. Meanwhile, the assessee had also filed an appeal before the High Court against the Tribunal's order. This appeal was admitted by the High Court, so that there was a further argument on behalf of the Revenue that the miscellaneous petition was not maintainable. It was further argued that the argument that all those who secured employment were not shown

to be poor and that mere assertion on the part of the assessee in this regard could not be accepted. The High Court, in *Mahatma Gandhi Charitable Society* v. *CIT* [2019] 415 ITR 27 (Ker), surprisingly reversed the order of the Tribunal, which was only one of remand. After an elaborate review of the case law on the subject, it was found by the High Court that the participation in railway tender itself did not fall under any of the objects of its memorandum of association. Provision for employment is only an incidental and not a necessary corollary to execution of the contract with the Indian railways. The participation in the contract was, therefore, held to be not a charitable one, so that the order of the Tribunal was upheld and the assessee's appeal was dismissed as the Tribunal's order was not perverse in any manner. More surprisingly, the High Court also found that there was no question of law arising from the Tribunal's order, while the issue posed was one of law. This is an instance of the law going astray, whoever may be responsible for the outcome.

(ii) Exemption

An educational institution to be accepted for exemption under section 10(23C) must exist solely for the purpose of education. Where a charitable trust has other objects as well, comparison between section 10(23C)(iiiad) and (vi) of the Income-tax Act, 1961 indicate the following principles :

(i) An institution solely engaged in education does not lose the right to exemption merely because it has been making profit.

(ii) The predominant object should be education.

(iii) Where the purpose is imparting education, a mere surplus is not vulnerable.

(iv) Distinction must be made between a mere surplus and profit. Profit may be vulnerable, but not a surplus which is incidental.

(v) The ultimate test depends upon the overall inference, whether the object is to make profit rather than one of providing education.

It is in the light of the above tests, the High Court, in *Chief CIT* v. *J. B. Memorial Manas Academy Management Society* [2019] 415 ITR 271 (Uttarakhand), after referring to the guidelines as above and the decisions from the Supreme Court on the basis of which these guidelines have been drawn as in *American Hotel and Lodging Association Educational Institute* v. *CBDT* [2008] 301 ITR 86 (SC) and *Queen's Educational Society* v. *CIT* [2015] 372 ITR 699 (SC), found that in view of various other objects other than education in the case before it, it was not possible to infer that it was meant solely for purpose of education, so as to fall within the requirement

of section 10(23C)(vi), so that the claim for exemption under this section was rejected by a single judge on a writ petition, though exemption was granted for income from educational activity. The High Court, however, found in the light of the two decisions of the Supreme Court referred to, there was no case only for partial exemption, so that the order of the single judge was set aside and matter remanded to the Department to reconsider the matter in the light of the aforesaid judgments.

(iii) Computation of income for meeting the requirement of 85 per cent. utilisation of the income for exemption

The income, that is required to be computed for a charitable trust or institution should be based upon commercial principles after providing for normal depreciation as was pointed out in *Pr. CIT(E)* v. *Manipal Academy of Higher Education* [2019] 415 ITR 361 (Karn) following *CIT* v. *Rajasthan and Gujarati Charitable Foundation* [2018] 402 ITR 441 (SC). It has been so conceded as well by the Board Circular No. 5P of 1968 dated June 9, 1968, as was pointed out in *CIT* v. *Society of the Sisters of St. Anne* [1984] 146 ITR 28 (Karn).

In the same case, it was also decided that the adjustment is permissible in respect of disallowed expenses in earlier years to be considered in a later year when the related income arises following *CIT (E)* v. *Ohio University Christ College* [2018] 408 ITR 352 (Karn).

Depreciation *v.* special deduction under section 24

An assessee's claim for depreciation was allowed on its income from house property assessed under the head income from business. The claim for special deduction under section 24 on the same income from house property was disallowed by the Assessing Officer as a claim for double deduction. This disallowance was confirmed in first appeal and the Tribunal. The High Court, in *Shri Hardoi Baba Roller Flour Mills Pvt. Ltd.* v. *CIT* [2019] 415 ITR 498 (All), held that the authorities were justified in rejecting the claim of deduction under section 24 as more than one deduction is not permissible against the same income following *Raj Dadarkar and Associates* v. *Asst. CIT* [2017] 394 ITR 592 (SC).

Business loss

(i) Is admissible

An amount of about Rs. 1.86 crores written off as bad debt by the assessee was the amount embezzled by a director representing workmen on the Board of the company. A criminal prosecution against the director was

pending in the court. The Tribunal had found that though the amount was not allowable as bad debt, there is no reason why it should not be allowed as business loss. On Departmental appeal, the High Court held that the outcome of the pending criminal prosecution need not make any difference to the finding of the Tribunal in this case because the actual loss suffered by the company was admissible as a deduction and this finding of the Tribunal does not give rise to any question of law for the High Court for interference as decided in *Pr. CIT* v. *Saravana Selvarathnam Trading and Manufacturing Pvt. Ltd.* [2019] 415 ITR 146 (Mad).

In another case in *CIT* v. *Chandragiri Construction Co.* [2019] 415 ITR 63 (Ker), a question had arisen as to the loss suffered in consequence of enforcement of bank guarantee given by it to the bank in respect of a contract, which was financed by the bank. The amount lost on encashment of bank guarantee was held to be a deductible business loss.

(ii) Not admissible

An assessee purchased an asset under an agreement and was put in its possession, but as he did not satisfy the conditions of the agreement, he had to forfeit the amount paid by him as advance . Though the amount paid in advance was Rs. 30 lakhs, the forfeiture was of Rs. 90 lakhs being the sum so far paid at the time of default of the purchaser. His claim that the payment should be treated as rental charges as he was in possession during the period, so as to be deductible, was found by the High Court to be unacceptable since the agreement did not provide for permissive use of the property on payment of rent, so that the forfeiture was held justified and that being a capital loss was not deductible as business loss as was also decided in *Nandkishor Motilal Shah* v. *CIT* [2019] 415 ITR 429 (Bom).

Business expenditure

(i) Interest on borrowed funds under section 36(1)(iii)

The assessee purchased a piece of land for Rs. 1 crore as found from a document during search at a price of Rs. 11.05 crores per acre, while it was accounted at Rs. 1 crore per acre. There was corresponding borrowing by the assessee at 12 per cent., which was also disallowed to the extent of excess payment under section 36(1)(iii). The assessee's first appeal was allowed as the photocopy of agreement for sale had not been disproved by any positive evidence. But interest claim was found to be unjustified and the photocopy itself was not capable of being accepted in the absence of original copy, which was not seized during search. The Tribunal held that

the understatement of consideration was not proved following *K. P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC), but the High Court in *Pr. CIT* v. *Kulwinder Singh* [2019] 415 ITR 49 (P&H) upheld the restriction of disallowance of interest.

(ii) Disallowance of partial claim

The assessee's occupation was that of an agent for recruitment of students for colleges in Australia for which she charged a commission, the receipts during the year were Rs. 1.78 crores and the expenses were Rs. 81 lakhs being the commission paid for those, who referred the students to her. A complete list of number of students and commission earned was not furnished on the ground that the computer holding the data had crashed. This version was not accepted since, in spite of two opportunities, the assessee was able to produce only 21 persons out of 43 from whom she claimed to have received commission, so that only 50 per cent. of the claim of expenses was found admissible. Since the disallowance was upheld concurrently in first appeal and the Tribunal, the matter came before the High Court in *Smt. Malti Gupta* v. *CIT* [2019] 415 ITR 168 (P&H), wherein it was found that partial disallowance for lack of proof at 50 per cent. in this case was justified in absence of any infirmity in the order passed by the Tribunal and that there was no substantial question of law arising out of appeal, so that the assessee's appeal stood dismissed.

(iii) Cost of replacement

An assessee engaged in manufacture of yarn had replaced an old machinery by a new one claiming the cost as a revenue expenditure. The claim was found admissible in *CIT* v. *Kongarar Spinners Ltd.* [2019] 415 ITR 103 (Mad) following *CIT* v. *Sarangpur Cotton Mfg. Co. Ltd.* [2017] 393 ITR 108 (SC). The precedent mentioned requires some clarification. The decision of the Supreme Court in *Sarangpur Cotton Mfg. Co. Ltd.'s* case (supra) deals with replacement of machinery relating to expenditure on conversion materials, etc., and should be treated as current repairs in the case of a textile mill with a number of divisions performing different functions. As for the decision in *Kongarar Spinners Ltd.'s* case *(supra)*, it relates to a case where replacement of old machinery by a new one in the case of a spinning mill. The decision was actually in favour of the Revenue on the inference that it was capital expenditure. The decision under the comment should, therefore, be understood in the light of the above clarification.

(iv) Section 43B

An amount of unpaid service tax in respect of detection and security services rendered by the assessee to its clients, being a tax, was admissible as deduction only on payment under section 43B, so that it was disallowed by the Assessing Officer. But in first appeal, it was found that the payment was due only when the amount is collected from the customers, while the Tribunal found that it was included in the bill raised on the customers, so that the order in first appeal was confirmed. The High Court upheld the Tribunal order dismissing the Departmental appeal in the view that service tax debited to profit and loss account but not credited to the Central Government by the assessee does not fall within the purview of section 43B because liability to pay service tax into the Treasury arose only when the assessee has received the funds and not otherwise. On this view, it was held that no question of law arose for the High Court to interfere. In coming to the conclusion, the High Court, in *Pr. CIT* v. *Tops Security Ltd.* [2019] 415 ITR 212 (Bom), followed its own decision in *CIT* v. *Ovira Logistics P. Ltd.* [2015] 377 ITR 129 (Bom). Special leave filed by the Department against this decision was dismissed by the Supreme Court [2019] 412 ITR (St.) 30.

(v) Year to which it relates

Disputes often arise, as to the year in which a claim which is admittedly deductible relates. Such an issue may be relevant in a case, where rates of tax are different in different years. When the rate of tax is same in whichever year the deduction is allowed, the issue becomes academic, so that such issues do not give rise to any substantial question of law for the High Court to take up the matter of adjudication in such cases as decided in a group of two cases in *Pr. CIT* v. *Rajesh Prakash Timblo* [2019] 415 ITR 334 (Bom) following *CIT* v. *Nagri Mills Co. Ltd.* [1958] 33 ITR 681 (Bom), *CIT* v. *Aditya Builders* [2015] 378 ITR 75 (Bom), *CIT* v. *Triveni Engineering and Industries Ltd.* [2011] 336 ITR 374 (Delhi) and *CIT* v. *Gujarat State Forest Development* [2007] 288 ITR 28 (Guj).

Capital gains

(i) Retirement of a partner

A settlement between the partners consequent on retirement of a partner does not, by itself, constitute transfer, notwithstanding the inter se adjustments of capital as between them. Such an arrangement was found only to lead to the inference of reconstitution of the firm even where two new partners were admitted with one pre-existing partner retiring from the

firm. It is because the assets of the firm continued with the firm before and after the reconstitution, so that there is no scope for inference of transfer. There had only been a revision of rights in accordance with their respective entitlement of their shares in the partnership. It is only where the assets of the firm are distributed to partners, liability is now specifically imposed under section 45(4) inserted by the Finance Act, 1987 in respect of assets distributed to the partners with effect from April 1, 1988. The High Court in *National Co.* v. *Asst. CIT* [2019] 415 ITR 5 (Mad) had, therefore, no difficulty in allowing the assessee's appeal holding that there was no liability as there was no element of transfer in a reconstitution following *CIT* v. *R. Lingamallu Raghukumar* [2001] 247 ITR 801 (SC) and *CIT* v. *Kunnamkulam Mill Board* [2002] 257 ITR 544 (Ker).

(ii) Reference to valuation officer

Where an assessee and his son purchased land in the same survey number and sold them on the same day, it was the assessee's case that the instance in one supported the other as regards the price paid. Since, however, the Assessing Officer had a different view as regards the stamp value, which according to him was less than fair market value, he adopted his estimate declining to make a reference to Valuation Officer as required under section 55A, as this instance is not covered by section 50C. As a result, no reference was made and his order was upheld in *C. V. Sunny* v. *CIT* [2019] 415 ITR 127 (Ker) following *Dilip N. Shroff* v. *Jt. CIT* [2007] 291 ITR 519 (SC).

In the same case, there was a different piece of land falling in the same survey number belonging to the assessee, his wife and son purchased on the same day at the same price in 1975. The assessee and his son sold their land on January 19, 2006 at the same price. The assessee had claimed the benefit of option to adopt the cost as on April 1, 1981 in respect of assets acquired before this date, so that the cost estimated was Rs. 1,15,385 for each cent by the assessee but revised by the assessee himself to Rs. 94,132 per cent. Even this reduced cost was not accepted. The Assessing Officer had found that the assessee's son had estimated value as on April 1, 1981 at Rs. 1,000 per cent, which formed the basis of the Assessing Officer's estimate in the cases of his parents. The assessee, however, questioned the value but it was affirmed in first appeal. The Tribunal found that the sale of land by the assessee's son was a court-approved sale, so that the facts, which were relevant for the court before it, could not have been automatically adopted in the assessee's case. It is in this view that the rate adopted by the Assessing Officer and in first appeal, was approved by the Tribunal.

When the matter went up to the High Court on the assessee's appeal, it was pointed out that in such cases, reference should have been made to Valuation Officer under section 55A. The fact of the court-approved sale by the son was a matter, which was available for the first time before the Tribunal. The facts were even otherwise different. The assessee had produced valuation report from a registered valuer, while the son did not. The assumption of the Assessing Officer, upheld in first appeal, that Rs. 1,000 per cent was about the same as the price fixed in the court-approved sale in the case of the son could not be accepted, when the assessee had supported the value with reference to a registered valuer report filed by him, so that the Assessing Officer was not justified in adopting the value, which he did, so that the High Court allowed the assessee's appeal setting aside the Tribunal's order and remitting the matter to the Assessing Officer for a reference to the Valuation Officer under section 55A.

(iii) On sale of agricultural land

Where the assessee had purchased land from land owners interface but converted them for non-agricultural use and sold them to companies in real estate business in which the assessee was a director, it was the assessee's case that the intention was to maintain the land as agricultural and, in fact, quite a few of them had been sold as agricultural land by the real estate dealer on resale. It was inferred by the Tribunal that the intention was to resell the land within a short period for real estate business, so that conversion to non-agricultural land was not material for inference of non-agricultural land in the assessee's hands. In the light of the assessee's intention to retain the property as agricultural land for purposes of his business, the Tribunal order reversed the concurrent view in favour of the assessee that irrespective of the character of land, the fact that it was clearly a business asset justifies the inference of liability. The High Court upheld the finding as one decided on facts after application of mind to the factual materials, so that no substantial question of law arose as decided in *Sunil Bansal* v. *Asst. CIT* [2019] 415 ITR 236 (Raj) following *Raja Bahadur Kamakhya Narain Singh* v. *CIT* [1970] 77 ITR 253 (SC) and some other judgments, which required the nature of transactions to be a decisive factor and that the primary intention of the statute should be a liberal one. This argument was not acceptable as the Tribunal while upholding the order in first appeal had considered the nature of transactions in respect of period of holding over a period of time besides sale and purchase activities, so that its decision could not be faulted.

What is manufacture ?

Conversion of Benzarone crude to Benzarone pure

The assessee was a manufacturer and exporter of bulk drugs, who claimed the benefit of manufacture of a chemical for export under section 10B. The Department's view was that every change does not constitute manufacture, unless a different marketable commodity has been produced. If the identity and character remains the same, there is neither manufacture nor production to justify the relief. The assessee in this case was exporter and manufacturer of bulk drugs with part of the manufacture done at Ankleshwar unit, processing semi-finished goods received from other units. According to the Commissioner (Appeals), the procedure involved was only of purification of Benzarone crude to Benzarone pure and that no chemical conversion had taken place in the process. The assessee had not proved that a different commercial product has emerged. The claim for relief under section 10B was, therefore, denied. However, the High Court after review of precedents held that the modification from crude Benzarone to a pure one did not involve a conversion to constitute manufacture or production. In respect of the product BFX-P, where manufacturing process was inferred by the Tribunal from a chart filed, claiming to show conversion in the movement of work-in-progress, the relief was found admissible by the Tribunal, but this inference was also reversed for this product as well, in *Pr. CIT* v. *Tonira Pharma Ltd.* [2019] 415 ITR 503 (Guj).

Incentive deductions

(i) Section 10A

Relief for export under section 10A is not confined to export of goods belonging to the exporter. Even where export though not made directly by him but through other exporters after fulfilling all the necessary conditions for purposes of export relief, the assessee was held entitled to relief under section 10A in the light of the object of the relief, where all the three conditions required for relief are satisfied under section 10A, viz., (i) the export must be made by the assessee of specified goods ; (ii) as long as the export is made, it makes no difference, whether it is made directly or through other exporters as long as the conditions therefor are satisfied ; and (iii) the sale proceeds are received in foreign exchange brought into India. The assessee becomes entitled to relief in such cases, where all these three conditions are satisfied as held in *Pr. CIT* v. *Broadcom India Pvt. Ltd.* [2019] 415 ITR 380 (Karn) following *CIT* v. *HCL*

Technologies Ltd. [2018] 404 ITR 719 (SC). The High Court found there was no perversity in the order of the Tribunal in granting relief in this case, so as to justify its interference.

(ii) Section 80HHC

Section 80HHC provides a formula for computation of eligible deduction meant for export profits with reference to the turnover of exports as denominator and the expenditure relating to such exports as numerator. Where the expenditure included what was expended on scientific research admissible under section 80GGA, it was claimed by the assessee to require exclusion, so that the deduction does not get reduced. Since the amount received under section 80GGA has the nature of donation, it cannot be treated as expenditure under section 35(1)(ii), so that the assessee's claim was found acceptable in *Sri Aurobindo Ashram Harpagon Workshop Trust* v. *Dy. CIT* [2019] 415 ITR 247 (Mad) following *IPCA Laboratory Ltd.* v. *Dy. CIT* [2004] 266 ITR 521 (SC).

(iii) Section 80-IA

A dispute related to the claim for exemption for infrastructure development under section 80-IA in respect of a railway contract. The claim was denied on the ground that there was no direct contract as between the assessee and either railways or the Central Government, so as to satisfy the requirement of section 80-IA(4), so that the exemption for profits from laying down railway track, sidings, etc., was disallowed by the Assessing Officer. But the Tribunal found that the Department had impliedly accepted that the assessee had provided infrastructure facility for maintenance of rail system, which enabled transport of lignite. The High Court upheld the Tribunal order that the assessee was a recognised contractor for the Railways and that the project was one of infrastructure development. Section 80-IA(4) does not specifically provide for a direct agreement as wrongly understood by the Assessing Officer. As long as the contract was duly recognised by the Railways for operation and maintenance of railway sidings between two railways stations, which constituted an infrastructure, the finding of the Tribunal was found to be unassailable by the High Court in *CIT* v. *Chettinad Lignite Transport Services Pvt. Ltd.* [2019] 415 ITR 107 (Mad). The reliance placed by the Revenue in *Covanta Samalpatti Operating Pvt. Ltd.* v. *Asst. CIT* [2018] 11 ITR-OL 604 (Mad) was found to be mistaken as it was clearly distinguishable in relating to a claim of a mere contractor for whom the benefit of the provision is not meant.

(iv) Section 80-IB

An assessee is entitled to relief under section 80-IB on its income from an industrial undertaking engaged in infrastructure development in manufacture of pig iron. The claim for relief had given rise to a dispute as to whether profit from sale of slag could be accepted as a by-product, so that profit therefrom can also be part of exempt income. It was decided by the Supreme Court in *Liberty India* v. CIT [2009] 317 ITR 218 (SC), that interpretation of relief for direct deductions under Chapter VI-A is different from those, which provides for determination of eligible profits to be ascertained according to prescribed procedure. It was pointed out that where the language used is "derived from", it has to be understood more strictly, than where the expression used is "attributable to". It is in this context, the claim of the assessee for exemption of profit from slag claimed by way of revised return under section 80-IB was disallowed by the Assessing Officer and such disallowance was confirmed because of the difference between sale of pig iron and slag. The Tribunal affirmed this finding in first appeal. But the High Court found the Tribunal's judgment perverse sinceslag obtained from manufacture of pig iron should qualify for consideration as an integral part of pig iron manufacture, which is undoubtedly eligible for relief as decided by the High Court in *Sesa Industries Ltd.* v. *CIT* [2019] 415 ITR 257 (Bom) following *CIT* v. *Vidyut Corporation* [2010] 324 ITR 221 (Bom).

Book profits tax

Section 115JA/115JB

Where the assessee had made long-term capital gains but availed of the benefit of investment in specified bonds under section 54EC, the question arises whether the exemption under section 54EC could have any relevance to the computation of book profits under section 115JA/115JB. While the claim was allowed in first appeal, the Tribunal upheld the decision for a different reason that capital gains do not form part of book profits, so that it need not be taken into account. In *CIT* v. *Metal and Chromium Plater (P) Ltd.* [2019] 415 ITR 123 (Mad), the High Court dismissed the Departmental appeal taking the view that the adjusted book profits at any rate would have the benefit of other provisions including section 54EC in computation of book profits under section 115JB distinguishing the decisions in *Apollo Tyres Ltd.* v. *CIT* [2002] 255 ITR 273 (SC), *CIT* v. *Veekaylal Investment Co. (P) Ltd.* [2001] 249 ITR 597 (Bom) and *N. J. Jose and Co. (P) Ltd.* v. *Asst. CIT* [2010] 321 ITR 132 (Ker) on the ground that these cases

related to section 115J, so as to be inapplicable in view of the different language in the provisions for computation of book profits in relation to capital gains under sections 115JA and 115JB.

An assessee, who had incurred an expenditure on purchase of land to the extent of Rs. 6.12 crores and had amortised the expenditure over the years vide AS 6, and in compliance with Companies Act, 1956, all the same, claimed depreciation on land for income-tax purposes, it was declined by the Assessing Officer. However, the accounts were audited by Comptroller and Auditor General, who had approved amortization, so that the write-off for this year was held justified by the Tribunal, while incidentally deleting the disallowance of loss in hedging transactions as well as the consequent addition under section 14A. The High Court dismissed the further appeal by the Department on these grounds in *CIT* v. *NHPC Ltd.* [2019] 415 ITR 321 (P&H) following *Apollo Tyres Ltd.* v. *CIT* [2002] 255 ITR 273 (SC). It was also incidentally observed that loss in hedging transactions was deductible in computation of book profits following *CIT* v. *Woodward Governor India P. Ltd.* [2009] 312 ITR 254 (SC).

In the same case, disallowance under section 14A in respect of investments in subsidiaries from which the assessee earned as much as Rs. 36.06 crores as dividend was also held to be not justified as the assessee had interest-free funds to the extent of Rs. 17,275 crores as against the investments in subsidiaries to the extent of only Rs. 1,014 crores from which the assessee had derived dividend of Rs. 36.06 crores. The deletion of disallowance under section 14A was upheld by the High Court in this case following *CIT* v. *Max India Ltd. (No. 2)* [2016] 388 ITR 81 (P&H). It was also incidentally decided in the same case, the disallowance of advance against depreciation was not justified in computation of taxable book profits under section 115JB.

Assessment

Insurance business

Income of insurance business is computed as per the First Schedule of the Income-tax Act along with the provisions of the Insurance Act, 1938 and Insurance Regulatory and Development Authority, 1999 and their regulations with the taxable surplus being based upon actuarial valuation after adjustments in Form 1 as pointed out by the Supreme Court in *Life Insurance Corporation* v. *CIT* [1964] 51 ITR 773 (SC). Where the authorities had followed this law, the Tribunal had upheld the computation, but a dispute had arisen because of 100 per cent. depreciation in computation

of net surplus giving rise to the question, whether the surplus in shareholders' account was only a part of income from insurance business. Where it was accepted as a part by the Tribunal along with right to 100 per cent. depreciation, the High Court in *Pr. CIT* v. *ICICI Prudential Life Insurance Co. Ltd.* [2019] 415 ITR 389 (Bom), upheld the deletion of the addition for 100 per cent. depreciation and the computation of net surplus. The Supreme Court, however, has granted special leave to the Department [2019] 411 ITR (St.) 39. As regards a new issue not raised before the Tribunal but covered in favour of the assessee is one following *CIT* v. *Tata Chemicals Ltd.* [2002] 256 ITR 395 (Bom), on a matter listed to be heard along with other appeals on the same issue.

Reassessment

(i) Valid

Where the assessee had assigned its right to receive subscriptions towards share-application money to the family trust of the promoter/founder of the company, but such right was not exercised in favour of the trust even after four years, reopening of the assessment for the year of assignment of the right, so as to tax the right to receive the share application moneys was held justified by initiation of reassessment proceedings as was decided in *Max Ventures Investments Holdings Pvt. Ltd.* v. *ITO* [2019] 415 ITR 395 (Delhi) following *Phool Chand Bajrang Lal* v. *ITO* [1993] 203 ITR 456 (SC).

A survey report in another case containing information relevant to the assessee referring to certain transactions shown by the assessee to be bogus, the initiation of reassessment proceedings on the exercise of belief on such materials was held justified for the Assessing Officer to initiate reassessment proceedings in *Sanjivani Non-Ferrous Trading Pvt. Ltd.* v. *ITO* [2019] 415 ITR 485 (Delhi) after review of case law on the subject.

(ii) Not valid

The law exempts a charitable trust or institution on registration under section 12A/12AA or on approval under section 10(23C)(iv),(v), (vi) or (via). In *Areez Khambatta Benevolent Trust* v. *Dy. CIT(E)* [2019] 415 ITR 70 (Guj), the assessee a public charitable trust had made a payment for purchase of Linac machine for a hospital. Though the exemption for the assessee was initially allowed, it was sought to be withdrawn as the recipient hospital was neither registered under section 12AA or approved under section 10(23C). But it was found by the High Court that the recorded reasons for reopening the assessment did not have any

material to justify the formation of belief on the part of the Assessing Officer that this donation of Rs. 3 crores to hospital has violated any of the provisions relating to exemption for the trust under section 11 except for non-registration under section 12AA and non-approval under section 10(23C) read with section 11(3)(d), which requires utilisation of the exempt income for charitable purposes under sections 11 to 13. The fact that the hospital was not registered under section 12AA or exempt under section 10(23C) was the sole reason for denial of exemption. The allegation of violation of section 11(2) read with section 11(3)(d) was not a matter, which formed the belief in the recorded reason for reassessment, so that on the basis of recorded reason, there could not have been any belief to justify rejection of exemption in a reassessment as decided in this case considering the fact that exemption was allowed, when all the facts had been made available in the original assessment. For the proposition that the recorded reasons were material for jurisdiction, the High Court followed the decisions in *Dhruv Parulbhai Patel* v. *Asst. CIT* [2014] 367 ITR 234 (Guj) and *Aayojan Developers* v. *ITO* [2011] 335 ITR 234 (Guj).

In another case, the assessee, a manufacturer and dealer declared book profits of Rs. 23,22,62,069 as against nil profit computed under normal provisions, but the Assessing Officer computed the income under normal provisions at Rs. 23,80,65,281. The assessment was, however, subject to reassessment under section 147 on the ground that there was failure to disallow a claim on account of loss on sale of stores. While the reassessment was confirmed in first appeal, the Tribunal found that the reassessment was based upon mere change of opinion as the loss on sale of stores was explained during the original assessment and no addition was made apparently because the explanation was accepted. It was under these circumstances, reassessment on mere change of opinion was held impermissible in *Pr. CIT* v. *Atul Ltd.* [2019] 415 ITR 1 (Guj) following *Gujarat Power Corporation Ltd.* v. *Asst. CIT* [2013] 350 ITR 266 (Guj).

Where sundry credit amounts shown by the assessee, it was felt, were not verified in the original assessment under section 143(3) pursuant to a survey under section 133A, notice under section 148 was issued in respect of two of the sundry creditors, which had been accepted without confirmation or verification. Since the original assessment was after scrutiny, there could have been no reassessment on mere change of opinion as was held in this case. It is interesting to note that the High Court in this

case in *Pawan Sood* v. *ITO* [2019] 415 ITR 350 (All) following *State of Uttar Pradesh* v. *Aryaverth Chawl Udyoug* [2016] 91 VST 1 (SC) observed even if there had been an omission by way of non-application of mind in the original assessment, initiation of reassessment does not always follow.

Where the assessee in hospitality business declared a loss, the Assessing Officer issued notice under section 148 questioning the provisions in respect of fixed assets and loans and advances besides a write-off on account of misappropriation. Notice under section 148 was issued as the provisions made were for unascertained liability, but it was found that the assessee had disclosed all material facts with no omission of any tangible material, so as to justify reassessment, so that reassessment notice was quashed in *IHHR Hospitality Pvt. Ltd.* v. *Addl. CIT* [2019] 415 ITR 459 (Delhi) following *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC).

Post-search assessment

Section 158BC

Action was taken under section 158BC against an assessee in consequence of information gathered during a search in his father-in-law's premises indicating his investment in a property jointly owned by the assessee and his wife. The cost of construction as per the information gathered in search was different from what was accounted, so that an addition was made, which was contested on first appeal on the ground that the matter of cost of construction would not form part of undisclosed income falling under the jurisdiction of section 158BC in the context of the fact that the construction as investment had been disclosed in the regular assessment. The addition was reduced in first appeal and such amount as reduced was approved by the Tribunal. The matter of jurisdiction raised by the assessee on the ground that it was not a material found at the time of search was not adjudicated upon. The High Court, therefore, in *Babu Manoharan* v. *Dy. CIT* [2019] 415 ITR 83 (Mad) allowed the assessee's appeal as it had found that a valuation report had been called for from the Departmental Valuer, so that such valuation report prepared much earlier to the search could not have been ignored. It was also found that the alleged incriminating material recovered during search was not put to the assessee for rebuttal. The valuer's report, which was different, estimates only a probable cost of construction. It is under these circumstances, non-filing of return could not be faulted in the absence of material to justify notice itself under section 158BC, so that

non-filing of the return by the assessee especially since he had time still available, could have also not been faulted. The order of the Tribunal upholding estimate of undisclosed income as found during search was, therefore, found to be not valid. It was further found that a difference between the cost that was admitted and returned was less than four per cent. while 15 per cent. margin is usually permitted for possible variation in estimates as in *Bimla Singh* v. *CIT* [2009] 308 ITR 71 (Patna). The other cases which were also followed were *CIT* v. *Ashok Khetrapal* [2007] 294 ITR 143 (Delhi), *CIT* v. *Khushlal Chand Nirmal Kumar* [2003] 263 ITR 77 (MP), *CIT* v. *Manoj Jain* [2006] 287 ITR 285 (Delhi), *CIT* v. *Puneet Sabharwal* [2011] 338 ITR 485 (Delhi) and *CIT* v. *S.V.Sreenivasan* [2018] 404 ITR 433 (Mad).

Recovery of tax

(i) Priority for secured creditors over State dues

State dues have priority between contesting claims against a defaulter. But a guarantor's right over the collateral offered to the bank overrides the State dues since a secured creditor has a priority of charge even over income-tax dues as was decided in *State Bank of India* v. *Tax Recovery Officer (TDS)* [2019] 415 ITR 370 (Mad) following *ICICI Bank Ltd.* v. *Official Liquidator, High Court, Madras* [2005] 124 Comp Cas 550 (Mad), *Stock Exchange, Bombay* v. *V. S. Kandalgaonkar* [2014] 187 Comp Cas 143 (SC) ; [2014] 368 ITR 296 (SC), *Principal CIT* v. *Monnet Ispat and Energy Ltd.* [2018] 211 Comp Cas 99 (SC) ; [2018] 12 ITR-OL 281 (SC) and *Well Stores (Madras) P. Ltd./Asset Reconstruction Co. (India) Ltd.* v. *Tax Recovery Officer* [2018] 2 Comp Cas-OL 406 (Mad).

(ii) Stay of disputed demand

Where the assessee entitled to a refund, had not made payment for dues of other years attributing non-payment on dues to the refund. The assessee's objection should have been heard by the Assessing Officer. But the Assessing Officer ignored the same and attached the assessee's property, which according to the Revenue was only provisional to safeguard the interest of the Revenue. It was decided that the attachment without considering the assessee's objection was unsustainable. There was no basis for apprehension of non-recovery. The assessee had meanwhile obtained a stay order from Commissioner (Appeals) as well. The High Court under these circumstances, while criticizing the unfair treatment accorded to the assessee, allowed the assessee's appeal with payment of cost of Rs. 50,000 for causing unnecessary harassment to the assessee, in

Milestone Real Estate Fund v. *Asst. CIT* [2019] 415 ITR 467 (Bom). The observation of the court in the following words is significant and reproduced below :

> "The least that is expected of officers of the State is to apply the law equally to all and not be over zealous in seeking to collect revenue ignoring the statutory provisions as well as the binding decisions of the court."

Refund

Interest on refund

Amount wrongly seized during a search qualifies for refund along with interest thereon under section 244A on such amount. Since the amount of Rs. 35 lakhs in question was included as income and brought to tax rejecting the claim that it was an amount of advance tax raising a demand of Rs. 9.18 lakhs which included interest under sections 234B and 234C, however, had overlooked that no credit was given to Rs. 35 lakhs cash seized during search. Meanwhile, a penalty at 10 per cent. of the amount of Rs. 35 lakhs amounting to Rs. 3.5 lakhs was levied payable within 30 days. The assessee claimed that the amount of Rs. 3.5 lakhs may be adjusted out of refund of Rs. 35 lakhs as cash seized during search. This was accepted and the balance of Rs. 31.5 lakhs out of total amount of Rs. 35 lakhs was also directed to be released by the Commissioner. Thereupon the assessee demanded interest on the cash retained by revenue before release. But the Assessing Officer rejected the claim of interest on the ground as the assessment being a regular one under section 143(3) and not a post-search assessment under section 153A, interest under section 132B and the consequent refund payable under section 244A had no application. On a writ petition, the High Court found that Rs. 35 lakhs seized had undoubtedly no element of income and had to be returned. Since section 153A was not applicable to this case made on regular basis under section 143(2), section 132B providing for payment of interest has no application, where an assessment is not made under section 153 of Chapter XIV-B, so that a clear reading of section 132B(4) could not justify the claim of interest because such interest is payable only under the special provisions being either under section 153A or Chapter XIV-B. It was further pointed out that interest payable under section 244A(1)(b) becomes payable only on amount paid as tax or penalty, which is refunded. There was no occasion for application of this section in the assessee's case. Interest on advance tax payable under section 244A(1)(a) is payable only in respect of amount paid by way of tax

deduction at source or advance tax or treated as paid under section 199 of the Act. It was further found that in the facts of the case, the representation by the assessee showing Rs. 35 lakhs as seized cash as advance tax, which was not adjusted as advance tax in assessment order cannot justify the inference of overpaid advance tax for payment of interest under section 244A(1)(b) vide *Explanation* thereunder. But the assessee was entitled to interest on Rs. 35 lakhs from the date of assessment order to the date of refund before adjustment of Rs. 3.5 lakhs as penalty. It was so decided in *Agarwal Enterprises* v. *Dy. CIT* [2019] 415 ITR 225 (Bom) following *K. Lakshmansa and Company* v. *CIT* [2017] 399 ITR 657 (SC) and *Union of India* v. *Tata Chemicals Ltd.* [2014] 363 ITR 658 (SC).

Revision

(i) Section 263—Justified

In a case, where a detailed questionnaire was issued by the Assessing Officer eliciting a reply from the assessee, it was understood by the Commissioner acting under section 263 that the Assessing Officer had not applied his mind to the reply or conducted any further enquiry based upon such reply but merely recorded the reply in the note sheet and accepted the assessee's reply. It was concurrently found in first appeal and the Tribunal that there is no material for inference of the Commissioner that the Assessing Officer, who had raised number of questions, had not applied his mind to the replies made to his questions. The Tribunal dismissed the assessee's appeal after approving the finding of the Commissioner that there was no application of mind by the Assessing Officer so as to justify the jurisdiction of Commissioner. Since it is a question of finding of fact, the High Court upheld the Tribunal order in *Nagal Garment Industries Pvt. Ltd.* v. *CIT* [2019] 415 ITR 134 (MP) following *CIT* v. *Amitabh Bachchan* [2016] 384 ITR 200 (SC), *Malabar Industrial Co. Ltd.* v. *CIT* [2000] 243 ITR 83 (SC) and *Rampyari Devi Saraogi* v. *CIT* [1968] 67 ITR 84 (SC). However, special leave petition has been granted to the assessee by the Supreme Court [2019] 414 ITR (St.) 11.

In another case of revision by the Commissioner under section 263, the claim of the assessee for deduction under section 80-IC conceded by the Assessing Officer was found to be erroneous as the assessee had been allowed 100 per cent. deduction while according to the Commissioner, he was entitled only to 25 per cent. as it was the sixth year of operation, so that 100 per cent. available only for first five years could not have been allowed to the assessee. Since the deduction had been given without

enquiry, the order of Commissioner was upheld by the Tribunal following its own decision in *Hycron Electronics* v. *ITO* [2015] 41 ITR (Trib) 486 (Chandigarh), a decision though reversed by the High Court had been restored by the apex court in *CIT* v. *Classic Binding Industries* [2018] 407 ITR 429 (SC), wherein it was held that where two views are possible, there can be no inference of error or prejudice merely because the other view to the one inferred by the Commissioner was preferred by the Assessing Officer. It was under these circumstances, recourse to the proceedings under section 263 was held unwarranted. The High Court found that it could not be disputed that the claim related to the fifth year, so that there was no basis for eligibility as found by the Commissioner. It was so decided in *Arun Trehan* v. *Pr. CIT* [2019] 415 ITR 175 (P&H). There is a footnote that the decision must be read in the light of the decision of the Supreme Court in *Pr. CIT* v. *Aarham Softronics* [2019] 412 ITR 623 (SC), which relates to a case where the assessee's business consisted of two undertakings or enterprises, one falling under the provision in section 80-IC(3), which limits the deduction from 100 per cent. to 25 per cent. from the sixth year, while the other falls under section 80-IC(2) meant for enterprises listed therein, which are eligible for the first ten years without any such limitations after the fifth year. It is, therefore, clear that it is necessary to make a distinction between units falling under sub-sections (2) and (3) of section 80-IC.

(ii) Section 264

Where a deduction under section 80-IA(5)/80-IB(10) providing for exemption for profits from housing project was omitted to be claimed in the return, but claimed in the revision petition, the deduction was still denied as the revision petition itself was delayed having been filed beyond the stipulated period of limitation. The Commissioner decided not to condone the delay apart from the reason that the claim was not made in the return. The challenge to constitutionality of retrospective limitation of time limit for making a claim in time by reading down the provision was not found acceptable in respect of a statutory provision as under section 80-IA(5). It was also found that the challenge to constitutionality was raised, but given up in writ petition filed by the assessee. It is under these circumstances, the dismissal of revision petition was upheld in *EBR Enterprises* v. *Union of India* [2019] 415 ITR 139 (Bom) [2019] 415 ITR 139 (Bom).

TDS

(i) Licence fee

Licence fee paid by a resident to a non-resident U.S. company under Licence Agreement for use of software constitutes royalty requiring tax deduction at source under section 195 as was decided in *Zylog Systems Ltd.* v. *ITO* [2019] 415 ITR 311 (Mad). But where the amount required to be deducted was deposited by the assessee with the State Government, the failure to deduct tax at the first instance ceases to be violation of section 195 in view of section 201(1). But all the same, levy of interest for delayed payment under section 201(1A) could not be avoided as was also decided in this case. It was pointed out that article 12(3) of Double Taxation Avoidance Agreements between India and U.S.A. would justify the inference of royalty, so that even on this ground levy of interest for delayed deposit of tax required to be deducted was justified following *CIT* v. *Synopsis International Old Ltd.* [2012] 28 taxmann.com 162 (Karn).

(ii) Nil deduction certificate

A non-resident Mauritius-based company, which had sold its investments in shares in a company in India in which it was a majority stakeholder at a profit of about Rs. 800 crores in all, filed an application for nil deduction certificate under section 197 to the Assistant Commissioner on the plea of non-liability. Several documents were asked for and furnished. Para 4 of Double Taxation Avoidance Agreement between India and Mauritius would spare at the relevant time liability to tax on capital gains, so that the Assessing Officer had sufficient material to justify issue of nil deduction certificate under section 197. The reason for rejection of same was that tax residency certificate of the non-resident companies was not available, though produced by the assessee. The inference that the transactions were through banking channels, it was decided, does not make the transactions tax-free. The transactions were held to be sham for lack of some details regarding administrative expenditure and employment structure. In fact, the very existence of the assessee-company was considered fraudulent, so that nil deduction certificate was refused. The denial of certificate under section 197 was taken up to the High Court in *Indostar Capital* v. *Asst. CIT (IT)* [2019] 415 ITR 513 (Bom), so that the order under section 197 was quashed with the observation that after balancing the equities, the payment withheld would be required to be adjusted in the assessment.

(iii) Penalty

Tax is required to be deducted for interest paid under section 194A at the time of payment. When it was not so deducted at the time of credit of such interest to the creditor, the mere fact that the assessee had made deductions at the close of the financial year does not spare the consequences of omission and failure for non-deduction at the time of credit, so that penalty under section 271C was held imposable in absence of any reasonable cause within the meaning of section 273B as was decided in *Union Bank of India* v. *Addl. CIT (TDS)* [2019] 415 ITR 422 (All).

High Court

Its powers

Powers of the High Court extends to any matter relating to a question of law arising out of the order appealed against. The assessee had transferred part of its shareholding to its sister concern claiming long-term capital loss in a transaction after entering into negotiations therefor, pending Government permission. The resolution for the transfer had taken place much earlier, so that the correspondence fixing a price thereafter with consequent loss for the assessee was inferred to be non-genuine. However, the Commissioner (Appeals) found that no ulterior motive could be found in the transaction, so that addition was deleted and such deletion was upheld by the Tribunal. The Departmental appeal to the High Court found that no evidence was made available to it by the appellate authorities to merit reappreciation of the evidence relating to the transactions and that the decision being solely on fact, the High Court could not interfere as no question of law had arisen in this case as decided in *CIT* v. *Parry and Co. Ltd.* [2019] 415 ITR 45 (Mad) following *CIT* v. *Ashini Lease Finance (P) Ltd.* [2009] 309 ITR 320 (SC) and *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC).

In a matter relating to a dispute on ownership of the property, which was the subject matter of compulsory sale during tax recovery proceedings, where the Income-tax Department, however, was not impleaded as a party to the suit, a writ petition by an aggrieved party was dismissed in the light of section 293 of the Income-tax Act, which bars filing of any suits in a civil court delegating the parties to remedies provided in the statute. The occasion was taken by the Supreme Court in *Sunil Vasudeva* v. *Sundar Gupta* [2019] 415 ITR 281 (SC) [2019] 415 ITR 281 (SC) to spell out the narrow scope of writ petition and a review thereon and that any observation made by the court while disposing of the petition cannot give rise to a fresh hearing as such observation is limited solely to the merits of the case before it.

A writ petition was also brought within the scope of bar in section 293 against civil suits. The decision also dealt with review applications, which are not uncommon against judgment of a court. On a writ petition, it was held that a review will be maintainable only under the following three circumstances :

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him ;

(ii) Mistake or error apparent on the face of the record ;

(iii) Any other sufficient reason.

It is true, that any other sufficient reason would also permit a review, but the scope of review has been the subject matter of decision of the Supreme Court in *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius*, AIR 1954 SC 526 to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India* v. *Sandur Manganese and Iron Ores Ltd.* [2013] 8 SCC 337, so that the scope of review is not broadened by these decisions. The Supreme Court also listed as many as 9 items where review will not be maintainable :

"(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

It referred to a number of decisions, where a bar under section 293 has been overlooked by the courts and deleted issues raised on writ petition. While laying down precise rules on the subject, the Supreme Court also took care to caution the High Court to decide the matter on merits expeditiously as it was pending for a long time "on its own merits".

In another matter of jurisdiction of the High Court, the Bombay High Court in *Pr. CIT* v. *Sungard Solutions (I) Pvt. Ltd.* [2019] 415 ITR 294 (Bom) decided that the jurisdiction of the High Court is limited to the orders passed by the Tribunal within its jurisdiction, so that an appeal against a decision rendered by the Bangalore Bench, it was held, cannot be entertained by the Bombay High Court.

Where the Tribunal passes a composite order both in respect of an appeal allowing set off and a miscellaneous petition, there is no single order on which an appeal can be entertained by the High Court, so that in such cases, the High Court was justified in assuming that no substantial question of law arises for adjudication in such cases as decided in *CIT* v. *S&S Power Switchgear Ltd.* [2019] 415 ITR 376 (Mad) following its own decision in [2009] 318 ITR 187 (Mad).

Where the Tribunal had dismissed the assessee's appeal without giving opportunity of being heard, the High Court remanded the matter back to the Assessing Officer for hearing the assessee as regards eligibility of assessee to exemption under section 80P(4) in *Bellad Bagewadi Krishi Seva Sahakari Bank Ltd.* v. *ITO* [2019] 415 ITR 454 (Karn).

Government

Rule making powers

Rule-making powers are part of the legislative powers, so that rules may be notified by the Government in order to better implement the law made by Parliament. This delegated power of making rules can be exercised only after the law comes into force. An issue had come up in the matter of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, which provides for its commencement on April 1, 2016 from which date it comes into force. Though rule-making powers are expressly provided under sections 85 and 86 of this Act to make rules or remove difficulties, such power could be exercised only on or after April 1, 2016, when the main Act comes into force. But two notifications dated July 1 and 2, 2015 granted exercise of powers under three different sections of this Act.

Since both the notifications under the rule-making powers were exercised prior to the date on which the law came into force, the High Court in *Gautam Khaitan* v. *Union of India* [2019] 415 ITR 99 (Delhi) found the notifications themselves to be invalid, so that restraint order was passed against the authorities from proceeding to take any action against the petitioner with reference to these notifications. While deciding the matter, the State relied upon the decision of the Supreme Court in *State of Rajasthan* v. *Noor Mohammad* [1972] 2 SCC 454, which was clearly not of any assistance to the Government as this was not the issue, which was called upon to be decided before the Supreme Court in this case.

Writ

Limited jurisdiction

Where, in an appeal before the Tribunal, the assessee claimed refund of tax under section 244A deducted in excess, though the refund had arisen due to dispute in quantum of interest as a result of assessment, the quantum being questioned owing to non-conformity with the decision of the Supreme Court in *CIT* v. *H. E. G. Ltd.* [2010] 324 ITR 331 (SC) and *India Trade Promotion Organisation* v. *CIT* [2014] 361 ITR 646 (Delhi). The matter had been dealt with by the Tribunal and remitted to the Assessing Officer for correct calculation. But the order passed by the Assessing Officer again came up before the Tribunal which had upheld the Assessing Officer's computation based on another decision of the Tribunal on a writ petition filed against his order. It was found that the parameters for determination of interest under section 244A had already been set by the decisions of the Courts, so that the Assessing Officer had no option except to follow the same. But his role was limited to giving effect to the directions of the Tribunal. But he followed the courts and not the direction of the Tribunal, so that the order of the Assessing Officer was set aside by the Bombay High Court in *Tata Communications Ltd.* v. *Dy. CIT* [2019] 415 ItR 344 (Bom). Since the Assessing Officer had followed the decision of the court, the direction of the Tribunal probably had lost its force, so that the decision of the High Court compelling the Assessing Officer to follow the directions of the Tribunal could have been different.

Penalty

(i) Section 271(1)(c)

Clause (2) of *Explanation 5* inserted by the Taxation Laws (Amendment) Act, 1984 with effect from October 1, 1984 offers immunity subject to conditions, where an income found during search is admitted and tax is paid.

The only change brought about with effect from June 1, 2003 was a requirement of separate return for each year and not a single one for the block period. Where there was no dispute about adjustment of Rs. 1.65 crores of cash seized during search towards the tax dues, the assessee, on satisfying all the three conditions, was entitled to immunity under section 271(1)(c). There was, therefore, a case for sparing penalty but the only objection that the assessee had claimed exemption for agricultural income on an estimate of which there was a difference, it was held, that even this matter having been resolved in appeal, there is no case for levy of penalty as decided in *Duraipandi and S. Thalavaipandian (AOP)* v. *Asst. CIT* [2019] 415 ITR 437 (Mad) following *Asst. CIT* v. *Gebilal Kanhailal, HUF* [2012] 348 ITR 561 (SC).

(ii) Section 271C for default under section 194-I

Where the assessee failed to deposit the tax deducted from rent in respect of payment to a trust, while it had deducted and deposited the tax in respect of payments to individuals and Hindu Undivided Family, omission to deduct tax on payment of rent to the trust was sought to be justified on the ground that the trust was exempt being registered under section 12A as an educational institution, so that it was argued that the deduction of tax was not required from such payments. This explanation was not found acceptable, so that penalty levied was held justified in *CIT (TDS)* v. *Eurotech Maritime Academy Pvt. Ltd.* [2019] 415 ITR 463 (Ker) following *Union of India* v. *Dharamendra Textile Processors* [2008] 306 ITR 277 (SC). But the Supreme Court has granted special leave to the assessee against this judgment [2019] 411 ITR (St.) 37.

(iii) Exigible

The assessee having non-banking business had paid advance tax of Rs. 12.24 lakhs on its income after a debit of Rs. 52.24 lakhs in the profit and loss account as loss from share dealing. When the matter was subjected to enquiry, the assessee did not file the revised return, but claimed that the debit could still be allowed as deduction under section 80P, which had been allowed for earlier years. This claim under section 80P was found to be inadmissible as the accounts, as required, had not been certified by a Chartered Accountant and that the claim at any rate was not made under the proper head, so that it was understood to be a case of furnishing inaccurate particulars, so as to justify penalty in *Hamirpur District Co-operative Bank Ltd.* v. *CIT* [2019] 415 ITR 184 (All). The High Court incidentally pointed out that the inference whether the assessee furnished inaccurate particulars would depend solely on the particulars furnished by the

assessee and unless such particulars, which are furnished are found to be inaccurate, penalty is not leviable following the decision of the Supreme Court in *CIT* v. *Reliance Petroproducts Pvt. Ltd.* [2010] 322 ITR 158 (SC). But the assessee's claim under section 80P was clearly unavailable to the assessee for the year under consideration. Reliance on the part of assessee on *Dilip N. Shroff* v. *Jt. CIT* [2007] 291 ITR 519 (SC) was also, therefore, unhelpful to the assessee.

(iv) Not exigible

Where an assessee during a search admitted Rs. 8.10 crores on the basis of a diary seized during the course of search, penalty was levied, but it was cancelled in first appeal as the assessee satisfied the three conditions under section 271AAA(2). The Tribunal order confirming the order in first appeal was not found to be erroneous in respect of any of the three conditions, so that the concurrent finding in first appeal and the Tribunal was upheld by the High Court in *Pr. CIT* v. *Ravani Developers* [2019] 415 ITR 91 (Guj) following *CIT* v. *Mahendra C. Shah* [2008] 299 ITR 305 (Guj).

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