GIST OF IMPORTANT JUDGMENTS RELATING TO TDS

SECTION 191 – DIRECT PAYMENT

1. Iac vs. Tata Chemicals Ltd. (1999) 68 Itd 205 (Mum.)

After an assessment order in the case of the payee has been made, the person who was to deduct tax at source, would not be liable to pay the tax and it shall be payable by that assessee.

2. Associated Cement Co. Ltd. vs. ITO TDS (2000) 74 ITD 369/111 Taxman 251 (Mag.)/68 TTJ (Mum) (SMC II) 220

Section 4(1) creates substantial charge on the person who earns the income and primarily it is his duty to pay tax on that income. Thus, section 191 provides for recovery of tax which is not deducted by the payer, only from the recipient of income and not from the payer of income. Further, section 205 fortifies this view since the bar against a direct demand on the assessee is only to the extent to which tax has been deducted by the payer of income. It obviously means that there is no bar against a direct demand from the assessee in respect of the tax which is not deducted by the payer of the income.

SECTION 192 – SALARY

1. John Patterson & Co. (India) Ltd. vs. ITO (1959) 36 ITR 449 (Cal)

No arrangement or agreement privately arrived at between the employer and the employee can affect or alter or modify the statutory liability of the employer under section 192 to deduct tax at source at the appropriate rates from payments made to the employee.

2. Gwalior Rayon Silk Co. Ltd. vs. CIT [1983] 140 ITR 832 (M.P.) [See also Su-raj Diamonds (India) Ltd. vs. ITO, 75 TTJ 766 (Mum); Lintas India Ltd. vs. Asst. CIT [2006] 5 SOT 310 (Mum.); Nishith M. Desai vs. ITO (2006) 9 SOT 42 (Mum.)]

A duty is cast on an employer to form an opinion about the tax liability of his employee in respect of the salary income. While forming this opinion, the employer is undoubtedly expected to act honestly and fairly. But if it is found that the estimate made by the employer is incorrect, this fact alone, without anything more, would not lead to the inference that the employer has not acted honestly and fairly. It cannot be held that he has not deducted tax on the estimated income of the employee. It could not therefore be held that the assessee was assessee in default and therefore provisions of section 201(1A) was not attracted.

3. ITO vs. Housing and Urban Development Corporation Ltd. [1984] 19 TTJ 482 (Delhi)

At the stage of checking the deduction at source the ITO (TDS) could not enter into a controversial question regarding the declaration of the value of perquisite in the case of a particular employee, while examining the annual return of 'salaries' submitted by the employer under section 206. This could be done only in the assessment of the employee himself.

4. CIT vs. Kannan Devan Hill Produce Co. Ltd. [1986] 161 ITR 477 (Ker.)

The liability of the employer is not independent of the liability of the employee to pay tax. Where assessment in relation to employee has been completed and has become final and there is no further tax due from the employee; that puts an end to the liability of the employer to deduct tax.

5. Executive Engineer, T.L.C. Division, A.P. State Electricity Board vs. ITO [1987] 20 ITD 318 (Hyd.)

Where no tax was deductible by the employer in normal course but due to grant of ex gratia, increments, and D.A., salaries of an employee exceeded taxable limit, it was held that no interest could be levied under section 201(1A) for non-deduction in the initial months since there was no default on the part of the assessee in terms of section 192(3) and, unless there was default, section 201(1A) was not applicable.

6. KLM Royal Dutch Airlines vs. Asstt. CIT (1998) 62 TTJ 268 (Delhi)

Where assessee had since long been reimbursing transportation expenses of its employees, without deduction of tax at source and filing return of tax deducted at source for year under consideration it could justify its failure to deduct tax at source from such reimbursement on the ground that it entertained a bona fide belief that no tax was to be deducted from such reimbursement under section 192.

7. Grindlays Bank Ltd. vs. CIT [1991] 56 Taxman 213 (Cal.) / (1992) 193 ITR 457 (Cal.)

Assessee bank had a number of expatriate officers working in India and these officers were entitled to proceed on furlough on completion of specific period of service in India. While on furlough they were entitled to furlough pay. Furlough pay which was paid in foreign currency abroad, was held to be salary for services rendered in India and, therefore, it was an income that accrued in India. Since assessee failed to deduct tax from furlough pay paid to its employees, it was liable to pay interest under section 201(1A).

8. State Bank of Patiala vs. CIT (1999) 236 ITR 281 (Punj.)

Once the investments, qualifying for tax rebate under section 88 such as PPF, NSC, etc. are found to be correct after verification, the employer has no further authority in law to examine the source and record his satisfaction.

9. Shriram Pistons and Rings Ltd. vs. ITO (2000) 73 ITD 30 (Delhi)

In case of adjustment, either of increasing or decreasing TDS under section 192(3) reference has to be made to the estimated income of 'the assessee'; i.e., an employee and not all of them taken together deducting from some and refunding to others. Secondly, under section 200 TDS is a statutory deduction which are held on behalf of the Government till deposited and hence adjustments as regards employees as a whole was clearly outside the legal mandate. Thus, adjustment of TDS among employees inter se is not permitted but qua each employee adjustment of TDS between months is permitted.

10. Koti Enterprises (P) Ltd. vs. ITO (2000) 74 ITD 437 (Cal) (SMC)

It is the duty of the employer to ensure that the investments qualifying for rebate etc. declared by the employees are actually made before the close of the financial year. Granting of rebates merely on the basis of declaration furnished by employees is not justified and short deduction of tax consequent thereto would attract penal provisions. [See also Major General, Vinay Kumar Singh vs. Union of India (2000) Tax LR 234 (MP)].

11. Associated Cement Co. Ltd. vs. ITO TDS (2000) 74 ITD 369/111 Taxman 251 (Mag.)/ 68 TTJ (Mum) (SMC II) 220

Tax is to be deducted under the head 'Salaries' is always contingent subject to regular assessment of income in the hands of the recipient. Hence, the point to be verified is whether the employer had acted bona fide or not while computing the tax liability of its employees for purposes of deducting tax at source.

12. Krishna Murthy (P) vs. CIT (1997) 224 ITR 183 (Kar.); CIT vs. M. K. Vaidya (1997) 224 ITR 186 (Kar.); CIT vs. S. S. Khosla (1996) 220 ITR 69 (P & H); CIT vs. P.R.S. Oberoi (1990) 183 ITR 103 (Cal.); Bharat Heavy Electricals vs. CIT (2001) 252 ITR 316 (AP)

Interest free housing loan/ interest subsidy to employee is not taxable perquisite.

N.B. Under the present Rule 3 of the Income Tax Rules, 1962 interest free or concessional loans are taxable as perquisite.

13. Y.S.C. Babu & A.V.S. Raghavan vs. Chairman & Managing Director, Syndicate Bank and Others [2002] 253 ITR 1 (A.P.)

The deduction of income tax u/s. 192 has to be made at the time of payment of salary but the calculation of tax deductible will have to be made on the estimated salary income of the employee for the relevant financial year computed according to the provisions of the Income-tax Act. Thus TDS has to be worked out after estimating the annual income chargeable under the head “Salaries” and also arriving at the average rate of income-tax computed on the basis of the rates in force on the said estimated income of the assessee.

14. Babcock Power (Overseas Projects) Ltd. vs. ACIT (2002) 81 ITD 29 (Del.)

In this case the appellant a foreign company deputed its employees to the Indian project office for execution of a contract. It paid salaries in foreign currency outside India but did not deduct tax at source u/s. 192. The Tribunal held that by virture of S. 9(1)(ii) read with the Explanation thereto if the salary is paid for the services rendered in India then such payments become chargeable to tax in India under the head ‘Salaries’ and consequently, the provisions of section 192 become applicable. The fact that the employees as well as the employer were non-resident, the fact that the payment was made outside India and the fact that the contract of employment was also out of India, are not relevant for deciding the issue.

15. CIT vs. Oil and Natural Gas Corporation Ltd. [2002] 254 ITR 121 (Guj.)

Allowance granted by employer to meet the conveyance expenditure was treated as exempt u/s. 10(14) for purpose of calculation of TDS u/s. 192. This stand of the employer would not be jeopardized by the fact that ultimately on assessment of the employees they have been found not utilizing the full amount of conveyance allowance and hence a part of the allowance is taxed as income from salary.

16. Infosys Technologies Ltd. vs. Dy. CIT (Bang) (2003) 78 TTJ 598 (Bang) [See also ITO vs. Television Eighteen India Ltd. (2006) 101 TTJ (Delhi) 669; CIT and Another vs. Infosys Technologies Ltd. (2007) 293 ITR 146 (Karn); CIT vs. Infosys Technologies Ltd. (2008) 297 ITR 167 (SC)]

On facts it was held that no perquisite arises to an employee on the exercise of stock options. Accordingly, the assessee company was not liable to deduct tax at source u/s. 192 on ESOP benefit.

17. Savani Financials Ltd. vs. ITO [2005] 1 SOT 111 (Mum.)

The taxability of the allowance in the hands of the recipient does not ipso facto lead to the conclusion that the employer is liable to deduct tax at source on the said allowance. Thus, where the assessee was under a bona fide belief that conveyance allowance paid to the employee was not taxable in the hands of the employee more so considering the fact that the allowance was not unreasonable or excessive as to be called payment of salary in the garb of allowance, the employer cannot be treated as an assessee in default u/s. 201(1) if he has excluded the conveyance allowance from the estimate considered for tax deduction.

18. Kinetics Technology (India) Ltd. vs. JCIT [2005] 94 ITD 63 (Del.) – 94 TTJ 1 [See also CIT vs. Woodward Governor India P Ltd. (2007) 295 ITR 1 (Del.); CIT (TDS) vs. Eli Lilly and Co. I.P. Ltd. (2008) 297 ITR 300 (Del.); CIT vs. Marubeni India P. Ltd. (2007) 294 ITR 157 (Del.); CIT vs. Alcatel India Ltd. (2007) 159 Taxman 332 (Del.)]

An employer is required to deduct TDS only on the salary income paid by him to the employee. If an employee is in receipt of the salary from more than one employers, it is not the duty of the employer to consider the salary paid to the employee by other employers unless the employee has submitted details in the prescribed manner u/s. 192(2).

19. Thai Airways International Public Co. Ltd. vs. ACIT [2005] 98 ITD 123 (Del.) – (2005) 2 SOT 389 (Del.)

Amounts paid by the appellants an international airline company, towards refreshment expenses, shift allowance, transport allowance (to office staff and sales staff) was held to be salary taxable u/s. 17. The said expenditure it was held could not be treated as reimbursements since the allowances were not paid against an actual expenditure. Further they were not specifically exempt u/s. 10(14) except transport allowance to sales staff which was specifically exempt vide notification 606 dated 9-6-1989 [178 ITR (St.) 43]. As regards free or concessional air tickets of other airline companies enjoyed by employees, no TDS was deductible by the appellants. But, as regards free or concessional air tickets provided to employees by the appellants, tax was deductible. The Tribunal concluded by allowing the appeal u/s. 201(1) and directed that the recovery of tax may not be made against the assessee within the meaning of section 201(1). However, it held that interest is mandatory u/s. 201(1A).

20. DCIT vs. HCL Infosystems Ltd. [2005] 4 SOT 428 (Delhi) – 95 TTJ 109

Leave travel allowance paid to employees was considered as exempt u/s. 10(5) while making salary estimate for deducting tax at source u/s. 192 after satisfying that the concerned employees had availed leave of minimum five days for the purpose of their travel and obtaining declarations from them to the effect that the allowance, so granted, was actually spent by them on such travel though the actual proof / evidence of having incurred the LTA was not verified. On facts the Tribunal held that the obligation u/s. 192 has been discharged by the assessee. [See Also State Bank of India vs. ASST. CIT (2007) 12 SOT 174 (Mum.) for reimbursement of wages and cleaning material cost to maintain furniture; Business India Television Ltd. vs. ASST. CIT (2007) 11 SOT 486 (Del.) for reimbursement of news gathering, readership and telephone expenses]

21. National Federation of Insurance Field Workers of India and Another vs. Union of India and Others [2005] 276 ITR 127 (Jharkhand)

Tax is required to be deducted at source u/s. 192 on the conveyance allowance and additional conveyance allowance granted to its Development Officers. It is not for the employer to decide that how much could be claimed by an individual assessee as the expenses incurred wholly and exclusively in the performance of his duties and therefore exempt u/s. 10(14). That is to be decided at the time of assessment of each employee who has to substantiate his claim for exemption. [Contra CIT vs. Branch Manager LIC (2006) 154 Taxman 76 (P & H) and LIC vs. UoI (2003) 260 ITR 40 (Raj). (See also Sl. No. 15)]

22. CIT vs. Tej Quebeccor Printing Ltd. (2006) 281 ITR 170 (Del.)

Obligation to deduct tax at source u/s. 192 arises only when salary is paid and not when it is credited.

23. CIT vs. NHK Japan Broadcasting Corporation (2007) 291 ITR 331 (Del.)

Where citizens tax which is a statutory payment required to be made by Japanese citizens was deducted by the assessee, a Japanese organization, from the salary paid to its employees, and paid to the Government, it was held that since the amount never reaches the hands of employees it is not part of the employees' income and accordingly not liable for TDS u/s 192.

24. State Bank of India vs. Asst. CIT (TDS) (2007) 12 SOT 174 (Mum.)

Furniture and other appliances made available to its employees by the assessee bank at an uniform rate based on their grade and standing without any concession in favour of any particular employee vis-à-vis other employees similarly placed would not amount to providing furniture at a concessional rate and accordingly there would no perquisite u/s. 17(2)(iii) requiring TDS u/s 192.

25. CIT vs. Marubeni India P. Ltd. (2007) 294 ITR 157 (Del.)

Performance incentive paid to employees which is based on the performance of a company in a given financial year, being varying and uncertain in nature, cannot be included in the "estimated income" of the assessee and hence the assessee cannot be held to be an assessee in default due to short deduction of the TDS related to performance incentive.

26. CIT vs. Max India Ltd. (2007) 163 Taxman 225 (Del.)

Where the assessee-company sold the cars and other items to its employees at prices mutually agreed, which in some cases was less than the written down value, the difference cannot be considered as perquisite for the purpose of S. 192.

27. RBF RIG Corporation vs. Asst. CIT (2008) 297 ITR (AT) 228 (Del.) (SB) [disapproving BJ Services Company Middle East Ltd. vs. Asst. CIT (2008) 297 ITR (AT) 141 (Del.)]

The taxes paid by the employer on behalf of the employee are a perquisite within the meaning of section 17(2) of the Income-tax Act, which is "not provided by way of monetary payment". Such tax payment is exempt u/s 10(10CC). Accordingly taxes paid would not form the part of total income of the employee and hence not requiring multiple grossing up for the purpose of TDS.

28. Cit vs. Nicholas Piramal India Ltd. (2008) 299 Itr 356 Bom

Employees of the assessee had given declarations and filed affidavits that they had incurred expenditure on childrens' education and on leave travel, after scrutiny of which assessee had not deducted tax on the allowances which were exempt. Tribunal considered these declarations and affidavits and recorded findings that the assessee had fairly estimated the income for deducting tax u/sec 192.

29. Cit vs. Coastal Power Co. 296 Itr 433 (Del)

Assessee having entered into consultancy agreements with consultants on a temporary basis stipulating relationship of customer and independent contractor, which were extended from time to time. However the temporary nature of the consultancy remained. Also, the consultants had agreed to indemnify the company (assessee) and its officers, directors, employees, agents, etc. against all liabilities as provided for in the agreement. Hence, there is no employer-employee relationship between the parties, and therefore, provisions of s.192 are not applicable.

30. Birla Vidya Niketan vs. ITO (2008) 166 Taxman 492

The assessee, a public school, charged concessional fees from the children of its teachers/employees who were studying in the school. It was not providing free educational facilities and therefore, concession given by the assessee has to be included in the income of the teachers/employees as perquisite for the purpose of calculated TDS. Proviso to Rule 3(5) of provision of free education is not applicable in this case.

31. CIT vs. Reliance Industries Ltd. (2008) 308 ITR 82 (Guj)

Non-transferable meal coupons distributed by the assessee company to its employees of the value Rs.50/- per day which were usable only at specified eating joints not being taxable as perquisites in the hands of the employees in view of proviso to Rule 3(7)(iii), no default can be ascribed to the assessee for not deducting tax at source in respect of said meal coupons merely because some employees misused the facility.

SECTION 193 : INTEREST ON SECURITIES

1. IDBI vs. ITO (2006) 10 SOT 497=104 TTJ 230 (Mum.)

Where the assessee made a provision of 'interest accrued but not due' in its books of accounts but the identity of payee could not have been ascertained at the time of making the provision since the bonds were freely transferable, the Tribunal held that no tax was required to be deducted at source. However, the Tribunal also observed that if the assessee knows the identity of lenders, whether the assessee credits the 'interest accrued but not due' in the account of the assessee or in some other suspense account, tax would continue to be deductible u/s. 193 by the virtue of deeming fiction set out in the Explanation to section 193. But, the Explanation to section 193 cannot be invoked in a case where the person who is to receive the interest cannot be identified at the stage at which the provision for interest accrued but not due is made."

SECTION 194A – INTEREST OTHER THAN INTEREST ON SECURITIES

1. Rishikesh Balkishandas vs. Manchanda I.T.O. (1987) 167 ITR 49 (Delhi)

Section 194A(4) allows increase/reduction of amount of tax to be deducted for adjusting excess/deficiency during a financial year. This provision for adjustment in subsequent payments in same year applies to cases where interest is paid more than once in the same year and not in different financial years.

2. M. L. Family Trust vs. State of Gujarat (1995) 213 ITR 152 (Guj) [See also Food Corporation of India vs. ITO (2007) 18 SOT 289 (Del.); NTPC Ltd. Employees Provident Fund Trust vs. ITO (2008) 2 DTR (Del) (Tri) 140]

Where the beneficiaries of a trust are individuals the status of the trustees would be that of individuals and hence no tax would be deducted from interest income since the provisions of section 194A do not apply to payments made by individuals. [see also ITO vs. Arihant Trust (1995) 214 ITR 306 (Mad.); ITO vs. S. K. Family Trust (1991) 36 ITD 351 (Ahd.) ; ITO vs. K. C. Trust (1992) 42 TTJ 141 (Ahd.)].

3. Sudershan Auto & General Finance vs. CIT (1997) 60 ITD 177 (Delhi)

Specific date must be ascertained before deciding whether the assessee committed default of failure to deduct tax since Form 15-H must precede the date of credit/payment.

4. Vijay Hemant Finance & Estate Ltd. vs. ITO (1999) 238 ITR 282 (Madras)

It is the duty of the ITO to give an opportunity to rectify the defects in the declarations in Form No. 15-H and imposition of tax liability, without giving an opportunity to the petitioner to rectify the defects in the declarations in spite of the petitioner asking for an opportunity to rectify the defects, is not justified in the eye of law.

5. A and M Agencies vs. CIT (1999) 239 ITR 136 (Mad)

Penalty for non-payment of the value of goods in time paid by the assessee agent to whom goods have been supplied by his principal was a charge relatable to the debt incurred by the assessee and therefore, has to be regarded as interest within the meaning of section 2(28A) of the Income-tax Act with the consequent liability to deduct tax on that account.

6. CIT vs. S. K. Sundararamier & Sons (1999) 240 ITR 740 (Mad)

Deduction of tax has to be made from gross amount and not the net interest payable after mutual set-off between parties.

7. Viswapriya Financial Services and Securities Ltd. vs. CIT [2002] 258 ITR 496 (Mad.)

On facts the Court held that monthly payments being "minimum guaranteed return"

@ 1.5% p.m. on funds with the assessee company pursuant to a scheme floated by the company is "Interest" u/s. 2(28A) and hence, is subject to TDS u/s. 194A.

8. Kedarnath Jute Manufacturing Co. Ltd vs. Prasad Ranjan Ray (2004) 266 ITR 677 (Cal.)

Where the order of the court directed the respondents to make all calculations and pay the appropriate amount to the petitioners, tax deducted from the payments is not a contempt of the court order.

9. CIT vs. Century Building Industries (P.) Ltd (2007) 163 Taxman 188 (SC)

Where the assessee company's directors took loan in their individual capacities but the directors routed the transactions of receipt and repayment of loan through the assessee company and the interest was debited by the assessee to the 'Interest Account' for a specific amount calculated with reference to the deductor's liability to a creditor, there was no resolution of the assessee-company placed before the Assessing Officer whereby the company had agreed to act as a medium for routing the borrowings and repayments. It was held that the assessee company was liable for TDS u/s. 194A.

SECTION 194B – WINNINGS FROM LOTTERY AND CROSSWORD PUZZLES

1. Om Prakash Gattani vs. ACIT and Others (1996) 222 ITR 489 (Gauh.)

Prize winner cannot be asked to make payment of tax to the extent tax has been deducted at source by person paying the prize under section 194 B. [See also ACIT vs. Om Prakash Gattani (2000) 242 ITR 638 (Gauh)].

2. ITO vs. Malayala Manorama Co. Ltd. [2005] 277 ITR 133 (AT) = 94 ITD 195 (Kochi)

To bring a scheme into the field of lottery two ingredients are required – (i) distribution of property by chance or lot among the participants (ii) consideration paid for the privilege of participation in the scheme. Thus, contests ["World Cup Football Forecast" and "Lok Sabha Election Forecast"] where prizes were distributed based on the skills of the participants without a participation fee, were held as not amounting to "lottery" [even if the ultimate winner was selected by a lot amongst various preliminary winners] and therefore the assessee is not liable to deduct tax before distribution of prizes u/s. 194B.

3. Hind Motors India Ltd. vs. ITO (2006) 9 SOT 556 (Chd.)

Where the assessee conducted a "Tata Sumo Lucky Draw" whereby it distributed coupons for Rs. 200 to the participants and the winner was selected by a lucky draw and winning did not require any personal skill of the participants, the scheme was held amounting to “lottery” and assessee was liable to deduct tax u/s 194B on the prizes distributed.

SECTION 194C – PAYMENTS TO CONTRACTORS AND SUB-CONTRACTORS

1. ITO vs. Rama Nand & Co. and Others (1987) 163 ITR 702 (HP)

The respondent firm purchased certain quantity of scants of timber. It was held that, the contractor would be a person who enters into a contract for carrying out any work including supply of labour for carrying out any work with any of the specified persons mentioned in section 194C(1) and a sub-contractor would be a person who enters into a contract with a contractor for carrying out any work including supply of labour for carrying out wholly or partly any work undertaken by the contractor. Since in the instant case the respondent firm had not entered into any contract for carrying out any work including supply of labour for carrying out any work with the specified persons, but it was only a contract for purchase of timber, they are not “contractors” and the payments made by the respondent firm to any person cannot be treated as payment made to “sub-contractors” so as to attract the provisions of section 194C(2).

2. CIT vs. Kumudam Publications P. Ltd. (1991) 188 ITR 84 (Mad.)

Activity of printing periodicals on materials supplied by the clients of printers is work and section 194C is attracted.

3. CBDT Circular No. 681 dated 8-3-1994 struck down by various courts as ultra vires and unenforceable

The extension of the definition of 'work' by the CBDT Circular No. 681 was struck down as ultra vires and unenforceable by various High Courts in the context of applicability of section 194C vis-à-vis various contracts such as contract for goods transport, advertising contracts, brokerage and commission, contract for payment of fees for professional services, etc. Some of the citations of the court judgements setting aside the Circular No. 681 are :

Sr. No.	Nature of Contract	Court Judgment
1.	Tour Operator	Indian Association of Tour Operators vs.Central Board of Direct Taxes (1995) 81 Taxman 340 (Del.)
2.	Payment to Advertising	Advertising Agency Association of India and Agencies1 Another vs. CBDT and Others (1994) 210 ITR 152 (Bom.)
3.	Transport[1]	Birla Cement Works vs. CBDT (2001) 248 ITR 216 (SC) / 115 Taxman 359 (SC); Bombay Goods Transport Association and another vs.CBDT and Others (1994) 210 ITR 136 (Bom); Calcutta Goods Transport Association and another vs. Union of India and Others (1996) 219 ITR 486 (Cal.)

4.	Professional charges[2]	Chamber of Income Tax Consultants and others vs. CBDT and Others (1994) 209 ITR 660 (Bom); Madras Bar Association and others vs. CBDT and Others (1995) 216 ITR 240 (Mad).
5.	Advertising[1] and transport[1] professional charges[2]	All Gujarat Federation of Tax Consultants and Others vs. CBDT and Others (1995) 214 ITR 276 (Guj)
6.	Brokerage and commission[3]	S.R.F. Finance Ltd. vs. Central Board of Direct Taxes and Others — (1995) 211 ITR 861 (Del)

Note:
1. Specifically covered by Explanation III to section 194C w.e.f. 1-7-1995.
2. Now covered under section 194J w.e.f. 1-7-1995.
3. Now covered under section 194H w.e.f. 1-6-2001.

4. S.R.F. Finance Ltd. vs. CBDT (1995) 211 ITR 861 (Del) [SLP dismissed by Supreme Court (1995) 212 ITR 375 (SC) (Stat.)] see also All Gujarat Federation of Tax Consultants vs. CBDT (1995) 214 ITR 276 (Guj)

The expression "any work" occurring in section 194C cannot include a contract for rendering of services.

5. V.M. Salgaocar & Bros. Ltd. vs. ITO (1999) 237 ITR 630 (Karn.); Birla Cement Works vs. CBDT (2001) 248 ITR 216 (SC)/115 Taxman 359 (SC)

It has been held that the newly inserted Explanation III to section 194C with effect from 1-7-1995 cannot be considered procedural. The inclusive definition given by that Explanation, therefore, is to be made applicable only from 1-7-1995.

6. Wadilal Dairy International Ltd. vs. Asstt. CIT (2001) 70 TTJ (Pune) 77 [see also Dy. CIT vs. Reebok India Co. (2006) 100 TTJ (Delhi) 976; Bangalore District Co-op. Milk Producers Societies Union Ltd. vs. ITO (2007) 11 SOT 539 (Bang.); Dy. CIT vs. Seagram Manufacturing (P.) Ltd. (2008) 19 SOT 139]]

In this case the assessee purchased packing material for its products from various manufacturers which was manufactured as per assessee's specifications. It was held that the main purpose in buying packing material was to obtain goods for the purpose of packing and the fact that incidentally some printing was required to be done by the supplier as per his specification was of no consequence. Essentially it was a contract for purchase/ sale and not a works contract and accordingly, provisions of section 194C are not applicable. [See also Andhra Pradesh State Road Transport Corporation vs. DCIT (2002) 74 TTJ (Hyd.) 531]

7. U. P. State Industrial Development Corpn. Ltd. vs. Income-Tax Officer (2002) 81 ITD 173 (Lucknow)

The assessee-corporation appointed a company as a consultant for a construction job at a fee of 11% of the actual cost of construction. The consultant company made payments towards the construction job on behalf of assessee-corporation and deducted tax u/s. 194C wherever applicable. Thereafter it received payment made towards the job from assessee-corporation. Held that TDS procedure have been complied with and assessee-corporation was under no obligation to deduct TDS from payment made to construction company for onward payment to various parties.

8. Datta Digambar Sahakari Kamgar Sanstha Ltd. vs. Asstt. CIT [2002] 83 ITD 148 (Pune)

The assessee society, engaged in the business of transporting milk of the Government milk schemes, hired tankers from its members, who were paid at a fixed rate for mileage covered. The Assessing Officer treated this payment as a payment to sub-contractor u/s 194C(2) and raised a demand on the assessee society for failure to deduct tax. Repelling this contention, the Tribunal held that the basic requirement of section 194C(2) is that the sub-contractor has to carry out whole or any part of the work undertaken by the contractor. In this case, the tanker owners merely entrusted their tankers to the society, which carried out the transport of milk. Further, in this case, it was the collective effort of the members that the contract with various milk schemes were carried out and therefore, there is no question that the co-operative society had given further sub-contracts to its own members. Hence no tax u/s 194C(2) is deductible from payments made by the society to its members.

9. Sunsel Drive-in-Cinema (P.) Ltd. vs. ITO, (TDS) [2006] 5 SOT 64 (Ahd.)

Sharing of proceeds of film distribution between a film exhibitor and film distributor would not attract provisions of s. 194C since a distributor who has acquired rights of the distribution of the films in particular area only gets his share and no work is carried by him for which the payment is made.

10. National Panasonic India (P.) Ltd. vs. DCIT, TDS Circle-50(1) [2005] 3 SOT 16 (DELHI) / 94 TTJ 899 [See also Glaxo Smithkline Consumer Healthcare Ltd. vs. ITO (2007) 12 SOT 221 (Del.)]

Payments made to clearing and forwarding agents are liable for TDS u/s. 194C. [See also Sl. No. 10 under section 194-I]

11. ITO vs. Dr. Willmar Schwabe (I) P. Ltd. [2005] 3 SOT 71 (DELHI) / 95 TTJ 53 [See also Jindal Photo Films Ltd. vs. ITO [2006] 5 SOT 272 (Delhi); Balsara Home Products vs. ITO [2005] 94 TTJ (Ahd) 970; BDA Ltd. vs. ITO (TDS) [2006] 281 ITR 99 (Bom.); CIT vs. Dabur India Ltd. (2006) 283 ITR 197 (Delhi); ITO vs. Millan Dairy Foods (P.) Ltd. (2006) 7 SOT 901=105 TTJ 252 (Delhi)

Payment made towards supply of printed packing materials manufactured by the suppliers as per the specific requirements given by the assessee was held not amounting to works contracts but it was considered as a contract of sale of goods since the raw materials for the said manufacture was purchased by the suppliers on their own account. Hence no TDS is deductible u/s. 194C. [See also Sl. No. 6 above].

12. ITO vs. Freight Systems (India) (P.) Ltd. (2006) 6 SOT 473 = 103 TTJ 103 (Delhi)

Inland haulage charges paid to authorised agents of non-resident shipping lines is chargeable to tax u/s 172(8) and no tax is deductible u/s. 194C.

13. Senior Accounts Officer (O & M), Haryana Power Generation Corp. Ltd. vs. ITO (2006) 103 TTJ (Delhi) 584

Where an assessee placed one common purchase order for supply of plant and for erection and commissioning of plant, the Tribunal held that the dominant intention of the contract is the purchase of the plant and the erection and commissioning was only incidental. However, the Tribunal held that the two contracts are separable contracts and hence TDS was deductible on the amount attributable to the erection and commissioning and not on the gross sum paid by the assessee.

14. Whirlpool of India Ltd. vs. Jt. CIT (2007) 16 SOT 435 (Del.)

Where the assessee got goods manufactured to its specification and quality from outside agencies who purchased the raw material, produced the goods and supplied it to the assessee by affixing the assessee's trademark after the assessee was satisfied with the quality, the contract was held to be contract of sale and not a works contract and therefore not liable for TDS u/s. 194C.

15. Power Grid Corporation of India Ltd. vs. Asst. CIT (2007) 13 SOT 347 (Hyd.)

Contract for design, manufacture and supply of conductors, insulators, towers and substations including erection thereof was held on facts to be a contract of sale and not a works contract, erection being only incidental, and accordingly not liable for TDS u/s 194C.

16. City Transport Corporation vs. ITO (2007) 13 SOT 479 (Mum.)

Where the assessee did not own any trucks but hired them as and when required, it was held on facts that no tax u/s 194C [as it stood at the relevant time] was required to be deducted from the freight paid since each trip was a separate contract and payment in respect of each trip did not exceed Rs. 20000/-.

[Note: For the change in law w.e.f. 1-10-2004, refer Chapter 3 para No 3.6]

17. ITO vs. Bhasin Motors India (P.) Ltd. (2007) 16 SOT 319 (Del.)

Where the assessee who was an authorised dealer of motor cars made payments to M/s W pursuant to a business collaboration agreement wherein M/s. W who was in possession of a premises used the same in mutual interest, decorated the same for display, repair, parking of vehicles; employed qualified staff, paid their salaries and serviced the vehicles, it was held that the payments to M/s W even though quantified as a percentage of vehicles sold was liable for TDS u/s 194C and not 194-I or 194H.

18. CIT vs. Prasar Bharti (Broadcasting Corporation of India) (2007) 292 ITR 580 (Delhi)

Amounts paid to producers for production of programmes for broadcasting and telecasting would attract TDS u/s 194C and not u/s 194J since Explanation III to S. 194C is more specific than S. 194J which is more general vis-à-vis the production activity.

19. CIT Vs. Deputy Chief Accounts Officer, Markfed (2008) 304 ITR 17 (P&H)

Purchase of printed packing material for which raw material was not supplied by the assessee was a contract for sale and outside the purview of s. 194C.

20. Kurukshetra Darpans (P) Ltd. vs. CIT (2008) 169 Taxman 344 (P&H)

Assessee, a cable network operator, having entered into a contract with the licensor of various TV channels for receiving telecast signals in order to further distribute the same to the customer(s), the contract involves broadcasting and telecasting and, therefore, the assessee was required to deduct tax at source on such payments made to licensor for obtaining TV signals.

SECTION 194-H – COMMISSION OR BROKERAGE

1. Assistant CIT vs. Samaj (2001) 77 ITD 358 (Cuttack)

In this case, the assessee sold newspapers through its agents to whom the newspapers were given at a discount of 25% on the printed price. The assessee also booked advertisements through various advertisement agencies for which the assessee billed the advertisement agencies. The agencies paid the assessee after deducting a specified percentage of the bill as their commission. In both these cases, the Tribunal held that the transaction did not attract section 194H since

i) in the first case it was in the nature of contract for sale of newspapers and not a contract of agency;

ii) in the second case the agreement was on a principal to principal basis and not on principal to agent basis.

2. Ahmedabad Stamp Vendors Association vs. Union of India (2002) 257 ITR 202 (Guj.) [See also Kerala State Stamp Vendors Association vs. Office of the Accountant General (2005) 150 Taxman 30 (Ker.)]

The definition of "commission or brokerage" in the Explanation (i) to section 194H is not so wide as to cover any payment receivable, directly or indirectly, for services in the course of buying or selling of goods. The element of agency is essential to attract Explanation (i) to section 194H. Hence discount given by the Government to licensed stamp vendors on sale of stamp paper to them, is not "commission" or "brokerage" u/s. 194H.

3. Hindustan Coca-Cola Beverages (P.) Ltd. vs. ITO, TDS Range-7 [2005] 97 ITD 105 (JPg.)

Where the assessee was engaged in manufacture and distribution of non-alcoholic beverages through distributors' the Tribunal on facts found that the relationship between the assessee and the distributors was that of a principal and agent and accordingly the assessee was held liable for TDS u/s. 194H in respect of payments made to distributors towards their commission.

4. National Panasonic India (P.) Ltd. vs. DCIT, TDS Circle-50(1) [2005] 3 SOT 16 (Delhi) / 94 TTJ 899

Commission payment, in order to attract the provisions of s. 194H, must have been received by a person who is acting on behalf of another, that is, in other words, he must be acting as an agent of another person. Thus, where it was found on facts that the arrangement between the assessee manufacturer and the distributors/dealers was on a principal to principal basis several incentives and discounts paid to distributors/dealers was held not liable to TDS u/s. 194H.

5. Govt. Milk Scheme vs. Asst. CIT (2006) 281 ITR (AT) 88 (Pune)

In order for a payment to be called "commission" u/s. 194H, there must be a relationship of a principal and agent between the payer and payee. Thus, where the assessee procured milk from various milk federations at 90 paise per litre and sold them to various milk booths and centres at Rs. 11.10 per litre who further sold it to retail customers at Rs. 12 per litre it was held that neither was the relationship between milk federation and assessee that of a principal and agent nor was the relationship between the assessee and the milk booths / centres that of a principal and agent. Accordingly, no tax was deductible at source u/s. 194H on the payment made to the Government as well as the margin of 90 paise which accrued to the milk booths/centres. [Contrast Delhi Milk Scheme vs. ITO (2006) 8 SOT 344 (Delhi) where it was held that the relationship between Delhi Milk Scheme and its booths/centres was that of principal and agent and hence TDS was applicable on the commission earned by agents.]

6. All India Radio Commercial Broadcasting Service/Prasar Bharti Broadcasting Corp. of India vs. ITO (2006) 8 SOT 513 (Delhi)

The assessee, a broadcasting agency, entered into a contract with accredited advertisement agencies for broadcasting advertisements. The amount was billed by the assessee to the agencies after giving a discount/commission of 15% to the agency. The agency billed the entire amount of broadcasting charges to its clients (advertisers) for whom it had booked the slots but paid the assessee after deducting its discount. The AO and the CIT(A) held that the discount retained by the advertisement agencies is commission paid by the assessee and is liable for TDS u/s 194H. The Tribunal negatived the contention and held as follows:

(i) The advertising agencies are not 'agents' of the assessee. The fact that they are accredited with the assessee would not make them 'agents'.

(ii) The amount deducted by the agency out of the amount paid to it by the advertiser, cannot be treated to be payment of commission by the assessee. At the most it could be treated as commission paid by the advertiser for services rendered to the advertiser.

(iii) The assessee is not liable to deduct TDS on the discount/commission retained by the agencies.

7. Asst. CIT vs. Bharti Cellular Ltd. (2007) 294 ITR (AT) 283 (Kol.)

The assessee company sold SIM and Prepaid cards to its distributors/ franchisees at a fixed rate below market price for onward sale to its ultimate customers. The difference was held as commission and not discounts as contended by the assessee and liable to TDS u/s. 194H since:

(i) all rights, title, ownership and property rights in such cards would always rest with the assessee; and

(ii) the agreement between the assessee and the franchisee revealed that they were commission agents acting on their behalf for margins.

SECTION 194-I – RENT

1. Gulf Oil India vs. ITO (2000) 75 ITD 172/67 TTJ (Mum) 182

The legal proposition that what is attached to land belongs to the land is a principle not applicable to India and hence storage tanks, though happen to be erected on land cannot be considered as either land or building. Thus hire charges paid for storage tank fails to attract the provisions of section 194-I since they are considered as 'plant'.

N.B. : W.e.f. 13-7-2006 tax is deductible even for the use of 'plant'.

2. Enterprise International Ltd. vs. Income Tax Officer [2001] 77 ITD 189 (Cal.)

Refundable deposits against tenancy agreements though adjustable against rent will not be considered as advance rent and hence will not attract TDS under section 194-I.

3. Kamat Hotels (I) Ltd. vs. Income-tax Officer [2001] 78 ITD 241 (Mum.)

In this case the assessee had an arrangement to conduct and manage the restaurants and food outlets of the payee for which the assessee paid a royalty/ commission as a percentage of the sales. On facts, the Tribunal held that the consideration was for allowing the assessee to manage or conduct the business and not for the use of land or building together with furnitures and fixtures, etc. and the very fact that the royalty/commission was fixed as a percentage of sales proceeds which were of a fluctuating nature the payment is not regarded as rent and hence TDS under section 194-I would not be attracted.

4. Krishna Oberoi vs. Union of India [2002] 257 ITR 105 (A. P.)

Payment made to hotels for use and occupation of hotel rooms is to be regarded as "Rent" for section 194-I. [See also CBDT Circular No. 5/2002 dated 30-7-2002, which clarifies that section 194-I would not apply to payments made to hotels towards accommodation taken pursuant to a rate contract agreement.]

5. Hindustan Coca Cola Beverages (P) Ltd. vs. JCIT (2004) 90 ITD 720 (Del.)

On facts the Tribunal held that warehousing charges would attract TDS @ 20% u/s. 194-I and not @2% u/s. 194C even if the recipient gives a declaration that the income is a business receipt and is being treated as business income in his hands and not property income.

6. Ganesh Alu Bhandar vs. ITO (2003) 87 ITD 588 (Rajkot)

Payment for use of cold storage is not subject to TDS u/s. 194-I since the definition of rent u/s 194-I does not include a payment for use of a plant, and cold storage is a plant and not a building.

N.B. : Circular No: 1/2008 dated 10-1-2008 clarifies that cooling charges paid by the customers of cold storage are liable for TDS u/s. 194C and not u/s 194-I even after 13-7-2006 from which date tax is deductible even for use of plant.

7. Amalendu Sahoo and others vs. ITO & others (2003) 264 ITR 16 (Cal.)

In this case, the tenant bank agreed to pay a rent of Rs. 6,20,512/- on December 16, 1998 to the petitioners who were undivided owners of the property. With effect from January 13, 1999 the petitioners individually agreed to rent out the specified portions of the properties to the Bank. The court held that the liability to deduct tax is foisted at the time of payment but the rate is different for an individual viz., 15% and body of individuals viz., 20%. The Court further held that the bank correctly proposed to deduct tax of Rs. 99,198 while agreeing to pay a sum of Rs. 6,20,512 to the petitioners jointly as and by way of rent.

Inasmuch as with effect from January 13,1999, the petitioners individually have let out specified areas of the property to the bank, the rent payable is required to be apportioned and accordingly if upon such apportionment the petitioners are not individually entitled to receive a sum in excess of Rs. 1,20,000 per annum, the bank is not entitled to make any deduction of tax at source.

8. P.S Cars (P) Ltd. vs. Income Tax Officer (2005) 92 TTJ (Del) 71

Interest-free security deposit paid to the lessor at the inception of the lease which was being renewed on a year to year basis and which was adjustable only at the end of the lease period was not rent paid in advance but a refundable deposit and accordingly does not attract TDS u/s. 194-I.

9. Dy. CIT vs. Japan Airlines (2005) 92 TTJ (Del.) 687 [See also Singapore Airlines Ltd. v. ITO (2006) 7 SOT 84 (Chennai); Contra : United Airlines vs. CIT (2006) 287 ITR 281 (Delhi High Court)]

Services provided by the Airport Authority of India to the respondents for landing and parking of its aircrafts does not amount to lease of the property and therefore the payments by the respondents to the authority towards landing and parking fee are not in the nature of rent as envisaged u/s. 194-I of the Act nor is the payment fees for professional or technical services u/s. 194J of the Act but are covered u/s. 194C of the Act.

10. National Panasonic India (P.) Ltd. vs. DCIT, TDS Circle-50(1) [2005] 3 SOT 16 (DELHI) / 94 TTJ 899 [See also Eli Lilly & Co. (India) (P.) Ltd. vs. Dy. CIT (2006) 99 TTJ (Delhi) 461]

An agreement or arrangement which gives rise to the payment of rent must necessarily be an agreement or arrangement predominantly for use of land or building. However, where the agreement is not predominantly for use of land or building but for something else, then payment under that agreement will not constitute rent even if that 'something else' involves the use of land or building as an integral part of or incidental to the predominant objective of the agreement. Payment to a C&F agent by a manufacturer, who receives the goods, 'stores' the goods and forwards the same to various wholesalers or stockists for onward movement to retailers and consumers would not amount to a payment for use of land or building merely because the C&F agent 'stores' the goods in the intervening period between their receipt and forwarding. Accordingly, no tax is deductible u/s. 194-I. The said payments made to C&F agents are liable for TDS u/s. 194C.

11. ITO vs. Roshan Publicity (P.) Ltd. [2005] 4 SOT 105 (Mum.)

Payment of charges for acquiring a right of display of advertisements on hoarding sites belonging to others is not "rent" and accordingly not liable for TDS u/s. 194-I. The Tribunal held that in order for a payment to be called "rent", there should be a live link between payment of compensation known as "rent" and the use of land or building and this live link is by the lease, sub-lease, tenancy, etc. In this case such live link was held to be absent.

12. Oriental Bank of Commerce vs. TDS/TRO Kaithal (2006) 150 Taxman 1 (Mag.)–(2006) 99 TTJ 1235 (Chd.)

Where the rent paid by the assessee to co-owners of a property, each having a definite and ascertainable share in the property, was below Rs. 1.20 lakhs, the Tribunal held that the limit of Rs. 1.20 lakhs would apply for each co-owner separately and no tax is deductible.

13. ITO vs. Lally Motors Ltd. (2006) 102 ITD 271 (ASR) – 104 TTJ 963 (Asr.) affirmed in CIT vs. Lally Motors (2007) 164 Taxman 510 (P & H) [See also Vijaya Enterprises vs. ITO (2006) 7 SOT 883 (Bang.)]

Where the payees were 'individual' co-owners and their shares were definite and ascertainable, tax is required to be deducted at source @15% u/s. 194-I(a) and not @20% u/s. 194-I(b). S. 194-I(b) would be triggered where there is a tenancy-in-common standing in the name of the landlords who would be considered as a 'composite conglomeration'.

14. CIT vs. Reebok India Company (2007) 291 ITR 455 (Del.)

Where the assessee company entered into an agreement to take on lease certain premises on rent and paid an amount as "security deposit" which was to be reduced every six months by the amount of rent which became payable in accordance with the agreement, it was held that the amount was not security deposit but was "advance rent" since:

(i) if it was a deposit, it would have been refundable at the time of termination of lease and there would no reduction in the security amount; and

(ii) unadjusted portion was refundable to the lessee.

Thus, the assessee was required to deduct TDS upfront on payment of the amount and not when it was adjusted.

SECTION 194J – FEES FOR PROFESSIONAL/TECHNICAL SERVICES

1. Skycell Communications Ltd. vs. Dy. CIT (Mad.) (2001) 251 ITR 53 (Mad.)

In this case the court laid down the following propositions —

1. Having regard to the fact that the term "fees for technical services" is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for

a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".

2. Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

3. "Technical service" referred in section 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services.

4. Subscription paid to cellular telephone companies for cell phone connections are not "fees for technical services" u/s. 9(1)(vii) r.w. section 194J of the Income-tax Act, 1961.

2. United Hotels Ltd. vs. ITO [2005] 2 SOT 267 (Delhi)

Where certain payees deputed their personnel ranging from chief engineer to accounts executive to housekeepers, etc. to the assessee and charged separate and distinct amounts for reimbursement of salaries and fees for deputation of personnel, it held that the reimbursement of salaries was not liable for deduction of tax at source u/s. 194J.

3. ITO vs. Dr. Willmar Schwabe (I) P. Ltd. [2005] 3 SOT 71 (Delhi)/95 TTJ 53

Where separate charges were made for professional fees and reimbursement of car maintenance expenses [with no element of profit] it was held that no tax is required to be deducted u/s. 194J from the amount paid towards reimbursement of car maintenance expenses. Q. 30 of Circular No. 715 was held to be applicable only in case where the bills are raised for the gross amount inclusive of professional fees and reimbursement of actual expenses.

4. Singapore Airlines Ltd. vs. ITO (2006) 7 SOT 84 (Chennai)

Payments made by the assessee to International Airport Authority of India for navigational facilities which consisted of several technical services required to fly the aircraft over the Indian Territories would attract TDS u/s 194J.

5. HFCL Infotel Ltd. vs. ITO (2006) 99 TTJ (Chd.) 440 [Contra : Hutchison Telecom East Ltd. vs. ASST CIT (2007) 16 SOT 404 (Kol.)]

Interconnect charges paid to BSNL for using the network [consisting of highly technical and sophisticated equipments and infrastructure] for routing calls is not payment for technical services attracting the provisions of S. 194J.

6. Ultra Entertainment Solutions Ltd. vs. ITO (TDS) (2007) 17 SOT 249 (Mum.)

The assessee appointed one M/s. 'P' for sale of online lottery tickets. It entered into two agreements – one for marketing, collection of proceeds, maintenance of books, etc. for a consideration of 2% of the total revenue and another for provision of infrastructural facilities to sell online lotteries like hardware, network backups, standby arrangements including carrying through its personnel all activities related to selling of lottery tickets for an operating fee. The assessee deducted tax from the commission but not from operating fee. The Tribunal held that the two agreements when read together clearly envisage that the role of P was not merely to provide infrastructure facilities for hire but to provide a service to the customer and was accordingly liable to deduct TDS u/s 194J on the operating fee, the services being a "technical service".

7. Tecumseh Products (I) Ltd. vs. Dy. CIT [2007] 13 SOT 489 (Hyd.)

The amounts paid by the assessee to its holding company for assisting in fields of accounts, finance, human resource development, taxation are fees for managerial/technical services and accordingly liable for TDS u/s 194J.

8. CIT vs. Sara International Ltd. (2008) 217 CTR 491 (Del)

Agreement between assessee and PEC showed that PEC transferred foreign buyers' letters of credit in favour of assessee against commission charge, PEC rendered agency services to assessee and not professional or technical services, hence assessee was not liable to deduct tax at source under s.194J.

9. Kotak Securities Ltd. vs. Addl. CIT (2008) 25 SOT 440 (Mum)

Transaction fee paid by Brokers to the Stock Exchange is not paid in consideration of any service provided by the stock exchange. It is a payment for use of facilities provided by the stock exchange and such facilities are available for use by any member. Therefore, the transaction fee paid could not be said to be a fee paid in consideration of any technical services rendered by the stock exchange to the assessee. The provisions of S. 194J were, thus, not attracted.

SECTION 194LA – PAYMENT OF COMPENSATION TO A RESIDENT ON ACQUISITION OF CERTAIN IMMOVABLE PROPERTY

1. Nalini vs. Deputy Collector, Land Acquisition (2007) 294 ITR 423 (Ker)

Sections 194A and 194LA cast a statutory duty on the Land Acquisition Officer to deduct tax at source from compensation/interest and the question whether land acquired was agricultural land exempt from TDS under s. 194LA could only be decided by an IT authority and not by the Land Acquisition Court.

SECTION 195 – OTHER SUMS.

1. Graphite Vicarb Ind. Ltd. vs. ITO [1986] 18 ITD 58 (Cal.)

Section 195(2) envisages application for determining appropriate proportion of the sum which would be chargeable to tax; but does not envisage a case where the assessee claims that no profits of the sum to be remitted is liable to tax at all.

2. Graphite Vicarb Ind. Ltd. vs. ITO [1992] 43 ITD 28 (SB) (Cal.) [See also DCIT vs. ITC Ltd. (2002) 82 ITD 239 (Kol.)]

Where payments to non-resident were not assessable to Income Tax, by virtue of DTAT, assessee was not liable to deduct tax at source from such payments.

3. Advance Ruling (1997) 228 ITR 487 (AAR)

Non-residents/foreign companies liable for TDS. A company incorporated in France entered into a contract with an Indian company for rendering engineering and other services for 28 to 30 months. The project head office and project site offices situated in India were held on facts to constitute permanent establishment. During the course of execution of contracts, the company made certain payments in connection with the contract to certain non-residents which were in the nature of royalties. It was held that the though such payments would attract the provisions of TDS under section 9(1)(vi)/(vii) of the Income-tax Act, 1961 and the project head office was liable to deduct tax at source, but under the provisions of Article 13 of the DTAA between India and France the payments would be taxable in India only if the payments are borne by the permanent establishment. On facts since this condition was not fulfilled since it was the French company and not the permanent establishment which had borne the expenses, no tax was deductible from those payments.

4. Steffen, Robertson and Kirsten Engineering vs. CIT (1998) 230 ITR 206 (AAR)

TISCO entered into a technical consultancy agreement with a South African company (SRK) for the following considerations :

1. Engineering services rendered in India	$ 59,500/-
2. Engineering services rendered in Johannesburg	$ 1,08,500/-
3. Daily allowances and travelling costs	$ 35,090/-
	$ 2,03,090/-

It was held that tax was deductible on the entire amount and no distinction between "engineering services" and "daily allowances and travelling costs" could be made. The entire amount constituted consideration under the technical consultancy agreement payable by TISCO to SRK.

5. Dieter Ebenhard Gustav Von Der Mark vs. CIT (1999) 235 ITR 698 (AAR)

Fees paid to non-resident non-employee director for sittings of the board meetings and similar payments, if any, would be liable to be taxed under Article 16 of Indo-FRG DTAA and tax at source is deductible under section 195.

6. Transmission Corporation of AP Ltd. vs. CIT (1999) 239 ITR 587 (S.C.) affirming CIT vs. Superintending Engineer (1985) 152 ITR 753 (AP)

The amount on which tax is required to be deducted at source need not necessarily bear the character of income to the recipient. The amount on which tax is required to be deducted is the gross sum which may not wholly bear the character of income to the recipient. It is only when an application is made to the Assessing Officer to determine the appropriate portion of the sum on which to deduct tax, that the payer can deduct tax on the appropriate sum. Where no such application is made tax must be deducted at source on the gross sum.

7. Cheminor Drugs Ltd. vs. Income Tax Officer [2001] 76 ITD 37 (Hyd.) [See also West Asia Maritime Ltd. vs. ITO (2008) 297 ITR (AT) 202 (Chennai); Poompuhar Shipping Corporation Ltd. vs. ITO (2007) 109 ITD 226 (Chennai)]

In this case the Tribunal held that the person making payments to a non-resident cannot take a unilateral decision that the payments made by him are not sums chargeable to income tax (unless they are explicitly declared exempt) and therefore he cannot make such payments without deducting tax at source unless he gets the concurrence of the Assessing Officer as provided in section 195(2) or an exemption certificate under section 195(3).

8. C. J. International Hotels Ltd. vs. ITO (2001) 79 ITD 506 (Delhi)

Where franchise fees liable to paid for two financial years to a foreign company was paid after the due date and was accounted on cash basis as and when paid without booking the liability in the accounts of the years in which the liability arose, the Tribunal held that the liability to deduct TDS u/s. 195 did not arise merely because income accrued to the foreign company in an earlier financial year. It also observed that it is not open to the Revenue to tinker with or reject the method of accounting employed by the assessee for the purpose of determining TDS liability of an assessee.

9. Fertilizers and Chemicals Travancore Ltd. vs. CIT [2002] 255 ITR 449 (Ker.)

Pursuant to a foreign collaboration between the assessee Indian company and certain foreign companies for providing know-how, commissioning of plant, etc. the foreign companies deputed their technicians to India. The Kerala High Court, on facts, held that, such technicians did not become employees of the company since the assessee company had no control over such foreign personnel whose terms of service was spelt out by the foreign companies. Though the contracts originated in a foreign country the foreign collaborators rendered service in India through their technical personnel. Hence the amount remitted to the foreign companies is subject to TDS u/s. 195.

10. SOL Pharmaceuticals Ltd. vs. ITO [2002] 83 ITD 72 (Hyd.)

Section 195(2) is attracted only in a case where at least a portion of the payment to non resident is chargeable as income. If no portion is chargeable, then section 195(2) is not attracted.

11. HCL Infosystems Ltd. vs. Dy. CIT [2002] 76 TTJ 505 (Delhi)

Reimbursement of salary (without any profit element therein) to a foreign company, under a foreign collaboration agreement whereby its technical personnel were deputed to India and were working under the direct supervision and management of the assessee, was liable for tax deduction under section 192 and not under section 195.

12. Indopel Garments (P.) Ltd. vs. DCIT, 86 ITD 102 (Mad)

No tax was deductible from the commission paid to the non-residents. Where there is no chargeable income, it is not necessary for assessee to get concurrence of AO u/s. 195(2).

13. CIT vs. Vijay Ship Breaking Corp. (2003) 261 ITR 113 (Guj)

Usance interest on credit availed by assessee for purchasing a ship from a non-resident was not part of purchase price and did fall within the definition of the term 'interest' as defined in the s. 2(28A) of the Act and DTAA and therefore, assessee was liable to deduct tax at source u/s. 195.

14. Re: Dun & Bradstreet Espana S.A. (2005) 272 ITR 99 (AAR)

Payment to a foreign company for supply of information regarding Business Information Reports electronically cannot be treated as royalty or fees for technical services and accordingly the payment does not attract TDS u/s. 195 since the applicant did not have a permanent establishment in India.

15. Re: Flakt (India) Ltd. (2004) 267 ITR 727 (AAR)

In the context of Indo-Sweden DTAA, the AAR held that the deduction of tax on royalties need not necessarily be at the time of making actual remittance of the said sums; it has to be at the time of making a mere provision thereof in the books of account since the requirement of actual payment of “royalties” is not a pre-requisite or pre-condition for triggering the incidence of income tax in the India-Sweden tax treaty.

16. Kanchanganga Sea Foods Ltd. vs. CIT (2004) 265 ITR 644 (AP)

The assessee is liable to deduct tax from payments made to non-residents even though the payment was made but by way of giving a percentage of the catch of fish and not by way of cash.

17. Re: Danfoss Industries (P) Ltd. (2004) 138 Taxman 280/(2004) 268 ITR 1 (AAR) [See also Timken India Ltd. [2005] 272 ITR 67 (AAR)]

In this case, the assessee which is a member of the Danfoss Group availed certain services from Danfoss Industries Pvt. Ltd., Singapore towards:

(i) Advice and assistance on the preparation and conduct of market research, surveys and strategies, advertising campaigns and public promotion;

(ii) Review, analyse and give recommendations on improvement of management and business activities;

(iii) Advice and assistance on financial matters including, but not limited to, budgeting and long-term financial planning; and

(iv) Assistance regarding seminars, customer training, employee relations and product application training.

The assessee was debited with its share of proportionate costs which was reimbursable on a monthly basis. On facts the AAR held that

(i) an element of profit is not an essential ingredient of a receipt to be taxable as an income.

(ii) There is no direct nexus between the actual costs incurred by Danfoss Singpore in providing the said services to a Danfoss group company and the fees payable by each individual company which avails of the services. Hence, the service fee payable by the applicant is not reimbursement of costs incurred by Danfoss in providing services to the applicant.

(iii) Even assuming that the fee charged by Danfoss Singapore to the applicant and similarly situated group companies is equivalent to the expenses incurred by it in providing the services and there is no profit element, it would still be a case of quid pro quo for the service fees and not of reimbursement of expenses.

(iv) Therefore, the payments have to be made after withholding tax under section 195 of the Act.

18. Wipro Ltd. vs. ITO (2005) 94 ITD 9 (Bang.)

Access fee/subscription fee paid for providing access to copyrighted information available in a data base maintained by a foreign company in a server in USA is not "royalty" u/s. 9(1)(vi) of the Income-tax Act or under Article 12(3)(a) of the India–USA DTAA and hence no TDS is applicable u/s. 195.

19. ACIT vs. Malayala Manorama Co. Ltd. [2005] 94 ITD 121 – [2005] 1 SOT 739 (Coch.)

Membership fees, donation and advertisement charges paid to International Press Institute (IPI) of which the assessee was a member was on facts held not to be 'income' since it was a voluntary payment and there was no contractual or legal obligation on the part of the payer to pay and the recipient had no right to receive the amount. Further, the assessee could not be treated as an agent of IPI nor did IPI have a permanent establishment in India. Hence, no tax was deductible u/s. 195.

20. Gentex Merchants (P.) Ltd. vs. Dy. DIT (International Taxation) [2005] 94 ITD 211 (Kol.)

Payments under an agreement whereby a US company delivered technical designs and plans for installation of water features in the assessee's premises squarely fell within the definition of 'fees for included services' under Article 12(4)(b) of the India-US DTAA and therefore, the assessee was liable to deduct tax at the rate of 15 per cent of the amount payable u/s. 195.

21. NQA Quality Systems Registrar Ltd. vs. Dy. CIT (2005) 2 SOT 249 (Del.)

(i) Payment made to UK companies towards assessment surveillance services for the purpose of ISO Certification would not amount to "fees for technical services" under Article 13 of Indo-UK DTAA since it would not result in making available any technical knowledge, experience, skill, know-how or process to the assessee. Accordingly no tax was deductible from such payments u/s. 195.

(ii) Payments made to Individuals for audit work was not "fees for technical services" but fees for "professional services" classifiable under Article 15 of the Indo-UK DTAA. However, in the instant case since the individual was not present in India for a period of more than 90 days in the year nor had he a fixed base available in India, such income was not taxable in India. Accordingly no tax was deductible from such payments u/s. 195.

(iii) It is only where there was no dispute that the income was chargeable to tax in India and when the rate of tax to be deducted at source was in doubt, there is an obligation to make an application u/s. 195(2). Where the payments are not liable for tax in India no obligation is cast upon the payer to make an application u/s. 195(2). It cannot be said that the assessee must first deduct the tax without considering the fact whether the income is liable to tax in the hands of the recipient.

22. Sonata Information Technology Ltd. vs. ADDL. CIT [2006] 103 ITD 324 (BANG.) [See Also Mphasis Bfl Ltd. vs. ITO (2006) 9 SOT 756 (Bang.)]

The assessee which carried on the business of trading in 'shrink wrapped computer software' imported various softwares from non-resident foreign companies to distribute it in packaged condition to various customers in India. The Assessing Officer considered the payments as for purchase of a copyright and accordingly held that tax is deductible u/s 195 treating the payment as royalties. Negativing the contention, the Tribunal held that what the assessee acquired was a 'copyrighted article' and not a 'copyright'. Thus, the payment partakes the character of purchase and sale of goods and accordingly the assessee was not liable to deduct TDS.

23. Titan Industries vs. ITO (2007) 11 SOT 206 (Bang.)

Payment of professional fees by the appellant to a non-resident (Hong Kong resident) for registration of patents of its products are for making or earning income from a source outside India and hence are covered in the exception provided in S. 9(1)(vii)(b). Thus the payments not being taxable in India, are not subject to TDS u/s. 195.

24. Tecumseh Products (I) Ltd. vs. Dy CIT [2007] 13 SOT 489 (Hyd.)

Where interest was paid by a resident bank to a foreign bank due to the default of an importer for whom it had opened a letter of credit, it was held that it was the responsibility of the resident bank and not the importer to deduct tax at source from the interest.

25. Asst. CIT vs. Modicon Network (P.) Ltd. (2007) 14 SOT 204 (Del.)

The assessee a joint venture company was created by a consortium of 3 companies for the purpose of bidding for operation–GSM based cellular services. By virtue of the consortium agreement the pre-bid expenses of its partners were to be reimbursed out of capital of the company. Payment was made to one of the partners which incurred consultancy services for preparation of pre-bid documents without deduction of tax. The AO contended that the payment was fees for technical services and partner had paid the amount only as the agent of the assessee and hence liable for TDS u/s 195. The Tribunal dismissed the contention and held that —

(i) the consultancy services are not rendered to the assessee, but to the partner in his independent capacity; and

(ii) there is no income element embedded in the remittance.

Accordingly, no TDS was deductible u/s 195.

26. LMN India Ltd., IN RE 220 CTR 70 (AAR)

Payment made by assessee to USA company towards interest on fully convertible bonds till conversion, is interest taxable in India within the meaning of s.2(28A) and art. 11.4 of the DTAA between India and USA, Hence liable to TDS under s.195.

27. Cushman & Wakefield (S) Pte. Ltd., IN RE (2008) 172 Taxman 179

Referral fee received in Singapore by the applicant, a Singaporean company, from an Indian company for referring customers to the latter is neither business income under s. 9(1)(i) nor royalty under s. 9(1)(vi) nor fee for technical services under s.9(1)(vii) r/w art. 12(4)(b) of the DTAA between India and Singapore and, therefore, it is taxable as business income in Singapore only as the applicant has no PE in India; impugned receipt not being chargeable to tax under the provisions of the DTAA, s.195 is not attracted.

28. Dell International Services India (P) Ltd., IN RE (2008) 172 Taxman 418

Provision of telecom bandwidth facility by means of dedicated circuits and other network installed and maintained by the service provider or its agent does not amount to a lease of equipment and, therefore, fixed monthly charge paid by the Indian company to the US company for providing two way transmission of voice and data through telecom bandwidth is not royalty; definition of 'royalty' in art. 12(3) of Indo-US DTAA is also not attracted as the Indian company does not make use of any secret process; payment also does not constitute 'fee for included service' within the meaning of art. 12(4) as there is no transfer of any technology in the sense that the recipient of the service is enabled to apply the technology by itself.

29. Knowerx Education (India) (P) Ltd., IN RE (2008) 170 Taxman 98

Applicant engaged in the promotion of professional examinations/certification programmes of the US entities APICS and the AST&L with no authority to conclude any contract on behalf of APICS and AST&L or to bind them in any way in the conduct of their examinations in India, and also carrying on the variety of other activities besides promoting examinations, cannot be deemed to be a PE of APICS and/or AST&L in India either in terms of para 4 or para 5 of art. 5 of Indo-US DTAA and, therefore, examination fees collected by the applicant for APIC and AST&L and remitted to them is not taxable in India in view of para 1 of art. 7 and the applicant is not required to deduct tax at source from such payments.

30. CIT vs. Estel Communications (P) Ltd. (2008) 217 CTR (Del) 102

Assessee using internet bandwidth of US party T for providing access to its subscribers and there being no privity of contract between the customers of assessee and T, Tribunal was justified in coming to the conclusion that no technical services were provided by T to assessee within the meaning of s. 9(1)(vii) and the assessee was not obliged to deduct tax at source from payment made by assessee to T.

SECTION 197 – CERTIFICATE FOR DEDUCTION AT LOWER RATE

1. Jaipur Udyog Ltd. vs. CIT [1985] 22 Taxman 42/155 ITR 476 (Raj.)

Even certificate granted by the ITO under section 197(3) without proper enquiry would not be invalidated.

2. ITO (TDS), Chittorgarh vs. Deputy General Manager (Finance), Aditya Cement [2005] 96 ITD 398 (Jodh.)

When section 197 is read in conjunction with Rule 28AA, the following salient features emerge :

(i) The satisfaction of the Assessing Officer shows his understanding at the stage of issuing the certificate that the total income of the recipient would not exceed the taxable limit warranting any TDS for the entire financial year and not a part of the year;

(ii) On the issuance of certificate u/s. 197(1) payer is authorized to make the payments without TDS or deducting at a lower rate, for a period up to the close of the financial year in which this certificate is issued unless the certificate is cancelled or the validity period expires.

(iii) An application for a fresh certificate can be made, if required, after the expiry of the period of validity of the earlier certificate. There is no need to apply for a fresh certificate during the currency of the period up to the close of the financial year, which is stipulated in the original certificate.

(iv) the amount specified in the certificate as "sums expected to be credited / paid…" to the payee is only a tentative figure and the actual amount may be more or less than that. It nowhere contains any ceiling or cap, being the amount beyond which no payment can be made without deduction of tax at source for deduction at lower rate.

3. Sri Santhalakshmi Mills (P.) Ltd. vs. ITO (2006) 99 TTJ (Chennai) 1134

The certificate from ITO for non-deduction of tax at source must be available for the payer at the time of making payment or credit. The certificate issued by the ITO for non deduction of tax cannot be operated with retrospective effect and the Assessing Officer cannot issue such a retrospective certificate.

However, in CIT vs. Ginni International Ltd. (2006) 202 CTR (Del.) 551 – (2008) 296 ITR 652 (Del.) where the certificate was granted to the payee on 10th May, 1995 in respect of interest credited by the payer on 31st March, 1995 without deduction of tax, the Delhi High Court held that the payer was not in default since the said amount had to be deposited only by 31st May, 1995 by which time the payer got the certificate for non-deduction of tax.

SECTION 199 – CREDIT FOR TAX DEDUCTED

1. CIT vs. Tanjore Permanent Bank Ltd. 149 ITR 788 (Mad.) [See also Tej Ram vs. ITO [2005] 93 ITD 1 (Chd.)]

Credit for TDS can be taken only if the relevant income has been offered for assessment.

2. Arya Tea Co. Ltd. vs. ITO [1985] 23 TTJ 151 (Cal.)

Where person has deducted tax as per law applicable but did not pay the same to the government, he is "Assessee in default". Assessee was nowhere responsible to take any steps to compel such person to make payment to government or to take any steps in that regard. Undoubtedly, credit for the TDS will be given only on payment by the deductor but will relate to the year in regard to which deduction was effected.

3. Rallis India Ltd. vs. ITO [1988] 24 ITD 495 (Cal.)

An assessee is entitled to credit of tax deducted at source even if it is not paid to the Central Government by the person who deducted it.

4. Asst CIT vs. Setco International (1995) 51 TTJ (Delhi) 251

Where, by mistake, tax was deducted and deposited in earlier year, though it pertained to the following year it was held that assessee can legitimately claim the same to be appropriated to the following year.

5. M. M. Publication vs. Asstt. CIT (1997) 92 Taxman 51 (Coch.) (Mag.)

Credit for TDS cannot be denied merely because date of deposit is not mentioned.

6. Stallion Securities Ltd. vs. ITO (2004) 91 ITD 338 (Hyd)

Credit for amount of TDS from Dividend has to be given only in the year in which dividend income is 'assessable' and not in the year in which the dividend is actually assessed.

7. Smt. Varsha Salunke vs. Dy CIT (Mum.) [2006] 98 ITD 147 (Mum.)

Credit for TDS can be given only in the assessment year in which the income is offered to tax on the basis of the method of accounting regularly employed.

8. LML Ltd. and Another vs. M. K. Venkataraman Asst. CIT (2006) 285 ITR 282=151 Taxman 11 (Bom)

Where tax, though deducted, was not paid to the credit of the Central Government by the deductor, on the date of filing of return of the payee, but was paid to the credit of the Central Government before the return of income of payee was processed, the High Court held that the payee is eligible for credit of tax deducted at source.

9. CIT vs. Malibu Estate (2007) 164 Taxman 518 (Del.)

Where the income was assessed in the hands of the AOP, credit for TDS is to be given to the AOP assessee even though the TDS certificate was in the name of another company in the group.

10. Pradeep Kumar Dhir vs. Asst. CIT (2007) 107 ITD 118 (CHD.) (TM)

In a case where only a part of income in respect of a TDS certificate has been offered for income tax then only pro rata TDS can be claimed, the balance TDS amount can be claimed in the year the rest of the income is offered for income tax.

11. ITO vs. T. G. Veeraraghavan (2007) 108 ITD 288 (Kochi Tribunal)

Where there were four co-owners receiving rent whereas only one TDS certificate was issued for the entire TDS in the name of one of the co-owners it was held that credit for the entire TDS amount should be given even if it exceeds the tax due on his income thus resulting in refund. (the case pertains to assessment year 1996-97. However from assessment year 1997-98 section 199 has been amended as a result of which the TDS is to be allowed on a pro rata basis to each of the co-owners)

12. CIT vs. Smt. Sonal Bansal (2008) 1 DTR 438

Assessee having purchased Deep Discount bonds from original purchaser and TDS amounting to Rs.91,800 on entire interest of Rs.9 lacs paid to the assessee at the time of maturity having been deducted and certificate having been issued in the name of assessee, assessee was entitled to credit of entire TDS even though she had returned interest in the sum of Rs.60,000 only.

SECTION 201 – CONSEQUENCES FOR FAILURE TO DEDUCT AND PAY

1. Iyer & Sons (P.) Ltd. vs. ITO [1982] 1 ITD 502 (Delhi)

Interest paid to department under section 201(1A) for delayed remittance of tax deducted at source is not admissible as deduction.

2. Cawnpore Sugar Works Ltd. vs. IAC [1982] 2 ITD 654 (All.)

A plain reading of section 201(1) clearly shows that it deals with two defaults, one of failure to deduct tax at source and another of failure to pay the tax after deduction. It cannot, therefore, be said that this provision deals with failures of the latter type only.

3. CIT vs. Divisional Manager, New India Assurance Co. Ltd. [1983] 140 ITR 818 (M.P.)

No tax can be demanded from the employer under section 201 in respect of tax short deducted from an employee whose regular assessment has been completed and tax has already been fully paid by him. [Also refer CIT vs. Kannan Devan Hill Produce Co. [1986] 161 ITR 477 (Ker.) CIT vs. Manager, Madhya Pradesh State Co-operative Development Bank Ltd. (1982) 137 ITR 230 (MP), CIT vs. Shri Synthetics Ltd. (1985) 151 ITR 634 (MP); CIT vs. Hindustan Steel Ltd. (1989) 176 ITR 282 (MP), CIT vs. Life Insurance Corporation, 1987) 166 ITR 191 (MP).]

4. Gwalior Rayon Silk Co. Ltd. vs. CIT [1983] 140 ITR 832 (M.P.)

Where the regular assessment of an employee had been completed and the amount of tax was fully paid by him, the ITO (TDS) had no jurisdiction under section 201 to demand further tax from the employer in respect of tax short deducted. Followed in CIT vs. M.P. Agro Morarji Fertilizer (1988) 41 Taxman 115 (M.P.). Also refer CIT vs. Divisional Manager, New India Assurance Co. Ltd. (1983) 140 ITR 818 (M.P.).

5. Methur Chemical & Industrial Corporation Ltd. vs. IAC (1984) 150 ITR 341 (Mad.) applying Express Newspaper Pvt. Ltd. vs. CIT 1978 111 ITR 347 (Mad)

Section 246 contemplates a written order under section 201 to treat an assessee in default in order to enable the assessee to file an appeal challenging the order.

6. Grindlays Bank Ltd. vs. CIT [1993] 200 ITR 441 (Cal.)./ (1992) 193 ITR 457 (Cal.)

Interest payable by Bank to Non-Resident customers. In the absence of the assessee being a statutory agent of the Non-Resident depositors, it was liable to deduct tax at source.

The Bank was also liable to pay interest under section 201(1A) even though recovery of TDS had become time-barred. Also, refer ITO vs. Marshall Sons & Co. India Ltd. (1992) 42 ITD 496 (Cal.).

It was also held that if the amount of tax has already been realised from the employees concerned directly, there cannot be any question of further realisation of tax as the same income cannot be taxed twice. If the tax has been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest, or any other legal consequence for their failure to deduct or pay in accordance with law, to the revenue.

7. Pentagon Engineering (P.) Ltd. vs. CIT [1995] 212 ITR 92 (Bom.) / ITO vs. Khushi Ram & Sons [1989] 31 ITD 151 (Asr.) [See also West Bengal State Electricity Board vs. Dy. CIT [2005] 278 ITR 218 (Cal); Ernakulam District Co-operative Bank Ltd. Vs. ACIT (TDS) [2005] 272 ITR 95 (HC); CIT vs. Majestic Hotel Ltd. (2006) 155 Taxman 447=204 CTR 330 (Delhi)]

The use of the word 'shall' in section 201(1A) makes the liability to pay interest in circumstances mentioned mandatory and there is no pre-condition of 'reasonable cause' for non-payment in time of tax deducted under various sections. Therefore, the ITO was not required to take into consideration the 'reasonable cause' for non-payment of taxes deducted at source for the purpose of default u/s. 201(1A).

8. (i) CIT vs. Rathi Gum Industries [1995] 213 ITR 98 (Raj); CIT vs. K. K. Engineering Co. (2001) 116 Taxman 390/249 ITR 447 (Ker.)

The provisions for payment of interest under section 201 are mandatory and automatic. Interest has to be paid from the date on which the tax was deductible till the date on which tax is actually paid. If the tax has already been paid by the recipient on such income, the income tax department may not be justified to recover the said amount of tax; but so far as the liability of interest is concerned that cannot be considered to be non-existent on account of deposit of tax by the recipient at a subsequent or later stage. [Contra see CIT vs. Rishikesh Apartments Co-op. Housing Society Ltd. (2001) 119 Taxman 239 (Guj.)/ (2002) 253 ITR 310 (Guj.)].

(ii) ITO vs. Manav Greys Exim (P) Ltd. [2002] 75 TTJ 115 (Mumb.) [See also Singapore Airlines Ltd. ITO (2006) 7 SOT 84 (Chennai); cit vs. Majestic Hotels (2006) 155 Taxman 447 (Delhi); ITO vs. Alfred Allan Advertising (2006) 8 SOT 312 (Delhi); CIT vs. Majestic Hotel Ltd. (2007) 293 ITR 185 (Del.)]

The date of payment of tax by the recipient should be considered as endpoint for computing period of default for charging interest u/s 201(1A).

(iii) CIT vs. Adidas India Marketing Pvt. Ltd. (2007) 288 ITR 379=57 Taxman 519 (Delhi)

If tax has not been deducted by the payer but the payee has already paid the tax before the due date of payment of TDS, no interest can be recovered u/s 201(1A).

(iv) CIT vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (2006) 287 ITR 354 (Raj)

When tax is not deducted at source and the payee has claimed refund in his return only due to TDS, there is no justification for charging interest u/s 201(1A)

9. Leema Resorts vs. C. G. Suryakant (1995) 215 ITR 618 (Mad)

Where order of the court did not give any scope for the payer to deduct TDS he cannot be treated as an assessee in default in respect of that tax not so deducted.

10. Nestle India Ltd vs. ACIT (1997) 61 ITD 444 (Delhi)

Penalty u/s 201 is not sustainable unless the department shows mala fides on the part of the company.

11. Eicher Goodearth Ltd. vs. ITO (1998) 98 Taxman 229 (ITAT-Delhi) (Mag.)

Scrutiny of annual return under section 201 is to be limited to two points viz. whether the person responsible for paying such income fails to deduct, or after deducting fails to pay the same as required under the Act. ITO (TDS) while checking annual return cannot enter into controversy about valuation of perquisite.

12. CIT vs. Ramesh Enterprises (1999) 105 Taxman 711 (Mad.)

While deducting tax at source, the payer need not consider the likely liability for tax of the payee unless a certificate or declaration for lower rate or for no deduction of tax is furnished by the payee. In all other circumstances the deduction of tax at source has to be made as per the statutory provisions in that regard irrespective of the extent of tax liability of the recipient; i.e., payee.

13. Chief Electoral Officer vs. ITO (1999) 68 ITD 439 (Chd.)

If tax due on payments in question has been paid by contractor, the object of provisions of section 194C, read with section 191, could be said to have been met and default, if any, would be of technical nature not attracting the provisions of section 201(1A).

14. Gujarat Narmada Valley Fertilizers Co. Ltd. vs. ITO (1999) 71 ITD 66 (Ahd.)

Where assessee was under bonafide belief that no tax was required to be deducted from disputed payments, order passed under sections 201(1) and 201(1A) would have to be quashed.

15. Ernakulam District Co-op. Bank Ltd. vs. Asst. CIT (2004) 272 ITR 95 ; Kanoi Industries P. Ltd vs. Asst. CIT (2003) 261 ITR 488 (Cal.)

Once there is failure to deduct tax at source levy of interest under section 201(1A) is mandatory.

16. Lakshmi Gnaneswara Enterprises and Finances vs. ITO (2000) 72 ITD 295/68 TTJ (Hyd.) 264

Initiation and conclusion of proceedings must be done within a reasonable period though statute does not prescribe period of limitation. However if there are sufficient reasons for delay, the original proceedings could not be said to be barred by limitation.

On facts of the case, though the original order under section 201, read with section 194B was set aside by the Commissioner (Appeals) and taken up after approximately 6 years, the assessee's contention that the order was barred by limitation was not considered since here the assessee had not furnished relevant details, not deducted tax at source, not filed any statutory return etc. Hence considering the peculiar facts and circumstances of the case the order could not be said to be barred by limitation.

17. ITO vs. A.S. Babu Shah (2003) 86 ITD 283 (Mad.)

Two dates are crucial for arriving at amount of interest chargeable under section 201(1A), that is date of deduction of tax and date of actual payment of such tax to credit of Government; where date on which such tax was actually paid was not available for the Assessing Officer to work out the interest, he was not right in substituting 'date of assessment order' in place of 'date on which such tax was actually paid' for computing interest u/s. 201(A).

18. Vinsons vs. Third ITO (2004) 89 ITD 267 (Mum) [See also Grasim Industries Ltd. vs. ITO [2005] 92 TTJ 944 (Jd.); Secy. Board of Secondary Education, Rajasthan vs. ITO [2005] 93 TTJ 256 (Jaipur)]

The tax deducted monthly from the salary may not be exactly 1/12 of the total tax deductible. Interest u/s. 201(1A) cannot be levied on a mere short deduction of tax at source from salaries paid to the employees at beginning of the Financial Year, (which was adjusted in latter months) unless the total tax deducted at the end of the year is less than tax deductible on the salary paid to the employee in that year.

19. Thai Airways Co. Ltd. vs. Asst. CIT (2005) 2 SOT 389 (Del.)

There is no time limit for passing an order u/s. 201. However, the order must be passed within a ‘reasonable’ time period. There is no infallible time limit of four years from the end of the financial year in operation in respect of every order under s. 201. Thus, where the assessee neither in his returns nor in the TDS certificates stated the fact that it had not deducted tax at source from certain payments, the assessing officer was left unaware of the facts relating to non-deduction of tax at source by the assessee since they were not placed before him and which he could not have enquired into or obtained in the ordinary course and, when he did become aware of the facts, he acted promptly, the Tribunal held that the order of the Assessing Officer u/s. 201, even if beyond the four year time period stated above, is not time-barred.

20. Dy. CIT vs. Excel Industries Ltd. (2006) 5 SOT 235 (Mum.)

The Tribunal held that:

1. A written order has to be passed specifically declaring an assessee as deemed to be in default. In absence of such a specific order, neither interest u/s. 201(1A) can be charged nor can penalty u/s. 221 be levied.

2. Where an employer-assessee honestly and fairly estimated income of his employees, the employer-assessee cannot be defaulted if an addition were to be made by the Assessing Officer to the income of the employee.

3. If there are two views possible on an issue/item of addition, and employer adopts the view favourable to the employee and does not deduct tax thereon, he cannot be defaulted for non-deduction of TDS on such payments.

4. Section 201(1) is a charging section for levy of penalty u/s. 221. If an employer-assessee cannot be declared in default, no proceedings can be initiated for levy of penalty u/s. 221.

5. After the completion of assessment of employees, the employer-assessee cannot be directed to pay the deficient tax, if any, not deducted from the payments made to the employees.

6. Where tax deducted either in full or short, has not been paid, interest u/s. 201(1A) will not be workable.

21. State Bank of India vs. Asst. CIT (TDS) (2007) 12 SOT 174 (Mum.); (2007) 106 ITD 589 (Mum.)

(i) Where a survey was conducted for financial years 1995-96 to 1997-98 on 11-12-2001 and orders were passed on 16-2-2001 and 25-10-2002, the Tribunal relied upon the decision of the ITAT Mumbai 'B' bench dated 8-6-2005 in the case of Wockhardt Life Sciences Ltd and held that order passed u/s 201 after the expiry of four years from the end of the relevant financial years were time barred even though the proceedings were initiated on 11-12-2001 [See also Century Textiles and Industries Ltd. vs. Dy. CIT (2007) 13 SOT 507 (Mum.)

(ii) Sections 201(1) and 201(1A) prior to its amendment by the Finance Act, 2002 w.r.e.f. 1-4-1962 do not apply to a case of short deduction of tax and these sections come into operation only if any person does not deduct or after deduction fails to pay the tax. [P. V. Rajagopal vs. UOI (1998) 233 ITR 678 (AP)]. However, the Finance Act, 2002 which amended S. 201 w.r.e.f 1-4-1962 to deem an assessee in default even in respect of short deductions, would apply even to cases which pertained to short deductions involved prior to the amendment by the Finance Act, 2002. [contra 'See also Business India Television International Ltd. vs. ACIT 11 SOT 486 (Del).

22. Hindustan Coca Cola Beverage (P.) Ltd. vs. CIT (2007) 163 Taxman 355 (SC)

The Supreme Court relying on Circular No. 275/201/95-IT(B) dated 29-1-1997 agreed with the deductor that once the deductee has paid the taxes, the Department cannot once again recover the tax from the deductor.

23. CIT vs. Ginni International Ltd. (2008) 296 ITR 652 (Del)

The assessee had credited interest to the account of its Depositor on 31st March 1995 without deducting tax at source on the declaration of the depositor that it had applied to the competent authority for exemption certificate in this regard. The competent authority having issued an order authorizing payments to the payee without deduction of tax at source within two months (on 10th May, 1995) from the date on which the assessee had credited interest in the account of the said company (31st March 1995), assessee was not in default in not deducting tax under s. 194A, as the time limit for depositing such tax to the credit of the Government (i.e. 31st May, 1995) had not passed by then.

24. CIT vs. Indokem Ltd. (2008) 2 DTR (Bom) 123

In view of concurrent findings of fact recorded by CIT(A) and the Tribunal that the assessee was under bona fide belief that the amount paid to the employees under the Voluntary Retirement Scheme was exempt in their hands and consequently the default in deducting tax at source was for good and sufficient reasons, and action under s.201(1) was not justified, no substantial question of law arises.

SECTION 205 – bar against direct demand on the assessee

1. Capt. J.G. Joseph vs. JCIT [2005] 92 ITD 358 (Mum.)

Where the assessee filed his return without Form No. 16 since his employer did not furnish the TDS certificate, no demand could be made against the assessee since s.205 put a bar against direct demand on the assessee to the extent tax was deducted at source. However, at the same time, credit for TDS cannot be given to an assessee unless the assessee submits his certificate in view s. 199. [See also Om Prakash Gattani vs. ACIT (1996) 222 ITR 489 (Gauh.) u/s. 194B].

2. Smt. Anusuya Alva vs. Deputy Commissioner of Income Tax and Others [2005] 278 ITR 206 (Karn]

Where a tenant deducted TDS from rent paid to the landlord but did not remit the amount to the Government, it was held that the Revenue cannot enforce demand against the landlord with reference to amount of tax already deducted by the tenant in view of s. 205 which puts embargo or prohibition on raising a demand on the assessee in respect of the amount, which was deductible and actually deducted, to the extent it has been deducted.

3. Yashpal Sahni vs. Rekha Hajarnavis, ACIT and Others (2007) 293 ITR 539 (Bom.) [See also J. Rajgopal vs. ITO (2007) 18 SOT 310 (Mum)]

Once it is established that the tax has been deducted at source from the income, the Revenue is barred from recovering the TDS amount once again from the payee even though the amount is not paid to the credit of the Government and TDS certificate has not been issued. As per the provisions of S. 205 the Revenue has to recover the amount only from the payer/deductor.

SECTION 221 – PENALTY PAYABLE WHEN TAX IN DEFAULT

1. CIT vs. Shyam-Sunder Tea Co. (P.) Ltd. [1979] 114 ITR 116 (Guwahati)

Section 221 makes a person who is “deemed to be in default”, subject to penalty even if recovery of tax is barred by limitation prescribed by the erstwhile section 231.

2. Jubilee Investments & Industries Ltd. vs. Asst. CIT (1999) 238 ITR 648 (Cal)

Delayed payment of TDS attracts penalty under section 221. It was also held in this case that once tax is deducted at source from the payee's income, the payer is merely a custodian of the TDS amount. He cannot touch that amount. That TDS amount has to be paid to the credit of the Central Government within the prescribed time, and any loss or profit in the business of the payer has nothing to do with deposit of the TDS amount so as to absolve the payer from the statutory liability of penalty leviable under section 221.

3. ITO (TDS) vs. Titagarh Steels Ltd. [2001] 79 ITD 532 (Cal.) [See also IDBI vs. ITO (2006) 10 SOT 497–104 TTJ 230 (Mum)]

In this case, for the default on part of the assessee – tax deductor for short deduction of tax, the Assessing Officer (TDS) initiated penalties under section 271C and under section 221(1) also. The Tribunal held that both the penalties, i.e., under section 221(1) as well as under section 271C, cannot be imposed as a consequence of the same lapse of short deduction of tax at source. The Tribunal also held that, penalty under section 221(1) cannot be imposed for the cases of non-deduction and short deduction of taxes at source, which are undisputedly covered by the specific provisions of section 271C, so far as period after 1st April, 1989 is concerned.

4. Woodward Governor India P. Ltd. vs. CIT and others [2002] 253 ITR 745 (Delhi)

Levy of penalty u/s 271C is not automatic. Absence of reasonable cause, existence of which has to be established by the assessee, is the sine qua non for levy of penalty.

5. Cit vs. Dlf Universal Ltd. (2008) 166 Taxman 14 (Del)

AO was not justified in imposing penalty under s. 221 without first disposing of stay applications filed before him by the assessee.

6. CIT vs. Binod Kumar & Bros. (2008) 170 Taxman 72 (Jharkhand)

No prejudice was caused to the Revenue by non-deduction of tax by assessee from the interest paid to two creditors as the assessment of the said creditors for the relevant assessment years resulted in nil demand and therefore, under s.221 was not justified.

SECTION 271C : PENALTY FOR FAILURE TO DEDUCT TAX AT SOURCE

1. Dy. CIT vs. SMS India Ltd. (2006) 7 SOT 424 (Mum.)

Where assessee was under a bonafide belief that certain allowances were not taxable (especially when returns for 4 years were accepted as such) and therefore did not deduct tax at source, but on being questioned by the department (in the 5th year) he sought professional advice and made a voluntary compliance by depositing the tax and revising the returns, the Tribunal held that penalty u/s 271C is not leviable since the assessee had a ‘reasonable cause’. The Tribunal further observed that non recording of satisfaction by the Assessing Officer in the order u/s 201(1) with regard to the fact that the case is fit for levy of penalty makes the levy of penalty void ab initio. (See also CIT vs. M. P. Electricity Board (2006) 154 Taxman 335 (MP) – assessee a Government body coupled with voluntary compliance)

2. ITO vs. Muthoot Financiers (2006) 103 ITD 108 (Kochi)

Where the assessee did not deduct tax at source on payments made to sister concerns on the bonafide belief that there is no taxable income in most cases and the transactions were voluminous, the Tribunal deleted the penalty u/s. 271C on the reasonable cause ground.

3. ITO vs. G. B. Morrison Travels (P.) Ltd. (2006) 99 TTJ (Delhi) 117

Where the assessee, an air travel agent did not deduct tax at source on rebate and discount to his customers, based on the opinion it obtained from experts, the Tribunal observed that there was a reasonable cause and no penalty is leviable u/s 271C.

4. Kamal Industries vs. Jt. CIT (2006) 100 TTJ (Jodh.) 451

The assessee firm had credited interest exceeding Rs. 2,500 as on 31-3-1999 without deducting tax at source, though not in possession of Form 15H. Subsequently the assessee received Form 15H on 1.4.1999. The Tribunal held that no penalty u/s 271C is leviable since the default was a technical one.

5. Aeroflot Russian International Airlines vs. Addl. CIT (2006) 5 SOT 583 (Delhi)

Where the assessee, an official Russian Government airline did not deduct TDS on various payments, penalty u/s 271C was condoned since – (i) It was under a bonafide belief that no tax was deductible in view of the Indo-Russia DTAA; (ii) It paid the entire tax along with interest on coming to know of its legal obligation; (iii) The department had also failed to discharge its obligations in properly instructing the assessee at the time when the instructions were sought by the assessee from it.

6. Dy. CIT vs. Ericsson Telephone Corp. India A. B. (2006) 155 Taxman 156 (Delhi) (Mag.)

Where the assessee was under a bonafide belief that tax was not deductible on children education expenses reimbursed to expatriate employees abroad since that would give S. 192 an extra-territorial operation, the Tribunal held that no penalty was imposable u/s. 271C especially considering the fact that the assessee paid the taxes along with interest and the amounts were insignificant as compared to the total payments made [just 5%] establishing that it had no motive to evade the payment of tax.

7. CIT vs. (1) Sencma Sa, France (2) Sencma India Liaison Office (2007) 288 ITR 76 (Del.)

Where the assessee was under a bona fide belief that tax was not deductible from that component of salaries paid by it outside India to its expatriate employees working in India u/s 192, the High Court held that no penalty was imposable u/s 271C especially considering the fact that the assessee had paid the taxes along with interest.

8. ITO vs. Benaras State Bank Ltd. (2007) 160 Taxman 210 (Del.)

Where the assessee on receipt of demand for tax and interest u/ss. 201 and 201(1A) made all the payments and the payee too included the receipts in its return and paid the advance tax, penalty u/s. 271C was deleted.

9. CIT vs. Alcatel India Ltd. (2007) 159 Taxman 332 (Del)

Assessee-company having failed to deduct tax at source in respect of three items of salary of its expatriate employees which were paid by its holding company on account of the fact that neither the parent company nor the employees informed the assessee about such payments, there was reasonable cause for non-deduction of tax at source and no question of law arises out of Tribunal's order deleting penalty under s.271C.

Section 272A – Penalty for failure to answer questionS, furnish information, statements, returns, etc.

1. Salwan Furnishing Co. vs. JCIT [2005] 1 SOT 485 (Del.)

Considering that tax has been duly deducted, duly deposited, TDS returns duly furnished within time enclosing therewith TDS certificates and TDS credit has been received by the payees, it was held by the Tribunal that merely because the TDS certificates were undated penalty u/s. 272A(2)(g) for delay in issuing TDS certificates is not imposable.

2. CIT vs. State Bank of Patiala [2005] 277 ITR 315 (P & H)

Where no tax was required to be deducted at source and there was no loss to the Revenue, no penalty u/s. 272A(2)(f) for non-filing of Form 15H is imposable since the default is technical or venial in nature.

3. H.M.T. Ltd., Tractors Division vs. CIT [2005] 274 ITR 544 (P & H) [See also CIT vs. Gabriel India Ltd. (2006) 282 ITR 58 (MP)]

Where there was a delay in issue of TDS certificates for 1039 days but the tax was duly deducted, duly paid, the returns filed on time, and none of the contractors had any grievance about belated issue of TDS certificates, it was held that no penalty is imposable u/s. 272A(2)(g) since the default is technical or venial in nature without any loss to the revenue.

4. CIT vs. Sri Ram Memorial Education Promotion Society (2006) 287 ITR 155=152 Taxman 257 (All) [See also CIT vs. Sahara India Mutual Benefit Co. Ltd. (2006) 157 Taxman 52 (All.); CIT vs. Sahara India Financial Corpn. Ltd. (2007) 158 Taxman 435 (All.)]

(i) In case the tax has not been deducted at source, the question of issuing the certificate of tax u/s. 203 or that of filing of return u/s. 206 would not arise at all.

(ii) For failure of the assessee in deducting the tax at source, penalty can be imposed upon him u/s. 271C of the Act.

(iii) Once an assessee has been subjected to a penalty u/s. 271C, for not deducting the tax at source, there would not arise any occasion for levying a penalty u/s. 272A(2)(c) for failure to file annual returns and u/s. 272A(2)(g) for failure to furnish TDS certificates.

5. ITO vs. Labh Construction & Ind. Ltd. (2006) 8 SOT 475/103 TTJ 269 (Ahd.)

On facts, the Tribunal held that non availability of particulars to properly fill TDS certificates cannot be treated as a reasonable cause to justify non-imposition of penalty u/s 272A(2)(g) for failure to issue TDS certificates.

6. Crest Communication Ltd. vs. Addl. DIT (2007) 11 SOT 547 (Mum.)

Where the assessee is responsible for TDS on payments to non-residents, failure to file the quarterly return under rule 37A within the due dates cannot be penalised u/s. 272A(2)(c) since the penalty under section 272A(2)(c) is imposable only for delay in filing the annual returns u/s 206 and not quarterly statements which are not pursuant to section 206. Further, it is also held on facts that since the he had a reasonable cause for delay in filing the TDS return as he was under financial constraints, he was unable to pay the tax, hence the quarterly statements were not filed. Accordingly it was held that no penalty could be imposable.

SECTION 276B – FAILURE TO PAY TAX TO THE CREDIT OF CENTRAL GOVERNMENT UNDER CHAPTER XII-D OR XVII-B

1. ITO vs. Joseph [1972] 83 ITR 362 (Ker.)

A managing director is not one of the persons falling under clause (a) of section 2(35) which defines "principal officer" since a managing director under the Companies Act cannot be equated with any of the persons viz., secretary, treasurer, manager or agent, mentioned in the said clause. Secondly, when no notice as contemplated under section 2(35)(b) has been served on the managing director of a company informing him of the intention of the ITO to treat him as the principal officer of the company, he could not be prosecuted u/s 276B for delayed payment of the tax deducted by the company. [See also M. R. Pratap vs. V. M. Muthuramalingam, ITO (1983) Tax LR 1432 (Mad)/(1984) 149 ITR 798 (Mad.), Rayala Corporation Private Ltd. vs. ITO (1981) 129 ITR 675 (Mad.), Greatway Pvt. Ltd. vs. Asst. CIT (1992) 64 Taxmann 421 (P&H)/(1993) 199 ITR 391 (P&H); ITO vs. Roshni Cold Storage (P.) Ltd. (2000) 245 ITR 322 (Mad.)].

2. Rayala Corpn. (P) Ltd. vs. ITO [1981] 129 ITR 675 (Mad.)

The expression 'fails to pay' occurring in section 276B has reference not only to those cases where there has been a total failure to pay the tax but also to those cases where there has been a failure to pay the tax within the prescribed time. Hence prosecution u/s 276B can be initiated u/s 276B even for delay in payment of TDS. [See also Jagmohan Singh vs. ITO (1992) 196 ITR 473 (P & H)].

3. Sequoia Construction Co. vs. P. P. Suri, ITO [1985] 21 Taxman 13 (Delhi)/158 ITR 496 (Del.)

Where penalty under sections 201(1) and 221 are quashed on merits; the prosecution initiated under section 276B had necessarily to be quashed.

4. Rishikesh Balkishandas vs. I. D. Manchanda, ITO [1987] 34 Taxman 305/167 ITR 49 (Delhi)

Section 276B does not contain the word 'knowingly'. The tax liability to deduct tax is an absolute liability. Deficient deduction or non-deduction is a conscious act. Therefore, prosecution under section 276B would arise without requirement of mens rea to be established.

Mere deposits of the TDS amount will not absolve assessee from proceedings under section 276B.

5. Adding Machines (India) (P.) Ltd. vs. State [1987] 35 Taxman 128/167 ITR 171 (Cal.)

A company cannot be prosecuted as it cannot be committed to prison. This does not mean that this section will be rendered nugatory because the principal officer may be prosecuted for an offence punishable under section 276 B.

6. Crest Communication Ltd. vs. Addl. DIT (2007) 11 SOT 547 (Mum.)

Where the assessee is responsible for TDS on payments to non-residents, failure to file the quarterly return under rule 37A within the due dates cannot be penalised u/s. 272A(2)(c) since the penalty under section 272A(2)(c) is imposable only for delay in filing the annual returns u/s 206 and not quarterly statements for payments to non-residents which are not pursuant to section 206. Further, it was also held on facts that since they were under financial constraints and were unable to pay the tax, they had a reasonable cause for delay in filing the quarterly statements. Accordingly it was held that no penalty could be imposable.

7. Jagmohan Singh vs. ITO [1992] 196 ITR 473 (Punj. & Har.)

The offence under section 276B is complete on the due date on which the amount of tax deducted at source should have been deposited; the late deposit will not absolve the company and its officers from the criminal charge. It is open to the Income-Tax authorities to impose penalty on the amount which had not been deposited.

Where the ITO felt satisfied by charging only interest on the late deposit, this fact, again, would not absolve the petitioner of criminal liability.

8. ITO vs. Sood Enterprises [1992] 41 ITD 234 (Delhi)

Where payee has already paid tax leaving nothing for the person responsible for effecting TDS to pay; and if such payments happen to be within the prescribed time, interest under section 201(1A) cannot be charged.

9. Greatway (P.) Ltd. vs. Asstt. CIT [1992] 64 Taxman 421 (P&H)/(1993) 199 ITR 391 (P&H)

Absence of reasonable cause is one of the ingredients of offence under Section 276B and it has to be proved by revenue.

Director or managing director of company cannot be prosecuted under section 276B until the Assessing Officer has served a notice on him under section 2(35) indicating his intention to treat one or more such persons as principal officers of company.

10. ITO vs. Roshni Cold Storage P. Ltd. (2000) 245 ITR 322 (Mad.)

The High Court confirmed the order of the trial court and held that the respondents were not liable to be prosecuted under section 276B for delayed remittance of tax deducted at source since

(a) The respondents were incurring heavy losses right from the incorporation and were under severe financial stringency;

(b) The payee had paid the tax on the amount of interest received from the respondents and hence there was no loss to the exchequer;

(c) The payee's assessments had been completed.

11. ITO vs. Sreevatsa Trading Co. and another [2001] 252 ITR 133 (Mad.)

In this case, the offence complained of was under section 276B; i.e., the failure to pay the tax deducted at source for A.Ys. 1982-83 and 1983-84. The court held

(i) the guilt of the accused has to be necessarily decided in accordance with law as it stood during the relevant time, namely, during 1982-83 and 1983-84 when both failure to deduct, or after deducting tax at source, failure to pay was an offence u/s. 276B.

(ii) A partner of the firm who is not in day-to-day management of the affairs of the firm cannot be prosecuted under section 276B.
N.B.: However w.e.f. 1-4-1989 section 276B covers only failure to pay tax after deducting at source.

12. Salwan Construction Co. vs. Union of India (2000) 245 ITR 175 (Delhi)

As per the amended provisions of section 276B w.e.f. 1-4-1989 read with the provisions of section 271C, failure to deduct tax at source is no longer an offence under section 276B. Hence no criminal proceedings could be initiated after 1-4-1989 for failure to deduct tax at source prior to 1-4-1989 under section 276B.

13. Vijaysingh vs. Union of India and Another [2005] 278 ITR 467 (MP)

The offence under 276B is complete when the tax deducted at source is not deposited in time. Mens rea is not necessary. However, the circular dated May 28, 1980 states that prosecution u/s 276B should not normally be proposed when the amount involved and/or the period of default is not substantial and the amount of default has also been deposited in the meantime to the credit of Government. On facts, since the amount involved was not substantial, the delay was not long and the petitioner was old (70 years), etc. the assessee was acquitted.

SECTIONS 131, 133A – [POWER TO ISSUE SUMMONS AND POWER OF SURVEY]

1. Reckitt Colman of India Ltd. and Another vs. ACIT (TDS) [2001] 252 ITR 550 (Cal.) approving [2001] 251 ITR 306 (Cal.)

In this case the High Court upheld the power of TDS officers [e.g., Joint Commissioner (TDS)] to conduct survey regarding tax deduction at source u/s. 133A of the Act. Further, it was also held that TDS officers receiving TDS returns under section 206 has the power to issue summons under section 131 of the Act for production of evidence, etc. on the person responsible for deducting tax.

MISCELLANEOUS

1. Islamic Investment Co. vs. Union of India [2002] 122 Taxman 719 (Bom.) / 176 CTR 46 (Bom) [See also ITO vs. Oriental Insurance Co. Ltd. (2006) 100 TTJ (Delhi) 1140]

TDS not applicable to payments made pursuant to a decree.

2. Samcor Glass Ltd. vs. ACIT [2005] 94 ITD 202 (Delhi) – [2004] 82 TTJ 325

The appellant deducted tax at source @ 30% as directed by the A.O. on payments made to non-residents and also issued a TDS certificate. Subsequently, on appeal, the assessee's claim for deduction of tax at a lower rate of 20% was allowed by the Commissioner (Appeals) as well as by the Tribunal. The assessee claimed refund of the excess tax deducted. The Tribunal on consideration of ss. 199, 203 and Article 25 of the Indo–US DTAA held that the payment shall be treated as a tax paid on behalf of the payee from whose income such deduction was made and he would get the credit of the tax paid as per the DTAA. Hence it was held that the appellant; (i.e., deductor) was not the rightful person to claim refund.

3. Larsen & Toubro Ltd. vs. ITO (TDS) [2005] 278 ITR 369 (Orissa)

Where the tax on payments from the project office at Balasore has been deducted and deposited by the Regional Office at Kolkata within their jurisdictional Income Tax Officer, the assessing officer at Balasore cannot compel the assessee to deduct and deposit the same with him. The court held that the above was also in accordance with Circular No. 719 dated August 22, 1995 and Circular No. 744 dated May 6, 1996, issued by the CBDT.

4. BASF (India) Ltd. vs. W. Hasan, CIT [2006] 280 ITR 136 (Bom)

Under a foreign collaboration agreement the assessee was required to pay a royalty to its foreign collaborator if the product manufactured was in excess of certain quantity. However, erroneously it paid royalty even when the production was below the specified quantity for the period 1-1-1999 to 30-6-1999. It claimed refund from the collaborator which it duly received. It also claimed refund of TDS from royalty vide Circular No. 760 dated 6-8-1998 on 6-2-2000. The Assessing Officer denied the refund vide his order dated 14-7-2000 in view of Circular No. 790 dated 20-4-2000 which revoked the earlier circular. The Court held that the refund application has to be considered in the light of Circular No. 760 since circulars which are in force during the relevant assessment years are the circulars that have to be applied, and subsequent circulars either withdrawing or modifying the earlier circulars have no application. Further it was held that the circulars are not merely procedural but created a vested right in favour of the deductor to claim refund of TDS. Hence Circular No. 790 cannot have retrospective operation.

5. State of Kerala vs. Mariyamma and Others [2005] 280 ITR 225 (Ker)

(i) Interest payable on enhanced compensation of land under a decree is subject to TDS u/s. 194A notwithstanding absence of provision to that effect in the decree. No special or specific order of any court is necessary. [Contra : see Sl. No. 1 Islamic Investment Co. vs. Union of India (2002) 122 Taxman 719 (Bom.)]

(ii) Compensation or enhanced compensation 'paid' to decree holders for the period 1-6-1999 to 1-6-2000 and from 1-10-2004 is subject to TDS u/s. 194L and s. 194LA respectively notwithstanding that the land was acquired much prior to the introduction of s. 194L or s. 194LA since the relevant date for fixing the tax liability is the date on which the amounts are paid or deposited in the court to be paid to the claimant.

(iii) In all cases it is the Land Acquisition Officer, who actually pays the compensation amount and interest to the claimants, who is liable to deduct TDS and issue the TDS certificate.

6. ASST. CIT vs. Shri Digvijay Cement Co. Ltd. (2007) 104 ITD 185 (Rajkot)

Interest u/s. 244A on refund arising due to TDS not payable to the extent and for the period when TDS was not deposited into the credit of Central Government by the deductor.