Section 68

CIT v. M. Venkateswara Rao (2015) 370 ITR 212 (T & AP):- **Can capital contribution of the individual partners credited to their accounts in the books of the firm be taxed as cash credit in the hands of the firm, where the partners have admitted their capital contribution but failed to explain satisfactorily the source of receipt in their individual hands?** *Whether the Assessing Officer was justified in treating the capital contribution of partners as income of the firm by invoking section 68? The* High Court held that the view taken by the Assessing Officer that the **partnership firm has to explain the source of income of the partners** as regards the amount contributed **by them towards** capital of the firm, in the absence of which the same would be treated as the income of the firm, **was not tenable**.

What does section 68 require: Section 68 directs that **if an assessee** fails to explain the nature and source of credit entered in the books of account of any previous year, the same can be treated as income.

Charitable Trust

Frequently asked adjustment

(1)**SRMMCTM Tirupani Trust V CIT**: Capital expenditure can be treated as application of income for exemption purpose**. (M-15)**

(2) **CIT v Janmbhumi Press Trust (Kar):-** Repayment of loan taken for construction of Hospital Building will be treated as application of Income. **. (M-15)**

(3) **CIT v Program for Community Organisation**:- **. (M-15)**

(4) DIT(Exm) v Bagri Foundation (Del):- (No-14)

(1) *Queen's Educational Society v CIT(SC):-*Where an institution engaged in imparting education incidentally makes profit, would it lead to inference that it ceases to exist solely for educational purposes?

The Supreme Court observed that the provisions of section 10(23C)(iiiad) provide for three requirements, namely, (i)the education institution must exist solely for educational purposes; (ii)it should not be for purposes of profit; and (iii)the aggregate annual receipts of such institution should not exceed the amount as may be prescribed. Such monetary limit is ₹1 crore as per Rule 2BC.

The Apex Court, after analyzing the legal provisions and precedents, summed up the law common to section 10(23C)(iiiad)/(vi):

(a)Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit;

(b)The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive;

(c)A distinction must be drawn between the making of surplus and an institution being carried on "for profit". Merely because imparting of education results in making a profit, it cannot be inferred that it becomes an activity for profit;

(d)If after meeting expenditure, surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes; and

(e)The ultimate test is whether on an overall view of the matter in the concerned assessment year, the object is to make profit as opposed to educating persons.

Held that the assessee was engaged in imparting education and the profit was only incidental to the main object of spreading education. Hence, it satisfies the conditions laid down in section 10(23C) (iiiad) for claim of exemption thereunder.

***(2) CIT v. Karimangalam Onriya Pengal Semipu Amaipu Ltd. (2013) (Mad):-* In a case where the application for registration of a charitable trust is not disposed of within the period of 6 months as required under section 12AA(2), can the trust be deemed to have been registered as per provisions of section 12AA?** Orissa High Court observed that in order to ascertain whether a provision is mandatory or not, the expression 'shall' is not always decisive. The nature of the statutory provision, whether mandatory or directory, has to be ascertained not only from the wording of the statute, but also from the nature and design of the statute and the purpose sought to be achieved. Further, since the consequence for non -adherence of the time limit of six months is not spelt out in the statute, it cannot be said that passing the order within such time limit is mandatory in nature. The Orissa High Court also opined that in the absence of any clear statutory intent to the contrary, when public duty is to be performed by the public authorities, the time -limit which is granted by the statute is normally directory and not mandatory. Hence, though the word „shall has been used in section 12AA (2), the period of six months provided thereunder is not mandatory but directory in nature. Accordingly, in the present case, the Madras High Court held that the time frame mentioned in section 12AA(2) is only directory in nature and non - consideration of the registration application within the said time frame of six months would not amount to "deemed registration".

(3) *DIT (Exemptions) v. Meenakshi Amma Endowment Trust (2013) (Kar.):-* Where a charitable trust applied for issuance of registration under section 12A within a short time span (nine months, in this case) after its formation, can registration be denied by the concerned authority on the ground that no charitable activity has been commenced by the trust? *Whether registration under section 12AA can be denied on the ground of non-commencement of charitable activity, where an application for registration has been made within a short-time span after the formation of the trust.* High Court opined that an application under section 12A for registration of the trust can be sought even within a week of its formation. The activities carried on by the trust are to be seen in case the registration is sought much later after formation of the trust. Further observed that, in this case, the corpus fund included contribution made by the trustees only, which indicated that the trustees were contributing the funds by themselves in a humble way and were intending to commence charitable activities. Also, it was not the Revenue's contention that the assessee-trust had collected lots of donations for the activities of the trust, by the time its application came up for consideration before them. When the application for registration was made, the trust, therefore, did not have sufficient funds for commencement of its activities. The High Court observed that, with the money available with the trust, it cannot be expected to carry out activity of charity immediately. Consequently, in such a case, it cannot be concluded that the trust has not intended to do any activity of charity. In such a situation, the objects of the trust as mentioned in the trust deed have to be taken into consideration by the authorities for satisfying themselves about the genuineness of the trust and not the activities carried on by it. Later on, if it is found from the subsequent returns filed by the trust, that it is not carrying on any charitable activity, it would be open to the concerned authorities to withdraw the registration granted or cancel the registration as per the provisions of section 12AA(3).

(4) *DIT (Exemption) v. Khetri Trust (2014) 367 ITR 723 (Del)* :-In a case where properties bequeathed to a trust could not be transferred to it due to ongoing court litigation and pendency of probate proceedings, can violation of the provisions of section 11(5) be attracted? The Madras High Court observed the decision of the Orissa High Court, in *Srikhetra, A.C. Bhakti-Vedanta Swami Charitable Trust v. ACIT (2006) (II) OLR 75,* wherein it was held that the period of six months as provided under section 12AA(2) is not mandatory. In that case, the Orissa High Court observed that in order to ascertain whether a provision is mandatory or not, the expression 'shall' is not always decisive. The nature of the statutory provision, whether mandatory or directory, has to be ascertained not only from the wording of the statute, but also from the nature and design of the statute and the purpose sought to be achieved. Further, since the consequence for non-adherence of the time limit of six months is not spelt out in the statute, it cannot be said that passing the order within such time limit is mandatory in nature. The Orissa High Court also opined that in the absence of any clear statutory intent to the contrary, when public duty is to be performed by the public authorities, the time-limit which is granted by the statute is normally directory and not mandatory. Hence, though the word 'shall' has been used in section 12AA(2), the period of six months provided thereunder is not mandatory but directory in nature.
Based on the above factual findings, elucidated and affirmed by the Commissioner (Appeals) and the Tribunal, the High Court held that there was no violation of section 11(5) in this case.

(5) *DIT (Exemptions) v. Ramoji Foundation (2014) 364 ITR 85 (AP)*:-Is the approval of Civil Court mandatory for amendment of trust deed, even in a case where the settler has given power to the trustees to alter the trust deed? *Whether the Tribunal was correct in holding that the amendment to the trust deed can be made without approaching the Civil Court, on the basis of the decision in the case of Kamla Town Trust (Supra).* The High Court observed that the power has been given to the trustees by the settler to amend the trust deed without approaching the Civil Court, provided all the conditions laid down by the settler are fulfilled. The sanction of Civil Court is required only when there is no such power. When the power has been specifically given to the trustees by the settler, no further power from the Civil Court is required. **Accordingly, in this case, the High Court held that the Tribunal has correctly dealt with the matter and the trust deed amended by the trustees can be relied upon by the Revenue authorities for the purpose of granting registration under section 12AA.**

Scope of Total Income

Section 9

***Barendra Prasad Roy v ITO (SC)*:-** Professional Connection amount to Business Connection. Since "business" includes not only trade and manufacture; it includes, within its scope, "profession" as well. **(Nov-14)**

***CIT v Alcatel Lucent Canada (Del)*:- Can consideration for supply of software embedded in hardware tantamount to 'royalty' u/s 9(1)(vi)?** The High Court had also observed that - (i) the software that was loaded on the hardware did not have any independent existence; (ii)the software supply is an integral part of GSM mobile telephone system and is used by the cellular operators for providing cellular services to its customers; (iii)the software is embedded in the system and there could not be any independent use of such software; (iv)this software merely facilitates the functioning of the equipment and is an integral part of the hardware. **The High Court held that where payment is made for hardware in which software is embedded and the software does not have independent functional existence, no amount could be attributed for software in terms of section 9(1)(vi).**

SALARIES

(1)CIT v. Shankar Krishnan (2012) (Bom.):- Can notional interest on security deposit given to the landlord in respect of residential premises taken on rent by the employer and provided to the employee, be included in the perquisite value of rent-free accommodation given to the employee? On appeal by the Revenue, the Bombay High Court held that the Assessing Officer is not right in adding the notional interest on the security deposit given by the employer to the landlord in valuing the perquisite of rent-free accomodation, **since the perquisite value has to be computed as per Rule 3 and Rule 3 does not require addition of such notional interest**. Thus, the perquisite value of the residential accommodation provided by the employer would be the actual amount of lease rental paid or payable by the employer, since the same was lower than 10% (now 15%) of salary.

(2)CIT (TDS) v. Director, Delhi Public School (2011 (Punj. & Har.): Can the limit of ₹1,000 per month per child be allowed as standard deduction, while computing the perquisite value of free or concessional education facility provided to the employee by the employer? The Punjab and Haryana High Court, in the above case, held that on a plain reading of Rule

3(5), it flows that, in case the value of perquisite for free/concessional educational facility arising to an employee exceeds ` 1,000 per month per child, the whole perquisite shall be taxable in the hands of the employee and no standard deduction of ` 1,000 per month per child can be provided from the same. It is only in case the perquisite value is less than ` 1,000 per month per child, the perquisite value shall be nil. Therefore, ` 1,000 per month per child is not a standard deduction to be provided while calculating such a perquisite.

House property

(1)Chennai Properties and Investments Ltd. V CIT(SC) 2015:- **Would income from letting of properties by a company, whose main object as per MOA is to acquire and let out prperties, be taxable as its business income or income from HP, considering the fact that the entire incme of company as per itds ROI was only from letting of properties?** Supreme cour obsrved that the main objective of company as per its MOA is to acquire and hold the properties and let out these properties**.** Therefore**,** holding of the properties and earning income by way of letting out these properties is the main objective of the company. Further. In the ROI filed by the company and accepted by the Assessing officer, the eniter income of the company comprises of income from letting out of suc properties.The Supreme Court, accordingly, held that assessee has rightly disclosed the income derived from letting of properties under the head "PGBP".

(2)New Delhi Hotels Ltd. v. ACIT (Delhi]:- Whether the rental income derived from the unsold flats which are shown as stock-in-trade in the books of the assessee would be taxable under the head 'Profits and gains from business or profession' or under the head 'Income from house property', in a case where the actual rent receipts formed the basis of computation of income? Wherein it was held that rental income derived from unsold flats which were shown as stock-in-trade in the books of the assessee should be assessed under the head "Income from house property" and not under the head "Profits and gains from business or profession".

(3)Azimganj Estate (P.) Ltd. v. CIT (Cal.):- On this issue, the Calcutta High Court held that the rental income from the unsold flats of a builder shall be taxable as "Income from HP" as provided under section 22 and since it specifically falls under this head, it cannot be taxed under the head "PGBP". Therefore, the assessee would be entitled to claim statutory deduction of 30% from such rental income as per section 24. The fact that the said flats have been claimed as not chargeable to wealth-tax, treating the same as stock-in-trade, will not affect the computation of income under the Act. **(M-15)**

(4)Mukherjee Estate (P) Ltd v CIT(Cal):- Income from Display of advertisement hording of various company on the roof of the building, then, such income shall be chargeable to tax under the head income from other source.

(5)CIT v Poddar Cement Ltd(SC):- **Whether the rental income of property not registered in the name assessee is assessable under the head HP?** It was held that so long as a person is entitled to receive income from the HP in his own right and not on behalf of someone else, it is not necessary that the sale deed must be registered in favour of the person to treat him as the owner of the property for the purpose of section.

(6)Joint ownership of house will not be assessed as an AOP. Such house is assessable u/s 26. Further each co-owner is entitled for deduction of ₹2.00 lakhs separately. **This limit of ₹2.00 lakhs applies for each member separately.**

(1)Joseph George and Co. v. ITO (Kerala) **:-** It was held that while lodging is a business, however, letting out of building to the bank on long -term lease could not be treated as business. Therefore, the rental income from bank has to be assessed as income from house property.

(2)CIT v. Asian Hotels Ltd. (Del.):- **Can notional interest on interest-free deposit received by an assessee in respect of a shop let out on rent be brought to tax as business income or income from house property?** The High Court observed that section 28(iv) is concerned with business income and brings to tax the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. Section 28(iv) can be invoked **only where the benefit or amenity or perquisite is otherwise than by way of cash**. In the instant case, the Assessing Officer has determined the monetary value of the benefit stated to have accrued to the assessee by adding a sum that constituted 18 per cent simple interest on the deposit. Hence, sect ion 28(iv) is not applicable. Section 23(1) deals with the determination of the expected rent of a let out property for computing the income from house property. It provides that the expected rent is deemed to be the sum for which the property might reasonably be expected to be let out from year to year. This contemplates the possible rent that the property might fetch and certainly not the interest on fixed deposit that may be placed by the tenant with the landlord in connection with the letting out of such property. **Thus, the notional interest is neither assessable as business income nor as income from house property**.

Benefi of self occupation to HUF

CIT v. Hariprasad Bhojnagarwala (2012) (Guj.) (Full Bench): Can benefit of self-occupation of house property under section 23(2) be denied to a HUF on the ground that it, being a fictional entity, cannot occupy a house property? The Gujarat High Court observed that a firm, which is a fictional entity, cannot physically reside in a house property and therefore a firm cannot claim the benefit of this provision, which is available to an individual owner who can actually occupy the house. However, the HUF is a group of individuals related to each other i.e., a family comprising of a group of natural persons. The said family can reside in the house, which belongs to the HUF. Since a HUF cannot consist of artificial persons, it cannot be said to be a fictional entity. Also, it was observed that since singular includes plural, the word "owner" would include "owners" and the words "his own" used in section 23(2) would include "their own". Therefore, the Court held that the HUF is entitled to claim benefit of self-occupation of house property under section 23(2).

Profit and Gains of Business or Profession

Charging Section 28

(1) ***CIT v Saurashtra Cement Ltd (SC):- What is the nature of liquidated damage received by a company from the supplier of plant for failure to supply machinery to the company within stipulated time- a capital or revenue receipt?*** Supreme Court observed that the damages where **directly and intimately linked with procurement of capital asset** which lead to delay in coming into extistance of the profit making appartus. **It was not a receip in the course of profit earning process**. Therefore, amount received by the assessee towards compensation for sterilisation of profit earning source, is not in the oridinary in the oridinaryy course of business, **hence it is capital receipt in the hands of assessee. (Nov-13) (Nov-11)**

(2)Compensation received due to delay in delivery of raw material is **Revenue Receipt** and chargeable to tax. Since it is earned in the ordinary course of business.

(3) ***Mahindra & Mahindra v CIT (Bom).*** The amount of term loan for purchasing fixed asset **waived by the nationalized bank** in respect of outstanding principal and interest on term loan is not assessable under clause (iv). **Since what was sought to be taxed was a benefit or perquisites, that is, something received in kind**. Waiver of term loan taken for acquiring fixed asset and interest on such loan, **cannot be said to be a benefit or perquisite, sine what was waived was not in kind**. Further, section 41(1) is not applicable in this case.

(4) ***CIT v Lakshmi vilas Bank Ltd (SC):-***The amount of margin money forfeited by a bank on failure of its constituents of not taking the delivery of the shares purchased by such bank on their behalf is **in the normal course of its banking business** and hence, **the forfeited amount is assessable as business income of the bank**. The forfeited amount being revenue in nature cannot be adjusted against the purchase price of shares.(May-14) **(May-11)**

(5) ***Orient Trading Co. Ltd v CIT(SC).:-*** Profit derived by the assessee engaged **in the carrying on the business as dealer in shares,** on **exchange of the shares held as stock-in-trade** of one company with the shares of another company. Difference between the price of shares of the 1st company and the market value of shares of new company on the date of such exchange has to be treated as "profit" derived by the dealer in shares (on exchange of shares held as stock-in-trade of the 1st company with the shares of new company**) in the normal course of business, and therefore, such profit is taxable as business income. (May-14) (May-11)**

(6) *CIT v NDR Warehousing P Ltd. (Mad)*:-Under what head of income should income from letting out of godowns and provision of warehousing services be subject to tax- "Income from HP" or "PGBP"? Observation as per "Object Clause" of the Memorandum of the assessee and also individual aspect of the business of the assessee that it was a case of warehousing business, and, therefore, the income would fall under the head "PGBP". High court held that income in question is c**hargeable to tax under the head "PGBP" and not under the head "Income from house property"**. **(M-16)**

(7) CIT v Henkel Spice India Ltd. (2015) (SC):- When would the interest income earned on share application money deposited with a bank for a specified period in accordance with the statutory requirement become taxable? The High Court noted that the company is required to keep the money in a bank account which yields interest. The interest so earned cannot be regarded as an amount which is fully available to the assessee for its own use, since interest is an amount which accrued on a fund which was held in trust until the allotment of shares got completed and moneys are returned to those to whom shares are not allotted. The High Court **also observed** that no part of this fund, i.e., neither the principal nor the interest, can be utilized by the company until the allotment process is completed. When the amount is repaid in cases of non- allotment of shares, it has to be repaid with such interest as may be prescribed having regard to the length of time or period of delay in returning the money to them. It is only after the allotment process is completed and all moneys which are refundable are refunded with interest, wherever interest becomes payable, the balance remaining application money can be regarded as belonging to the company. The application money as also interest earned remain in trust in favour of the general body of the applicants until the process of allotment is completed in all respects. As the amount of interest in the bank account includes interest payable to the applicants to whom the shares are not allotted, the trust would terminate only after allotment. The interest on balance application money (in respect of which shares have been allotted) amount would accrue to the company only after completion of allotment. ***Held that the interest income accrues to the company only in the AY in which the allotment is comleted.***

(8) Tamil Nadu Tourism Development Corporation Ltd v Dy CIT (MAD) 2014:- **Under which head of income is franchise fee received by an assessee in tourism business, against capital rights given to franchisees to undertake hotel business in assessee's property, taxable?** Whether the income by way of franchisee fee is taxable as income from business or as income from house property. The High Court looked into the contract between the assessee and the franchisees which contained various conditions ranging from obtaining of permits and licences, maintenance of rooms, common area, garden maintenance, catering, Bar etc with 33 clauses. The assessee had not simply leased the land and building but had imposed further conditions as to how the business of franchisees' should be conducted with regard to the hotels given on lease.

The special conditions stipulated in the contract clearly indicated that the name of the assessee should be prominently indicated in the name board and that the name of the franchisee should be below the name of the assessee, thereby, making it clear that the assessee continued to operate the business through the franchisees. Thus, these special conditions were a clear indicator that the assessee continued to be in the business of tourism activities, though not directly but through the franchisees, and received income as franchisee fee. The assessee received franchisee fee for giving a special right or privilege to the franchisees to undertake tourism business in the property. **Held that the income earned by the assessee by way of franchisee fee is in the nature of business income and not income from HP.**

(9) ***CIT v K & Co. (Del) 2014:-*** Is interest income on margin money deposited with the bank for obtaining bank guarantee to carry on business, taxable as business income? ***Whether such interest income would be taxable under the head 'PGBP' or under the head 'Income from other sources'.*** The High Court noted that the interest income from the deposits made by the assessee is **inextricably linked to the business of the assessee and such income, therefore, cannot be treated as income under the head 'Income from other sources'**. The margin money requirement was an essential element for obtaining the bank guarantee which was necessary for the contract between the State Government of Sikkim and the assessee. If the assessee had not furnished bank guarantee, it would not have got the contract for running the said lottery. **Held that the interest income received on funds kept as margin money for obtaining the bank guarantee would be taxable under the head "PGBP".**

(10) CIT v Bijli Cotton Mills (P) Ltd. (SC):- Whether "Dharmada" collected from customers would form part of trading receipt? Since right from inception, the amounts were impressed with obligation in the nature of trust to be sepent for charitable purpose. These amounts were not assessee trading receipt. **(Nov-13)**

(10) Dr. K. GeorgeThomas vs. CIT (1985):- Donations received by a person in the course of carrying on vocation, from his followers. Donations are taxable as business income as there is a direct nexus between the vocation carried on by the assessee and the receipt of such donations***.***

(11) A group free air ticket *was provided by a supplier for reaching a certain volume of purchase during the financial year 2016-17. The same is encashed by the company for ₹ 10 lacs in April 2017 and credited to General Reserve Account.* Value of group free air ticket provided by a supplier is taxable as business income under section 28(iv), as the value of any benefit, whether convertible into money or not, arising from business is taxable as business income.

Section 29

(1)Calcuta Co. Ltd. v CIT (SC):-**Commercial Expediency**: It is **not practical** for law maker to **specifically provide** for allowance of **all types of expenses** that may be incurred during the course of business or profession. Therefore, common **principle of commercial Expediency should be also be born in mind** in this regard.

(2)***CIT v Piara Singh (SC):-*** Illegal Expense: Loss due to confiscation of smuggled currency notes will be allowed. For illegal business illegal expense is incidental in nature.

(3)Dr. T. A. Quershi v CIT (SC):- Heroin, which forms part of stock in trade was confiscated. Loss will be allowed since activity is incidental to the assessee business (Trading loss). Further, case will not be covered under explanation of section 37(1), as it is not a case of illegal expenditure but loss.

(4)CIT v Mysore Sugar Co. Ltd. (SC):- Advance given to the supplier of raw material, supplier neither supply raw material nor return advance is a loss incidental to business, therefore, allowed.

(5)CIT v Amalgamation Pvt. Ltd. (SC):- Assessee is in the business of financing suffered loss on account of guarantee provided to its subsidiary. Such a loss is incidental to the business of financing and therefore, allowed.

Section 31: Current Repairs v Replacement:

(1)CIT v Saravan Spinning Mills Pvt. Ltd (SC):- **Current Repair**: It was observed that "Current Repair" u/s 31 refer to expenditure effected to preserve and maintain an already existing asset and object of the expenditure must not be to bring into existence or to obtain a new advantage.

(2)CIT v TVS Motors Ltd (Mad) 2015:- **Replacement**: **Is the expenditure on replacement of mould and dies, being part of plant and machinery, deductible as current repairs?** Held that the "mould and dies" are not independent of plant and machinery but are parts of plant and machinery. Once the dies are worn out, they had to be replaced so that machine can produce the product according to business specifications. Therefore, the expenditure incurred by the assessee towards replacement of parts of machinery to ensure its performance without bringing any asset or advantage or enduring, is eligible for deduction as "current repairs" u/s 31. *CIT v. Machado Sons (2014):-* ***When the object of the expenditure was not for bringing into existence a new asset or to obtain a new advantage, the said expenditure qualifies as 'current repairs' under section 31.***

(3)CIT v Mangaryarkarsi Mills Pvt. Ltd (SC):-One has to examine the cost of replacements are revenue or capital expenditure based on the following criteria:

- What is replaced is only a part;
- What is replaced had gone defective or old so as to require replacement;
- The replaced asset had to be sold either as junk or at nominal value or it remain unsold and unusable;
- There has been no significance increase in productive capacity after the replacement.

If the above criteria are not met & expenditure brings into existence a new asset or an enduring benefit in the capital field, it can be neither be claimed u/s 31 nor u/s 37(1) but depreciation can be claimed u/s 32 subject to relevant condition.

(4)CIT v Darbhanga Sugar Co. Ltd (Pat):- **Replacement of worn out parts of machineries. Where such expenditure does not increase the future benefit from the asset beyond its previously assessed standard of performance**. Whether case is covered u/s 31? The test to determine whether replacement of parts of machinery amounts to repair or renewal is whether the replacement is one which is in substance replacement of defective parts or replacement of entire machinery.

Here, expenditure on repairs does not bring in any new asset into existence. Such replacement can only be considered as current repairs.

Further, as per ICDS V on Tangible Fixed Asset, only expenditure that increase the future benefits from the existing asset beyond previously assessed standard of performance has to be added to the actual cost.

Section 32: Ownership + Used for business or profession or Beneficial Ownership + Used for business or profession

(1) ***Mysor Minerals Ltd. v CIT(1999) (SC)****:-* ***Whether the person using the asset will be deemed as owner for the purpose f claiming depreciation?*** The term "asset used" in section 32 must be assigned a wider meaning and anyone in possession of property in his own title, exercising dominion over the property, to the exclusion of others and having the right to use and enjoy it, **must be taken to be the owner.**

(2) ***I.C.D.S. Ltd. v CIT (SC):-*** **Leased Vehicle:** Held the Section 2(3) of the Motor Vehicle Act, 1988 is a deeming provision which create a legal fiction of ownership in favour of the lessee only for that Act, not for the purpose of law in general. No conclusion could be drawn from the registration certificate as to the ownership of the legal title of vehicles, since registration in the name lessee during the period of lease is mandatory as per the Motor Vehicle Act, 1988. If the lessee was in fact the legal owner, he would have claimed depreciation on the vehicle which was not the case. Therefore, as-long-as the assessee-lessor has a right to retain the legal title against the rest of the world, he would be the owner of the asset in the eyes of law. **(N-14)**

(3) ***CIT v. Podar Cement P Ltd.(SC):-*** It was observed that the owner need not necessarily be **the lawful owner** entitled to pass on the title of the property to another.

(4) ***CIT v Smt. A. Sivakami and Another (Mad) 2010:-*** **Would beneficial ownership is sufficient for claim of depreciation? Yes**

(5) ***CIT v. J & K Tourism Development Corporation (2001) (J&K): Whether registeration of asset in the name assessee is necessary for claiming depreciation?*** Registration of the buses is only a formality to perfect the title and does not bar enjoyment. The Corporation cannot, therefore, be denied depreciation on the buses.

Used for purpose of business or profession during the PY:

(1)CIT v Insilco Ltd (Del):- Where the spares are capitalised as per the above requirement, the issue as to provision of depreciation arises – whether depreciation can be provided where such spares are kept ready for use or is it necessary that they are actually put to use. The Court observed that the expression "used for the purposes of business" appearing in section 32 **also takes into account emergency spares**, which, even though ready for use, yet are not consumed or used during the relevant period. **This is because these spares are specific to a fixed asset, namely plant and machinery, and form an integral part of the fixed asset. These spares will, in all probability, be useless once the asset is discarded and will also have to be disposed of. In this sense, the concept of passive use which applies to standby machinery will also apply to emergency spares.** Therefore, once the spares are considered as emergency spares required for plant and machinery, the assessee would be entitled to capitalize the entire cost of such spares and claim depreciation thereon.

ICDS V Tangible Fixed Assets:- Machinery spares shall be charged to the revenue as and when consumed. When such spares can be used only in connection with an item of tangible fixed asset and their use is expected to be irregular, they shall be capitalised.

(2) I.C.D.S. Ltd. v CIT (SC):- **Leased Vehicle:** Section 32 does not mandate the actual usage by the assessee itself. Held that in this case, the assessee did use the vehicle in the course of its leasing business.

(3)CIT v Yamaha Motor India Pvt. Ltd. (Del):- **Discarded Machine:** Held that when above expression used with respect of discarded machinery would mean the use in business, not in the relevant FY/PY, but in the earlier financial years. Depreciation for said machine can be claimed as long as it was used for the purpose of business in the earlier years **provided the block continues to exist in the relevant PY**. **(M-16) (May-12A)**

Explanation 3(b) **to section 32(1): Intangible Asset Corporate restructuring**

(1)*CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC)*:- Depreciation on Excess consideration paid over the value of net asset acquired treating as Goodwill i.e. Intangible Asset: It was observed that the Explanation3(b) to Section 32(1) states that the expression "Asset" shall mean an intangible asset, being know-how, patent, copyright, trademarks, licenses, franchises, or 'any other business or commercial right of similar nature". A reading of the words "any other business or commercial right of similar nature" in Explanation 3 indicates that "Goodwill" would fall under the said expression, **applying the principle of ejusdem generis**. In the process of amalgamation, the amalgamated company had acquired a capital right in the form of goodwill because of which the market worth of **amalgamated company** stood increased. Therefore, it was held that 'Goodwill' is an asset under *Explanation 3(b)* to section 32(1) and depreciation thereon is allowable under the said section. **(May-13)**

(2) *Areva T and D India Ltd. v. DCIT (2012) (Delhi):- Can business contracts, business information, etc., acquired by the assessee as part of the sl0075mp sale and described as 'goodwill', be classified as an intangible asset to be entitled for depreciation under section 32(1)(ii)?* The Delhi High Court observed that the principle of *ejusdem generis* provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind. The Court applied this principle for interpreting the expression "business or commercial rights of similar nature" specified in section 32(1)(ii) . It is seen that such rights need not be the same as the description of "know-how, patents, trademarks, licenses or franchises" but must be of similar nature as that of specified assets. The use of these general words after the specified intangible assets in section 32(1)(ii) clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate.

Further, it was observed that the above mentioned intangible assets are invaluable assets, which are required for carrying on the business acquired by the assessee without any interruption. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee has got a running business. The aforesaid intangible assets are, therefore, comparable to a license to carry on the existing business of the transferor.

The High Court, therefore, held that the specified intangible assets acquired under **the slump sale agreement** by the assessee are in the nature of intangible asset under the category "other business or commercial rights of similar nature" specified in section 32(1)(ii) and are accordingly eligible for depreciation under section 32(1)(ii).

Classification of Assets

(1) *Federal Bank Ltd. v. ACIT (Kerala)*:- Can EPABX and mobile phones be treated as computers to be entitled to higher depreciation at 60%?: Held that there is no ground to treat the communication equipment as computers. Hence, EPABX and mobile phones are not computers and therefore, are not entitled to higher depreciation at 60%. **(May-15A) (May-12A)**

(2) *CIT v. BSES Yamuna Powers Ltd (Delhi)*:- Rate of depreciation in respect of computer accessories and peripherals: The High Court observed that computer accessories and peripherals such as printers, scanners and server etc. form an integral part of the computer system and they cannot be used without the computer. Consequently, the High Court held that **since they are part of the computer system**, they would be **eligible for depreciation at the higher rate of 60% applicable to computers including computer software. (May-15A)**

(3) ***CIT v Turner International India (P) Ltd (Del):- Depreciation on the "decoders" given on loan to the cable operators but owned by the assessee who is engaged in the business of distributing satellite channels***. Activity is in the normal course of the assessee's business of distribution of satellite channels, and hence the same can be treated as use of asset for business purpose. Since the assessee is the owner of decoders used for business purposes, he is entitled to depreciation u/s 32.

Section 36(1)(ii)

(1)Controls & Switchgear Contrcators Ltd v Dy CIT (Del)(2014):- Is guarantee commission paid by a company to its employees directors deductible as its business exp, where such guarantee was given by the employees directors to the Bank for enabling credit facility to the Company? Allowed. (M-16)

(2) *CIT v. Kasturi Mills Ltd. (1998)(Madras): Whether settlement bonus (production bonus) paid in addition of statutory payment as per the Payment of Bonus Act, 1965 will be allowed as deduction?* **Settlement bonus** can be claimed as deduction under section 37(1) on the grounds of commercial expediency since the expenditure is laid out wholly and exclusively for business purposes.

Section 36(1)(iii)

(1) ***Madhav Prasad Jatia v. CIT(SC):-***Where the expression '**for the purpose of business'** occurring in section 36(1)(iii) **was held** as wider in scope than the expression '**for the purpose of earning income, profits or gain**'. The Apex Court observed that where a holding company has a deep interest in its subsidiary and advances money to the subsidiary and the same is used by the subsidiary for its business purposes, **the lending-holding company would be entitled to deduction of interest on its borrowed loans**.

(2) ***JK Synthetics Ltd v. CIT(All):-*** **Whether interest paid by the holding company as guarantor for the amount borrowed by the subsidiary company deductible?** Conditions to claim under this section (i) interest should have been payable; (ii) there

should be a borrowing; and (iii) capital must have been borrowed or taken for business purposes. Referring above ruling HC observed that the assessee had deep in the existence of subsidiary and therefore, repaid installments of loan to financial institutions. Such loans were given for the purpose of business. It was held that the claim for deduction of interest by the assessee-holding company is allowable.

(3) *Taparia Tools Ltd. v Joint CIT (SC):-* *Can interest paid up front to the debenture holders be allowed as deduction in the first year itself or should the same be spread over the life of debentures, being five years in this case, when such interest is shown as deferred expenditure in the Books of Account?* U/s 36(1)(iii), any amount paid on account of interest is an admissible deduction, if the capital was borrowed by the assessee and the borrowing was for the purpose of business or profession. The SC opined that once the genuineness was proved and the conditions of section 36(1)(iii) read with section 43(2) were satisfied, the benefit of deduction in the year in which the amount of interest was actually paid or incurred cannot be denied. In the present case, the AO has not disputed the issue of debentures and use of funds for business purposes.

Moreover, the SC also noted that there is no concept of deferred revenue expenditure in the Income-tax Act, 1961 except under specified sections such as section 35D meant for amortization over a period of time. Normally, revenue expenditure is deductible in the year in which it is incurred. However, if the assessee wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'matching concept' is satisfied. **Entries in the books of account are not conclusive and the matter has to be examined on the touchstone of the provisions contained in the Act**.

The SC took note that the assessee had issued debentures with **two options for payment** of interest and if the interest is allowed by spread over it would amount to treating **both the methods of interest payment at par**, which was clearly unsustainable. By discharging the liability in the first year itself, the assessee had benefitted by making payment of a lesser amount of interest in comparison to the interest which was payable under the first option over a period of five years. When the assessee did not seek spread over of expenditure and had claimed the entire expenditure in the same year and a return was filed in that manner, **the AO was bound to carry out the assessment by applying the provisions of the Act and not to go beyond the said return**. The statute enables and entitles the assessee to claim the entire upfront interest paid in the year of payment.

The Supreme Court, accordingly, held that the assessee would be entitled to deduction of the entire upfront interest paid in the same year in which the amount was actually paid. (M-16) RTP N-16

Section 36(1)(va)

Allowability for employees' contribution deposited on or before due date u/s 139(1)

***(i)CIT v Gujrat State Road Transportation (Guj):-* 1st view:** Employees' contribution to PF, deposited by employer **after** the due date specified under the EPF & MP Act, but **before** the due date specified u/s 139(1) for relevant AY, is not allowed as deduction u/s 36(1)(va). **Since section 43B(b) pertaining to employer's contribution cannot applied in respect to employees' contribution** which is governed by section 36(1)(va). **(May-16)A**

***(ii)CIT v Kichha Sugar Co. Ltd (Utarkhand):-* 2nd view:** Employees' contribution to PF, deducted from their salaries, shall be **allowed as deduction** from the income of employer- assessee, if the same is deposited by employer- assessee with the PF authority **on or before the due date of filing return for the PY**. This is using extended period u/s 43B.

Section 36(1)(vii)

***(1)T.R.F. Ltd. v CIT (SC):- Requirement of Establish facts that the debt become irrecoverable or bad*:** Apex Court held that, there is no requirement under section 36(1)(vii) to establish that the debt has become irrecoverable or bad. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee during the relevant previous year. **(Nov-11)**

***(2)CIT v T. Veerabhadra Rao, K. Koteswara Rao & Co. (SC):-* Whether Successor of business can write off predecessor debt as irrecoverable or bad:** Held that the successor of a business is entitled to write off the predecessor's debt as a bad debt and claim as deduction if the other conditions are fulfilled. This is so because the benefit of deduction in respect of bad debt is not accrued to the assessee by way of personal relief but relates to the business. A successor to a business will be entitled to claim an allowance for bad debt under section 36(1)(vii) even though the debt was not incurred by it (i.e., the successor) but was incurred by the predecessor before takeover of the business by the successor. **(Nov-12)**

Section 37(1): Expenditure- Capital or Revenue

(1) *CIT v. Priya Village Roadshows Ltd. (Delhi):-* Special Expense Expenditure incurred on feasibility study conducted for examining proposals for technological advancement relating to the existing business, where the project was abandoned without creating a new asset: In such cases, whether or not a new business/asset comes into existence would become a relevant factor**. If there is no creation of a new asset**, then the expenditure incurred would be of revenue nature. Since the feasibility studies were conducted by the assessee **for the existing business** with a common administration and common fund **and the studies were abandoned without creating** a new asset, the expenses were of revenue nature. **(N-14A) (May-12A)**

(2) McGaw-Ravindra Laboratories (India) Ltd. v. CIT (1994) (Guj.): ***Whether expenditure incurred on abandoned project not relating to existing business of assessee will be allowed as deduction?*** Where expenditure is incurred for a project not related the existing business and the project was abandoned without creating a new asset, the expenses are capital in nature.

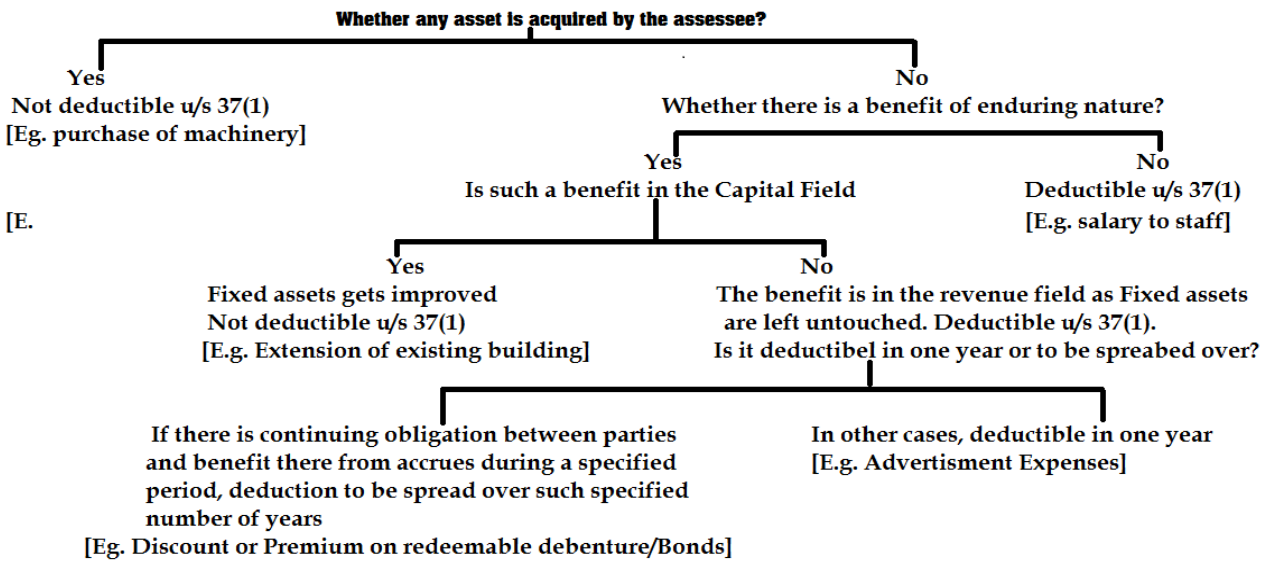
(3)Travelling expenses incurred on foreign tour of a director for initiating a new line of business is a capital expenditure.

(4) <u>Shyam Burlap Co. Ltd. C CIT (Cal) (2016)</u>:- Can compensation paiud by the assessee-company to its tenants for vacating the premises in order to earn higher rent by re-letting the same, be allowed as reveune expenditure, if the main object of the assessee as per its MOA is to acuire & develop properties and deal with the same by way of lease, sale, letting out etc.? The High Court referred to the decision of the Apex Court in the case of *Chennai Properties and Investments Ltd. v. CIT (2015) 373 ITR 673,* wherein it was laid down that the objects of the company must also be kept in mind while interpreting the nature of rental income and the head under which the same is taxable. In that case, it was held that since the main object of the company was to earn rental income by letting out of properties, such income constituted its business income and not income from house property.

Accordingly, the High Court, in this case, took note of the objects clause of the MOA of the assessee which permitted the assessee to carry on the business of letting out premises. Also 85% of the assessee's income was by way of deriving rent and lease rentals. The compensation paid was to obtain possession from the lessee / tenant so as to earn a higher rental income. Thus, the payment of compensation had arisen out of business necessity and commercial expediency. As the compensation was not for acquiring a property, it cannot be said that the payment made was for having a benefit of enduring nature. The compensation, in fact, was paid to the existing tenants to have their portions vacated to have new tenants with higher rent and, thus, to earn higher rental income which was a business activity permitted by the memorandum. The assessee, being the owner of the property, was carrying on business by letting out of properties and the compensation paid to the existing tenants was for deriving higher rent by re-letting out the properties which was in line with the MOA of the company.

Referring the rulling of SC in the case of Chennai Properties & Investment Ltd High Court Held that when income from letting out of premises is treated as income from business and the compensation is deductible as revenue exp.

(1)<u>Empire Jute Co. Ltd. Vs CIT 1980 (SC):</u> Supreme Court pronounced that the test of the benefit of enduring nature may fail in certain cases and the expenditure giving rise to such benefit would still be deductible if the benefit is in the revenue filed. The settled position of law in this regard is as follow;



(2)Addtl. CIT v. Dharmpur Sugar Mill (P) Ltd (2015) (All):- Is expenditure incurred for construction of transmission lines by the assessee for supply of power to UPPCL by the assessee deductible as revenue expenditure?: the erection of power lines by the assessee was for facilitating its routine operations and for smooth functioning of its business. **The power lines remained the property of the Electricity Board**. The High Court, therefore, held that the **assessee had not acquired a capital asset or any enduring benefit or advantage**. Following the principle of law laid down by the Supreme Court in *Empire Jute Mills'* case, the Allahabad High Court, in this case, held that the expenditure which was incurred by the assessee in the laying of transmission lines was clearly on the revenue account. The transmission lines, upon erection, vested absolutely in UPPCL. The expenditure which was incurred by the assessee was for aiding efficient conduct of its business since the assessee had to supply electricity to its sole consumer UPPCL. This was not an advantage of a capital nature.

(***4)<u>CIT v. Hindustan Zinc Ltd. (2009) (Raj):</u> Can expenditure incurred on alteration of a dam to ensure adequate supply of water for the smelter plant owned by the assessee be allowed as revenue expenditure?:*** **<u>Fcats</u>**:-The assessee incurred expenditure for alteration of the dam (constructed by the State Government) to ensure sharing of the water with the State Government without having any right or ownership in the dam or water. The assessee's share of water is also determined by the State Government.

<u>Tribunal</u>:- Object and effect of the expenditure incurred by the assessee is t**o facilitate its trade operation and enable the**

management to conduct business more efficiently and profitably, the expenditure is revenue in nature and hence, allowable as deduction.

The High Court observed that the expenditure incurred by the assessee for **commercial expediency relates to carrying on of business**. The expenditure is of such nature which **a prudent businessman may incur for the purpose of his business**. The operational expenses incurred by the assessee solely intended for the furtherance of the enterprise can by **no means be treated as expenditure of capital nature.**

(5)CIT v. IBM Global Services India P Ltd (2014)(Karn): Where the assessee-company came into existence on bifurcation of a Joint Venture Company (JVC), can the amount paid by it to the JVC for use of customer database and transfer of trained personnel be claimed as revenue expenditure?:-The High Court observed that the expenditure incurred for use of customer database did **not result in acquisition of any capital asset**. The assessee got the **right to use the database** and the company which provided the database was **not precluded from using such database. Therefore, the expenditure incurred was for use of data base and not for acquisition of such data base and, hence, is deductible as revenue expenditure**.

As regards payment for obtaining trained and skilled employees, it was held that the joint venture company spent a lot of money to give training to employees who were transferred to the assessee-company. They were trained in the field of software. They have opted for employment with the assessee, and for their past services with the joint venture company, expenditure has been incurred. In effect, the payment made by the assessee-company was towards expenditure incurred for their training and recruitment. **Such expenditure was in the revenue field, and therefore, the payment made by the assessee-company as per agreement to save such expenditure was also revenue in nature**. Therefore, the expenditure incurred for obtaining trained and skilled employees cannot be termed as capital expenditure though the benefit may be of enduring nature. The High Court, thus, held that both the expenditures claimed were allowable as revenue expenditure.

Sales tax interest Penal or not

(1) CIT v Ratanchand Bholanath(MP):- Whether penalty paid for delay in filing sales tax return is penal in nature or not? *Held that not deductible since it is on account of infraction of the law requiring filing of return within the specified period. Therefore, it is penal in nature.*

(2) Lachmandas Mathursdas v CIT (SC):- Whether interest paid on "Arrear of Sales Tax" is penal in nature or not? *Held that it is compensatory in nature and is an allowable deduction u/s 37(1).*

Prohibited or Offensive Expenditure

(1)*CIT v. Kap Scan and Diagnostic Centre P. Ltd. (2012) (P&H):* Can the commission paid to doctors by a diagnostic centre for referring patients for diagnosis be allowed as a business expenditure under section 37 or would it be treated as illegal and against public policy to attract disallowance?: - The demanding as well as paying of such commission is bad in law. It is not a fair practice and is opposed to public policy and should be discouraged. Thus, the High Court held that commission paid to doctors for referring patients for diagnosis is not allowable as a business expenditure. (May-14)

(2)*Confederation of Indian Pharmaceutical Industry (SSI) v. CBDT (2013) (H.P.):-* Is *Circular No. 5/2012 dated 01.08.2012* disallowing the expenditure incurred on freebies provided by pharmaceutical companies to medical practitioners, in line with *Explanation* to section 37(1), which disallows expenditure which is prohibited by law? The High Court opined that the contention of the assessee that the above mentioned Circular goes beyond section 37(1) was not acceptable. As per *Explanation* to section 37(1), it is clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circular is also the same. Therefore, the circular is totally in line with the *Explanation* to section 37(1). However, if the assessee satisfies the assessing authority that the expenditure incurred is not in violation of the regulations framed by the Medical Council then it may legitimately claim a deduction, but it is for the assessee to satisfy the Assessing Officer that the expense is not in violation of the Medical Council Regulations.

(3)*CIT v. Neelavathi & Others (2010) (Karn):-* Can payment to police personnel and gundas to keep away from the cinema theatres run by the assessee be allowed as deduction?:- Any payment made to the police illegally amounts to bribe and such illegal gratification cannot be considered as an allowable deduction. Similarly, any payment to a gunda as a precautionary measure so that he shall not cause any disturbance in the theatre run by the assessee is an illegal payment for which no deduction is allowable under the Act**.** If the assessee had incurred expenditure for the purpose of security, the same would have been allowed as deduction. However, in the instant case, since the payment has been made to the police and gundas to keep them away from the business premises, such a payment is illegal and hence, not allowable as deduction.

(4)Millennia Developers (P) Ltd. v. DCIT (2010) (Karn.): **Is the amount paid by a construction company as regularization fee for violating building bye-laws allowable as deduction?** The High Court observed that as per the provisions of the Karnataka Municipal Corporations Act, 1976, the amount paid to compound an offence is obviously a penalty and hence, does not qualify for deduction under section 37. Merely describing the payment as a compounding fee would not alter the character of the payment. **(May-15A)**

(5) ***DCIT v Super Tannery (India) Ltd. (ALL):-****C*ommission paid to a recovery agent for getting realisation of an old outstanding debt. Tax at source is deducted. It is an allowable expense u/s 37(1).

(6)***Tarini Tarpauline Productions v CTI (Ori):-*** **Whether secret commission paid and debited to under commission account is deductible?** Explanation 1 to Section 37(1) restricts the allowability of illegal expense. Therefore, if it is established as a payment for any purpose which is an offence or which is prohibited by law, cannot be allowed as deduction. **(May-12A)**

(7) Penalty for non-fulfillment of delivery conditions of a contract of sale for the reasons beyond control:- Non-fulfilment of delivery conditions of a contract for reasons beyond control is **not for the breach of law but was paid for breach of contractual obligations** and therefore, is an allowable expense.

Wholly & execlusively for business or profession

(1) ***Enkay(I) Rubber Co. Pvt. Ltd. v CIT (Del):-*** **Director Relative**: Disallowed since director's relative is not in the employment of the assessee. –Q 21(ii) **(May-13)**

(2) Echjay Forging Ltd. v ACIT (Bon). Can expenditure incurred by a company on higher studies of the director's son abroad be claimed as business expenditure under section 37 on the contention that he was appointed as a trainee in the company under "apprentice training scheme", where there was no proof of existence of such scheme? On this issue, it was observed that there was no evidence on record to show that any other person at any point of time was appointed as trainee or sent abroad for higher education. Further, the appointment letter to the director's son, neither had any reference number nor was it backed by any previous application by him. The appointment letter referred to "apprentice training scheme" with the company in respect of which no details were produced. There was no evidence that he was recruited as trainee by some open competitive exam or regular selection process. **The High Court, thus, held that there was no nexus between the education expenditure incurred abroad for the director's son and the business of the assessee company. Therefore, the aforesaid expenditure was not deductible. (May-16A) (May-12A)**

(3) ***CIT v Naiduniya News & Networking Co. Ltd. (MP):-*** **Employee**: Allowed if there is a nexus between education and business of the assessee. – (4)Expense incurred by the assessee on **installation of a "traffic signal**" to facilitate its employee to overcome traffic jam and be on time, is in the interest of the business so that the works gets completed on time, and is hence, an allowable expense u/s 37(1).

(6) ***CIT v Rajasthan Spinning and Weaving Mill Ltd (Raj).:-***The expenditure incurred for acquiring **a new bus and donating it to schools** is for the welfare of the children of where staff/workmen of the company. It is a part of employees' welfare expenses incurred for the purpose of securing healthy services for staff members. Further, no benefit of enduring nature was derived by the assessee since bus has been donated to school. It is incurred wholly and execlusively for the purpose of business. Therefore, to be allowed as deduction. **(May-12A)**

*(7)*Whether amount **contribution by the assessee company to wholly owned subsidiary company** for construction of a school for the benefit of its employee is deductible or not as an revenue expenditure? Such contribution is allowable u/s 37(1).

(8) ***Dalmia Jain & Co. Ltd. v CIT (SC).:-*** Legal fees incurred in defending title to factory premises is an expenditure incurred wholly, and execlusively for the purpose of business, and is, therefore, allowable u/s 37(1).

(9) ***Hero Honda Motors Ltd v CIT (Del):-***Whether **travelling expense of the wife of managing director**, who accompanied him on tour to America on invitation of Trade & Commerce Chamber, is deductible? Held it is an allowable expense on the grounds of commercial expediency and business consideration. **(N-14A)**

(10)Whether travelling expense on foreign tour of a director for negotiating collaboration with a foreign manufacturer for initiation of new line business is deductible? Held that it is a capital expenditure since incurred for new business. Therefore, it is not deductible u/s 37(1).

(10) Shanti Bushan v CIT (Del) :- Can the Expenditure incurred on heart surgery of an assessee, being a lawyer by profession, be allowed as business expenditure u/s31, by treating it as current repairs considering heart as Plant and machinery, or u/s 37, by treating it as expenditure incurred wholly and execlusively for the purpose of B or P? On this issue, the Delhi High Court observed that a healthy and functional human heart is necessary for a human being irrespective of the vocation or profession he is attached with. Expenses incurred to repair an impaired heart would thus add to the longevity and efficiency of a human being which would be reflected in every activity he does, including professional activity. It cannot be said that the heart is used as an exclusive tool for the purpose of professional activity by the assessee. Further, the High Court held that:-

(i)To allow the heart surgery expenditure as repair expenses to plant, the heart should have been first included in the assessee's balance sheet as an asset in the previous year and in the earlier years. Also, a value needs to be assigned for the same. The assessee would face difficulty in arriving at the cost of acquisition of such an asset for showing in his books of account.

Though the definition of "plant" as per the provisions of section 43(3) is inclusive in nature, such plant must have been used as a business tool which is not true in case of heart. Therefore, the heart cannot be said to be plant for the business or profession of the assessee. Therefore, the expenditure on heart surgery is not allowable as repairs to plant under

section 31.
(ii)According to the provisions of section 37, *inter alia,* the said expenditure must be incurred **wholly and exclusively** for the purposes of the assessee's profession. As mentioned above, a healthy heart will increase the efficiency of human being in every field including its professional work.
There is, therefore, no **direct nexus** between the expenses incurred by the assessee on the heart surgery and his efficiency in the professional field. Therefore, the claim for allowing the said expenditure under section 37 is also not tenable. Hence, the heart surgery expenses shall not be allowed as a business expenditure of the assessee under the Income-tax Act, 1961. **(Nov-12)**
(11) CIT v Avery Cycle Industries Ltd. (P&H): Expense on distribution of gift items to dealer under sale incentive scheme would be promote Goodwill and in the interest of business. Such gift is promoted by commercial expediency and hence allowed u/s 37(1). **(May-13)**

Employee retrenchment

(i)CIT v JK Cotton Spinning & Weaving Co Ltd. (All):- **On closure of one the units**: Held that the Retrenchment compensation paid to the employees at the time of closure one of the units of the business is allowable**.**

(ii)CIT v DCM Ltd. (Del):- **Whether Interest on money borrowed for payment of Retrenchment Compensation on the closure of one of the units: revenue in nature:** Held that the interest and retrenchment compensation is revenue in the nature, since control and management is centralised, common marketing facilities, Profit & Loss account is prepared in consolidated basis.

Section 35D or Section 37

(1) ***CIT v General Insurance Company (SC):-*** **Whether expenditure incurred for issue of bonus share is allowable as deduction?** The issue of bonus shares does not result in inflow of fresh funds or increase in the capital employed. It is mere capitalization of reserves. The total funds available with the company and its capital structure will remain the same on issue of bonus shares. The Supreme Court considered the effect of issue of bonus shares and ruled that expenditure incurred in connection with the issue of bonus shares was allowable as revenue expenditure. (May-14)

(2) ***Brook Bond India Ltd v CIT (1997) (SC):-*** **Whether expenditure incurred for issue of right share is allowable as deduction**? The Supreme Court has held that expenditure incurred by a company in connection with issue of shares with a view to increase its share capital is directly related to the expansion of its capital base and, **therefore it constitutes a capital expenditure**.

(3) ***CIT v Kodak India Ltd. (SC):-*** **Public Issue to Reducing Foreign Holding: Capital Expenditure**, even if share was issued to reduce foreign holding as per direction of RBI.

Legal Fee for alteration of MOA, AOA, and listing:

(1) ***Punjab State Industrial Development Corporation v CIT (SC):-*** **Legal Fee paid to the ROC for enhancement of authorised capital**: If authorised capital is enhanced for issue of bonus share, then, expenditure will be **revenue expenditure**. For other purpose, expenditure will be capital expenditure. (May-14)

(2) ***CIT v Modi Spinning & Weaving Mills Co. Ltd (All):-*** **Legal Fee paid for alteration of AOA**: Such Fee will be treated as Revenue Expenditure.

(3) ***Mascon Technical Service Ltd v CIT (Mad):-*** **Legal fee for listing paid to SEBI**: **Capital Expenditure**, even if issue is aborted, **the fact that the** expenditure was incurred for expansion of capital base **remains same**. **(May-15A)**

Personal Expense

Jugal Kishore Baldeo Sahai v CIT(1967) (SC):- **Whether an HUF can pay salary to the karta and claim the payment as deduction from profit of its business?** The Supreme Court has held that if remuneration is paid to the Karta of a Hindu undivided family (HUF) under –
(i) a valid agreement which is bona fide and
(ii) is in the interest of, and expedient for, the business of the family and
(iii) the payment is genuine and not excessive,
such remuneration would be an expenditure laid out **wholly and exclusively for the purpose of business of the family and would be allowable as a deduction while computing the income of the HUF**. The test which should be applied for judging, what is a valid agreement is, whether the agreement for payment of salary to the Karta was by or on behalf of all the members of the family and whether it was in the interests of the business of the family so that it could be justified on the grounds of commercial expediency.

Capital Loss or Loss Incidental to business

(1) ***Dr. T. A. Quereshi v CIT (2006) (SC).*** Whether confiscation of *Wines and liquor held as stock by the Government will be allowed as deduction?* The Apex Court observed that loss of stock-in-trade has to be considered as a trading loss. *Explanation* to section 37(1) is not relevant here since it is not a case of business expenditure but one of business loss. Business loss is allowable on ordinary commercial principles. Therefore, since wine and liquor formed part of stock-in-trade of the firm, confiscation of the same is allowed as business loss. **(Nov-13)**

(2) ***Sawdeshi Cotton Mills Co. Ltd. v CIT(SC):-*** ***Whether Compensation paid to the suppliers of automatic kitchen appliances because of termination of the contract will be allowable as deduction.*** Compensation paid to supplier for breach of a contract for supply of a capital asset is in the nature of capital expenditure. **(Nov-13)**

(3) Loss due to destruction of machinery caused by a fire due to short circuit. The insurance company did not admit the claim of the company. It is not deductible since it is capital in nature.

(4) ***G.D. Dandekar Machine Works Ltd v CIT (Bom):-*** **Where assessee lost cash due to theft when it was withdrawn from bank and taken to administrative office i.e. cash in transit**. In order to determine whether any loss from theft, dacoity, embezzlement, etc., is deductible or not, what is material is whether the loss incurred by theft, dacoity, etc., is incidental to the carrying on of the business. it does not make difference whether such act is committed by the employee of the assessee or by strangers. Held that it is deductible. **(May-15A)**

Debenture related expense

(1) ***Madras Industrial Development Corporation v CIT (SC):-*** **Discount on issue of Redeemable Debenture:** Held that such issue discount has **to be spread proportionally over** the life of debentures**.**

(2) ***Universal Cables Ltd v CIT (Cal):-*** **Premium payable on redemption of Secured Convertible Debenture**: Held that such Premium payable on redemption has **to be spread over** the period of debentures**.**

(3) ***CIT v S. M. Holding & Finance Pvt. Ltd. (Bom):-*** **Zero-convertible Debentures Redeemable after 10 years are issued at premium:** Held that issue premium has **to be spread over** the life of the debentures **and taxed accordingly.**

(4) ***South India Cement (Agencies) Ltd v CIT (Mad):-*** **Issue expense on Partly-Convertible Debenture: It was** held that expenditure incurred on partly-convertible debentures is revenue expenditure eligible for deduction while computing business income. **The High Court observed that** the issue of shares is **a future event**, which may or may not happen. Since, at present, it is an expenditure incurred on the issue of debentures only, it is revenue expenditure eligible for deduction u/s 37(1).

(5) CIT v. ITC Hotels Ltd. (Kar.):- Would the expenditure incurred on issue and collection of convertible debentures be treated as revenue expenditure or capital expenditure? : On this issue, the Karnataka High Court held that the expenditure incurred on the issue and collection of debentures shall be treated as revenue expenditure even in case of convertible debentures, i.e., the debentures which had to be converted into shares at a later date. **(Nov-12)**

(6) Indian Cement Ltd. v CIT(SC):- Expenditure on issue of debenture is not capital expenditure and is laid wholly & exclusively for the purpose of business of the assessee and therefore, is an allowable expenditure. The act of borrowing money is incidental to carry on business, the loan obtained is not an asset or an advantage of enduring nature. The expenditure is made for securing use of money for a certain period, and it is not relevant to consider the object with which the loan was obtained. **(May-15)**

Section 40(a)(ii)

(1)***East India Pharmaceutical Ltd. v CIT (1997) (SC):-*****Interest paid on a overdraft taken for making payment of instalment of Advance Tax:** It was held that the Interest on the overdraft taken for making payment of installment of advance tax is not allowable under section 37(1) since it is not an expenditure wholly and exclusively incurred for the purpose of business.

(2)Interest paid u/s 234B for short payment of advance tax: Interest paid for delayed payment of tax by assessee is part and parcel of the liability to pay income tax. The interest paid u/s 234B cannot qualify for deduction.

Section 40A(2)(a) Vs. Section 40(b)(v)

(1) CIT v. Great City Manufacturing Co. (All) :- Can remuneration paid to working partners as per the partnership deed be considered as unreasonable and excessive for attracting disallowance under section 40A(2)(a) even though the same is within the statutory limit prescribed under section 40(b)(v): the High Court observed that section 40(b)(v) prescribes the limit of remuneration to working partners, and deduction is allowable up to such limit while computing the business income. If the remuneration paid is within the ceiling limit provided under section 40(b)(v), **then, recourse to provisions of section 40A(2)(a) cannot be taken**. *The Assessing Officer is only required to ensure that the remuneration is paid to the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and the remuneration is within the limits prescribed under section 40(b)(v)*. If these conditions are complied with, then the Assessing Officer cannot disallow any part of the remuneration on the ground that it is excessive. **Held that the question of disallowance of remuneration under section 40A(2)(a) does not arise in this case, since all the three conditions mentioned above have been satisfied. Hence, the remuneration paid to working partners within the limits specified under section 40(b)(v) cannot be disallowed by invoking the provisions of section 40A(2)(a)**. **(Nov-15)**

(2) ***Brij Mohan Das Laxman Das v. CIT (1997)(SC): Whether interest paid to Karta by the firm in which he is representing its HUF for loan made by the kart disallowed?*** *Where an individual is a partner in a firm, in a representative capacity, interest paid by the firm to such individual in his individual capacity shall not attract disallowance under section 40(b).*

(3) ***Novel Distributing Enterprises v. DCIT (2001) (Ker):- Where the partnership deed provides for payment of Interest on balances of capital account of partners only. Can interest paid on the balances standing to the credit of the current***

accounts of partners is allowable u/s 40(b)? The Kerala High Court has held that interest paid to the partners on their current account balances is not allowable.

(4) ICDS II : Valuation of Inventories: Valuation of inventories on dissolution of firm. In case of dissolution of a partnership firm or association of persons or body of individuals, whether business is discontinued or not, the inventory on the date of dissolution shall be valued **at the net realisable value**.

Section 40A(7)

Sree Akilandeswari Mills Pvt. Ltd. v Dy CIT(Mad):- **Whether gratuity of the employees who has retired during the year of transferee company taken over the transferor company as per the term of agreement is an expense?** Held that "the company, by virtue of the deed of transfer, had taken over the liability towards the employees of the transferor company and on the date of transfer, the liability relating to gratuity was an ascertained liability on the basis of actuarial valuation. This also formed an integral part of the sale consideration to be discharged by making actual payment to the employee in the subsequent years. The payment of gratuity, thus, was in the nature of a capital expenditure".

Section 40b

(1)CIT v Anil Hardware Store (HP):- **In case where partnership deed does not specify the remuneration payable to each individual working partner but lays down manner of fixing remuneration, would the assessee-firm, be entitled to deduction in respect of remuneration paid to partners? Note:- Partnership Deed specified the manner of quantifying the remuneration of the working partners**: Held that even if the manner of fixing remuneration of each individual working partner is not specified in the partnership deed, the assessee firm would be entitled to deduct remuneration paid to all such partners, subject to the limit specified u/s 40b(v). **(May-13)**

(2)Rashik Lal & Co. vs CIT (1998) (SC):- **Whether salary paid to the partner representing his HUF will be subject to the limits prescribed in section 40(b)(v)?** Even though Z is a partner in a representative capacity, he is still a partner. Therefore, remuneration to Z should **also be subject to the limits prescribed in section 40(b)**(v).

Section 41: Waiver of Principal Amount of Loan & Interest on such Loan

(1) *Iskraemeco Regent Ltd. v CIT (Mad)*: Waiver of Term loan: Held that the grant of bank loan for purchase of a capital asset is a capital receipt and not a trading receipt. Since, the loan was taken for purchase of capital assets, waiver of a portion of principal would not amount to remission of trading liability to attract the provision of section 41(1). Further, such waiver cannot be treated as a benefit arising out of business and consequently, Section 28(iv) will not apply in respect of such loan transaction.

(2)Waiver of Cash Credit: Held that the section 41(1) will be attracted in respect of waiver of working capital loan utilized for day-to-day business operations, since it amounted to remission of a trading liability. Further, the benefit is in the revenue field as the money had been borrowed for day-to-day affairs.

(3) *Rollatainers Ltd. v CIT (Del):* Can section 41(1) be invoked in respect of long standing credit balances of sundry creditors admitted as liability in the Balance Sheet? Held that the addition on the ground that the amounts were outstanding for several years cannot be made u/s 41(1) unless and until it is found that there was remission or cessation of liability that too during the PY, relevant to the AY in question. Even if the credit balances are outstanding for long time, such balances cannot be subjected to tax by invoking section 41(1), unless there is a remission/cessation of liability in the year under question. ***PCIT v Matruprasad C. Pandey(Guj)*** **(May-13)**

(4) *CIT v KLN Agrotechs (P) Ltd. (2015) (Kar):-*Where the lump sum amount paid as One Time Settlement, without bifurcation of interest and principal, has been offered to tax u/s 41(1), can the assessee claim benefit of deduction of interest (interest paid plus interest waived)u/s 43B? The HC concurred with the Tribunal's view that if out of total sum 265.54 lakhs which has been and subjected to tax by an assessee in its return, the amount of unpaid interest of 193-96 lakhs is deducted then the waived principal sum would come to 62.58 lakhs (i.e. 441.30 lakhs – 378.73 lakhs), which is the amount which ought to have been taxed u/s 41(1). Based on above reasoning, the HC held that either interest amount has to be allowed as deduction u/s 43B or the sum offered for tax (as waived by the bank) has to be reduced by the amount of interest. In either case, the effective amount which is subjected to tax, would come to the same.

(5) Computer Software Pvt. Ltd. v CIT(Bom): Waiver of loan taken for the purpose of relockting office premises (i.e. capital asset being office premise) cannot be treated as waiver or remission of trading liability for the purpose of section 41(1) **(May-15A)**

Excise Duty: Allowed on actual Payment basis due to section 43B.

(1) *Polyfex (India) Pvt. Ltd. v CIT(SC):-*Refund of ED obtained and Further appeal to the court by Central Excise Department: Held that refund of excise duty would be subject to tax u/s 41(1). Because it will be a case where the assessee "**has obtained any amount in respect of such expenditure**". Further it is not necessary that the Revenue should await the verdict of a higher court. **(Nov-13)**

(2)Refund not obtained against the order & Further appeal to the court by Central Excise Department: Section 41(1) will not be attracted since the assessee "has not obtained any amount in respect of such expenditure". Further, it is not a case of trading liability, since excise duty has been remitted to the central excise department and therefore, section 43B was not attracted.

(3) *Chorwinge Sales Bureau Pvt. Ltd v CIT (SC):-* Sales tax Collected: It shall be treated as Revenue receipt.

(4*) CIT v Thirmalaiswamy Naidu and Sons (SC):-* Refund of Sale Tax refund to the purchaser: Held that the assessee would be entitled to claim deduction of the amount of refund of sale tax as and when the same is refunded to by the assessee to the purchaser**.**

(5) *CIT vs. Udaipur Distillery Company Limited (2004) (Raj):- Mere furnishing Bank Guarantee towards disputed sale tax liability amount to actual payment?* It was held that actual payment requires that amount must flow from the assessee to the public exchequer as specified in section 43B. Mere furnishing of bank guarantee by the assessee towards sales tax dues does not mean actual payment of sales tax dues. Hence, it is not treated as payment to be eligible for deduction under section 43B.

Section 43(2)

(1)*Nonsuch Tea Estate Ltd. Vs. CIT (SC):* The liability to incur any expenditure that requires approval from Government or statutory authority based on a law on force cannot be said to accrue unless such approval has been obtained. When the requisite approval has been received after the end of the PY, any such expense cannot be claimed as deduction. Where managerial remuneration payable requires approval and the approval under the law is received only after the end of the PY, such remuneration paid cannot be claimed as deduction. It can be claimed as deduction in subsequent FY.

(2)*UCO Bank Vs CIT (SC):* Even in the case of an assessee following mercantile system of accounting in respect of loans which have become non-performing assets, interest income which is not received with no possibility of recovery may not be recognised. Such interest shall not be treated as accrued in favour of assessee.

(3) *Kedarnath Jute Manufacturing Company Ltd. v. CIT (1971) (SC)]:- Whether purchase made in the PY but omitted to be recorded in books of account of that PY would be disallowed?* Since the purchase is made in March, 2017 (i.e., P.Y.2016-17), in respect of which bill of ` 2 lakhs received on 31.3.2017 has been omitted to be recorded in the books in that year, it has to be deducted to compute the business income. It is logical to assume that the company is following mercantile system of accounting.

Section 43(6)

***CIT v. Cable Corporation of India Ltd. (2011) (Bom.):-* Can "moneys payable" in respect of a building sold by the assessee be construed as the fair market value of the asset instead of the actual sale price?**: On this issue, Court observed that the "moneys payable" to be reduced from the WDV of the BOA as per section 43(6) is to be construed as per the meaning assigned to the same according to the Explanation below section 41(4) which states that the "mp" in relation to the sale of a building, machinery, plant or furniture would be **the price for which it is sold**. Therefore, the WDV of the asset **falling within** that BOAs **at the beginning** of the PY has to be **adjusted by the amount for which the asset is actually sold and not by its fair market value**. It may, however, be noted that, **in case of scrap**, the amount of scrap value (i.e. the fair market value) has to be reduced as per the provisions of section 43(6), to arrive at the WDV at the end of the year.

Section 43B: Actual payment

***(1) CIT v. Andhra Ferro Alloys P. Ltd. (2012)(A.P):-* Can unpaid electricity charges be treated as "fees" to attract disallowance under section 43B?** The Andhra Pradesh High Court observed that the provisions of section 43B do not incorporate electricity charges. Therefore, non - payment of electricity charges would not attract disallowance under section 43B since such charges cannot be termed as "fees".

(2) *McDowell & Co. Ltd. v CIT (SC):-* Whether a Bank Guarantee given towards disputed sale tax liabilities amount to "Actual Payment" as required u/s 43B: Held that Actual payment requires that the money must flow from the assessee to the public exchequer. Therefore, **deduction u/s 43B cannot be claimed** by merely furnishing a bank guarantee. (**Nov-13)**

***(3) Mewar Motors v CIT (Raj):-* Whether Interest payable to Sales Tax Department but not paid before filing of return is covered u/s 43B:** Held that the interest payable is a part of the sales tax and therefore, the provisions of **section 43B are attracted is respect of such interest also**. **(Nov-13)**

(4) CIT v. Gujarat Guardian Ltd (2009)(* Delhi*): Whether lump-sump pre-payment premium paid to financial institution for restructuring its debts and reducing its rate of interest is allowed as deduction? The Court observed that the assessee company's claim for deduction has to be allowed in one lump sum keeping in view the provisions of section 43B(d), which provide that any sum payable by the assessee ***as interest on any loan or borrowing from any financial institution shall be allowed to the assessee in the year in which the same is paid, irrespective of the periods, in which the liability to pay such sum is incurred by the assessee according to the method of accounting regularly followed by the assessee.*** The High Court concurred with the Tribunal's view supporting the assessee that in terms of section 36(1)(iii) read with section 2(28A), the deduction for pre-payment **premium was allowable**.

Capital Gain

Section 2(14)

CIT v Alps Theatre (SC).:- Site and building are separate capital assets for the purpose of capital gain. This distinction is clear

from the scheme of the Income Tax Act. 1961. For the purpose of section 32, a building which is entitled to depreciation means only the superstructure and does not include the site on which it is built.
Section 2(47)
(1)*<u>CIT Vs Laxmi Devi Ratni (MP</u>):* Proposed purchaser filed a suit for specific performance of contract against the owner of the property (i.e. seller). In term of compromise, the owner agreed to pay purchaser an amount as consideration. The action of assessee (i.e. purchaser) in giving up his right to claim the property & instead accepting money compensation is a clear case of Extinguishment of right in the property resulting in transfer. This transaction being transfer shall be chargeable to tax. **(2)*<u>Oriental Trading Company Ltd (SC</u>):*** Shares held as investment in a company are **Exchanged** for the issue of share in newly incorporated company is a transfer. **(3<u>) C. F. Thomas Vs CIT(Kerla)</u> *<u>(2006)</u>*<u>:-</u>** Kerala High Court has held that the execution of sale deed is not compulsory for the purpose of charge of capital gain because the transfer of right enabling enjoyment of immovable property gives rise to charge of capital gains. **(4*<u>) Anarkali Sarabhai v CIT(SC):</u>* Whether redemption of preference share amount to transfer u/s 2(47)?** When shares are redeemed by a company, it only, means that the concerned shareholder is giving up his ownership or claim with reference to the shares in favour of the company. The consideration received by shareholder from the company is certainly for sale/relinquishment of the interest in the shares and therefore, the redemption of preference share amount to "transfer" ad gain arising therefrom, being the excess realisation over the COA, shall be charged to tax under the head "CG".
***<u>(1)CIT v. Smt. Rama Rani Kalia (2013) (All.)</u>:-* Where a leasehold property is purchased and subsequently converted into freehold property and then sold, should the period of holding be reckoned from the date of purchase or from the date of conversion for determining whether the resultant capital gains is short-term or long-term?;** The High Court observed that the difference between "short-term capital asset" and "long-term capital asset" is the period over which the property has been held by the assessee and not the nature of title over the property. The lessee of the property has rights as the owner of the property subject to the covenants of the lease deed. Accordingly, the lessee may, subject to covenants of the lease deed, transfer the leasehold rights of the property with the consent of the lessor. The Allahabad High Court, thus, held that conversion of rights of the lessee from leasehold to freehold is only by way of improvement of his rights over the property, which he enjoyed**. It would not have any effect on the taxability of gain from such property, which is related to the period for which the property is held, both as leasehold and as freehold**. ***(2)<u>CIT v S.R. Jeyashankar (Mad) 2015</u>:-* Whether, for the purpose of computing the period of holding of the property, the date of allotment letter issued by the builder of the flat or the date of registration of the property has to be considered for determining the nature of capital asset- long term or short term?** The Madras High Court observed that the right to the property flows from the date of agreement with the builder. Over a period of time, payments were made and the transaction was concluded in accordance with the terms of the agreement by registering the undivided share in land and handing over of the flat subsequently. : Accordingly, the Madras High Court held that the assessee had rightly claimed the benefit of long-term capital gain, since the holding period exceeded 36 months (i.e., from 22.02.2005, being the date of agreement, to 10.04.2008, being the date of sale of property). **(2) *<u>P. P. Menon v. CIT (2010) 325 ITR 122 (Ker.)</u>:-* In determining the period of holding of a capital asset received by a partner on dissolution of firm, can the period of holding of the capital asset by the firm be taken into account?:** The High Court held that the benefit of including the period of holding of the previous owner under section 2(42A) read with section 49(1)(iii)(b) can be availed only if the dissolution of the firm had taken place at any time before April 1, 1987. In this case, the firm was dissolved on April 15, 2001 and therefore **the benefit of these sections would not be available to the assessee**. Therefore, in this case, the period of holding of the asset received by the assessee-partner on dissolution of the firm has to be reckoned only from the date of dissolution of the firm. Since the assessee-partner has sold the property within three days of acquiring the same, the gains have to be treated as short-term capital gain. **(3) *<u>Navin Jindal v. ACIT (2010) 320 ITR 708 (SC)</u>:-* What would be the period of holding to determine whether the capital gains on renunciation of right to subscribe for additional shares is short -term or long-term?:** For determining whether the capital gains on renunciation of right to subscribe for additional shares is short-term or long-term, the period of holding would be from the date on which such right to subscribe for additional shares comes into existence upto the date of renunciation of such right.
Section 45(1)
***<u>CIT v. Yatish Trading Co. Pvt. Ltd. (2013) (Bom.)</u>* :- In the case of an assessee, being a dealer in shares and securities, whose portfolio comprises of shares held as stock-in-trade as well as shares held as investment, is it permissible under law to convert a portion of his stock -in-trade into investment and if so, what would be the tax treatment on subsequent sale of such investment?:** The High Court concurred with the Tribunal‟s ruling that the gains arising on sale of those shares

held as investments by the dealer -assessee (i.e., the difference between the sale price and the fair market value on the date of conversion) were to be assessed under the head "Capital gains" and not under the head "Profits and gains of business or profession".

Section 45(5)

CIT v. A.N. Naik Associates (Bom):- **The** expression "otherwise" covers transfer of CA in favour of retiring partner.

Indexation benefit +Section 47+ Period of holding

CIT v. Manjula J. Shah (2013) 355 ITR 474 (Bom.) :- ***Whether indexation benefit in respect of the gifted asset shall apply from the year in which the asset was first held by the assessee or from the year in which the same was first acquired by the previous owner?:-*** *Explanation* 1 to section 2(42A), in case the capital asset becomes the property of the assessee in the circumstances mentioned in section 49(1), *inter alia*, by way of gift by the previous owner, then for determining the nature of the capital asset, **the aggregate period** for which the capital asset is held by the assessee and the previous owner shall be considered. Section 48, the profit and gains arising on transfer of a LTCA shall be computed by reducing the indexed cost of acquisition from the net sale consideration. The indexed cost of acquisition meant the amount which bears to the cost of acquisition the same proportion as Cost Inflation Index (CII) for the year **in which the asset is transferred bears to the CII for the year in which the asset was first held by the assessee transferring it** i.e., the year in which the asset was gifted to the assessee in case of transfer by the previous owner by way of gift. The Bombay High Court observed that by way of 'deemed holding period fiction' created by the statute, the assessee is deemed to have held the capital asset **from the year the asset was held by the previous owner and accordingly the asset is a long term capital asset in the hands of the assessee.** Therefore, for determining the indexed cost of acquisition under Section 48, the assessee must be treated to have held the asset from the year the asset was first held by the previous owner and accordingly the CII for the year the asset was first held by the previous owner would be considered for determining the indexed cost of acquisition.

Hence, the indexed cost of acquisition in case of gifted asset has to be computed with reference to **the year in which the previous owner first held the asset** and **not the year in which the assessee became the owner of the asset. (Nov-14)**

Cost of Acquisition + Section 47

Apex court observed that the income chargeable to capital gain tax is to be computed by deducting from full value of consideration "the COA of the CA". If it is not possible to ascertain COA, then, transfer of such CA is not chargeable to tax. B. S. Srinivasa Setty (SC)	Section 55(2)(ii) provides that COA of certain self generated capital assets, including goodwill of business is Nil. In respect of self generated capital asset covered u/s 55(2)(a), the decision of apex court in **B. C. Srinivasa Setty's** case would not apply.

Cost of improvement

(1) RM. Arunchalam Vs CIT (SC):- Inheritance of mortgaged property & subsequent discharge of mortgage by the assessee. Assessee can claim the amount paid to the mortgagee as cost of improvement/acquisition while computing capital gain at the time of sale of the said property.

(2)VSMR Jagdish Chandran Vs CIT (SC) **:-** If assessee himself creates the mortgage in respect of a property, then, it is self created mortgage. The debt discharged by the assessee on the property under mortgage created by him does not form part of COA.

Cost of Acquisition

(1)What would be the capital gain in case of self generated capital asset, where cost of acquisition is indeterminate? Supreme Court observed that the income chargeable to capital gain tax is to be computed by deducting from the full value of consideration "the cost of acquisition of the capital asset". If it is not possible to ascertain the cost of acquisition, then, transfer of such asset is not chargeable to tax. **CIT v B.C. Srinivasa Setty (SC) (Nov-13)**

Section 55(2)(a) provides that the cost of acquisition of certain self generated assets, including goodwill of business, is nil. Therefore, in respect of self generated assets covered u/s 55(2)(a), the decision of SC would not be applicable.

*(2)**CIT v. Theatre Sri Rangaraja (2004)(Madras):-*** ***What is the cost of acquisition in a case where the previous owner himself acquired the asset by any of the modes set out in section 49(1)?*** *The Madras High Court observed that the Explanation to section 49(1) makes it clear that where the previous owner of an asset which was sold had himself acquired it by any of the modes set out in section 49(1)(i) to (iv), it is the cost incurred by the owner who had owned the asset prior to the previous owner that is required to be taken into account and not the cost incurred by the previous owner at the time he received the asset in any of the modes set out in sub-clauses (i) to (iv) of section 49(1).*

Section 54

(1) ***CIT v Annand Basapa (Kar)*** **:-** Where two flats were purchased under separate agreement and the flats are situated side by side and the builder had effected the necessary Modification to make it as one house, the assessee would be entitled to exemption under section 54 in respect of investment in both the flats, despite the fact that they were purchased by separate sale deeds. **(Nov-14)**

(2)CIT v. K.G. Rukminiamma (2011) (Kar):- Wherein it was held that where a residential house was transferred and four flats in a single residential complex were purchased by the assessee, all the four residential flats constituted "a residential house" for the purpose of section 54.

(3) *CIT v. Syed Ali Adil (2013) (A.P.)* :- Would an assessee be entitled to exemption under section 54 in respect of purchase of two flats, adjacent to each other and having a common meeting point?: The Andhra Pradesh High Court, on the basis of the above rulings of the Karnataka High Court, held that in this case, the assessee was entitled to investment in both the flats purchased by him, since they were adjacent to each other and had a common meeting point, thus, making it a single residential unit.

(5) ***CIT v T.N. Arvinda Reddy (SC):-*** The release by other co-owners of their share in co-owned property in favour of assessee would amount to purchase by assessee for the purpose of exemption u/s 54**.**

(6) *CIT v Rajiv Shukla (Del):-* Section 54F and Capital Gain on transfer of Depreciable Asset held for more than 36 months. Held that the benefit of section 54 will be allowed to the assessee. (May-14)

(7)Whether benefit u/s 54 is allowed when New residential house is acquired before date of transfer of CA? Yes, since house can be purchased even 1 year before the date of transfer of capital asset.

(8) *Balraj v CIT(Del) and CIT v Shahzada Begum(AP):-* What to do when 2 houses is purchased, and later is old house but having **high investment and registration is not completed** even though consideration has been paid:- Held that for the purpose of claiming exemption u/s 54, holding of legal title is not necessary. If the taxpayer pays the full consideration in terms of the purchase agreement within stipulated period; the exemption u/s 54 would be available.

Section 54B

***CIT v. Gurnam Singh (2010) (P&H):-* Can exemption under section 54B be denied solely on the ground that the new agricultural land purchased is not wholly owned by the assessee, as the assessee's son is a co-owner as per the sale deed?:** In this case, the High Court concurred with the Tribunals view that merely because the assessees son was shown in the sale deed as co -owner, it did not make any difference. It was not the case of the Revenue that the land in question was exclusively used by the son. Therefore, the assessee was entitled to deduction under section 54B.

Section 54EC

(1) *Hindustan Unilever Ltd. v. DCIT (2010) (Bom.):* Can exemption under section 54EC be denied on account of the bonds being issued after six months of the date of transfer even though the payment for the bonds was made by the assessee within the six month period?: The Bombay High Court observed that in order to avail the exemption under section 54EC, the capital gains have to be invested in a long-term specified asset within a period of six months from the date of transfer. Where the assessee has made the payment within the six month period, and the same is reflected in the bank account and a receipt has been issued as on that date, the exemption under section 54EC cannot be denied merely because the bond was issued after the expiry of the six month period or the date of allotment specified therein was after the expiry of the six month period. **For the purpose of the provisions of section 54EC, the date of investment by the assessee must be regarded as the date on which payment is made.The High Court, therefore, held that if such payment is within a period of six months from the date of transfer, the assessee would be eligible to claim exemption under section 54EC. (Nov-14)**

(2) *CIT v Ruby Trading Co. (P) Ltd(Raj):-* 54EC require "transfer" and resulting LTCG can be used to avail 54EC. But 46(1) issue covered here in shall not be treated as transfer in the case of company. As there is no transfer, the assessee would be not entitled for the benefit of 54EC.

Section 54F

(1) *CIT v. Gita Duggal (2013) (Delhi):-* Where a building, comprising of several floors, has been developed and re-constructed, would exemption under section 54/54F be available in respect of the cost of construction of –

(a)the new residential house (i.e., all independent floors handed over to the assessee); or

(b)a single residential unit (i.e., only one independent floor)?: The High Court held that the fact that the residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction under section 54 or section 54F. It is neither expressly nor b y necessary implication prohibited. Therefore, the assessee is entitled to exemption of capital gains in respect of investment in the residential house, comprising of independent residential units handed over to the assessee.

(2) CIT v. Kamal Wahal (2013) (Delhi) :- Can exemption under section 54F be denied solely on the ground that the new residential house is purchased by the assessee exclusively in the name of his wife?: The Delhi High observed that a new residential house need not necessarily be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. It was further observed that section 54F does not require purchase of new residential house property in the name of the assessee himself. It only requires the assessee to purchase or construct a residential house. Further, in this case, the Delhi High Court observed that the assessee had not purchased the new house in the name of a stranger or somebody who is unconnected with him, but had purchased it in the name of his wife. The entire investment for purchase of new residential house had come out of the sale proceeds of the capital asset (of the assessee) and there was no contribution from his wife. **Hence, the Delhi High Court, having regard to the rule of purposive construction and the object of enactment of**

section 54F, held that the assessee is entitled to claim exemption under section 54F in respect of utilization of sale proceeds of capital asset for investment in residential house property in the name of his wife. (N-16)

(3) *CIT v. Ravinder Kumar Arora (2012) (Delhi):- In case of a house property registered in joint names, whether the exemption under section 54F can be allowed fully to the co-owner who has paid whole of the purchase consideration of the house property or will it be restricted to his share in the house property?:* The Delhi High Court held that the assessee was the **real owner of the residential house** in question and mere inclusion of his wife's name in the sale deed would not make any difference. The High Court also observed that section 54F **mandates that the house should be purchased by the assessee but it does not stipulate that the house should be purchased only in the name of the assessee**. In this case, the house was purchased by the assessee in his name and his wife's name was also included additionally. Therefore, the conditions stipulated in section 54F stand fulfilled and the entire exemption claimed in respect of the purchase price of the house property shall be allowed to the assessee.

(4) *CIT v. Sambandam Udaykumar (2012)(Kar):-* Can exemption under section 54F be denied to an assessee in respect of investment made in construction of a residential house, on the ground that the construction was not completed within three years after the date on which transfer took place, on account of pendency of certain finishing work like flooring, electrical fittings, fittings of door shutter, etc?: The Karnataka High Court observed that **the condition precedent** for claiming the benefit under section 54F is that capital gains realized from sale of capital asset **should have been invested either in purchasing a residential house or in constructing a residential house within the stipulated period.** If he has invested the money in the construction of a residential house, merely because the construction was not completed in all respects and possession could not be taken within the stipulated period, would not disentitle the assessee from claiming exemption under section 54F. In fact, in this case, the assessee has taken the possession of the residential building and is living in the said premises despite the pendency of flooring work, electricity work, fitting of door and window shutters. **The Court held that in this case the assessee would be entitled to exemption under section 54F in respect of the amount invested in construction within the prescribed period.**

(5) *CIT v. Rajiv Shukla (2011) (Delhi):-* Can the assessee claim exemption under section 54F, on account of capital gain arising on transfer of depreciable assets held for more than 36 months i.e. a long - term capital asset, though the same is deemed as capital gain arising on transfer of short-term capital asset by virtue of section 50?: The Delhi High Court, in the present case, relying on the decision of the Bombay High Court in the case of *CIT v. Ace Builders P. Ltd. (2006) 281 ITR 210* and the decision pronounced by Gauhati High Court in *CIT v. Assam Petroleum Industries P. Ltd. [2003] 262 ITR 587,* in relation to erstwhile section 54E, held that **the deeming fiction created by section 50 that the capital gain arising on transfer of a depreciable asset shall be treated as capital gain arising on transfer of short-term capital asset is only for the purpose of sections 48 and 49 and not for the purpose of any other section. Section 54F being an independent section will not be bound by the provisions of section 50. The depreciable asset if held for more than 36 months shall be a long-term capital asset as per the provisions of section 2(29A).** Therefore, the exemption under section 54F on transfer of depreciable asset held for more than 36 months cannot be denied on account of fiction created by section 50.

(6) *Gouli Mahadevappa v. ITO (2013) (Kar.):-* Where the stamp duty value under section 50C has been adopted as the full value of consideration, can the reinvestment made in acquiring a residential property, which is in excess of the actual net sale consideration, be considered for the purpose of computation of exemption under section 54F, irrespective of the source of funds for such reinvestment?: On the issue of exemption under section 54F, the High Court held that when capital gain is assessed on notional basis as per the provisions of section 50C, and the higher value i.e., the stamp duty value of ` 36 lakhs under section 50C has been adopted as the full value of consideration, the entire amount of ` 24 lakhs reinvested in the residential house within the prescribed period should be considered for the purpose of exemption under section 54F, irrespective of the source of funds for such reinvestment. **(M-15)**

Section 54G

***Fibre Boards (P) Ltd. v CIT (SC):-* Can advance given for purchase of land, building, plant and machinery tantamount to utilisation of capital gain for purchase and acquisition of new machinery or plant and building or land, for claim of exemption u/s 54G?** For the purpose of availing exemption, all that was required for the assessee is to "utilise" the amount of capital gain for purchase and acquisition of new machinery or plant and building or land. Since the entire amount of capital gain, in this case, was utilized by the assessee by way of advance for acquisition of land, building, plant and machinery, the assessee was entitled to avail exemption/deduction under section 54G. **Held that the requirement of section 54G is satisfied if the capital gain is given as advance for acquisition of capital assets such as land, building and/or plant and machinery.**

Other sources

Section 2(22)(e)

(1)CIT v. Parle Plastics Ltd. (2011) (Bom.): What are the tests for determining "substantial part of business" of lending company for the purpose of application of exclusion provision under section 2(22)? In this case, 42% of the total assets of the lending company were deployed by it by way of loans and advances. Further, if the income earned by way of interest is excluded, the other business had resulted in a net loss. These factors were considered in concluding that lending of money was a substantial part of the business of the company. **Since lending of money was a substantial part of the business of the lending company, the money given by it by way of advance o r loan to the assessee could not be regarded as a dividend, as it had to be excluded from the definition of "dividend" by virtue of the specific exclusion in section 2(22).**

(2)<u>CIT v. Vir Vikram Vaid (2014) (Bom):</u> Can repair and renovation expenses incurred by a company in respect of premises leased out by a shareholder having substantial interest in the company, be treated as deemed dividend? The High Court observed that **no money had been paid by way of advance or loan** to the shareholder who has substantial interest in the company. Further, the amount spent was towards repairs and renovation of the premises owned by the assessee but occupied by the company as lessee. There is no dispute that the company had taken on rent the aforesaid premises.
The High Court observed that the expenditure incurred by virtue of repairs and renovation on the premises **cannot be brought within the definition of advance or loan given** to the shareholder having substantial interest in the company, though he is the owner of the premises. **It cannot be treated as payment by the company on behalf of the shareholder or for the individual benefit of such shareholder. If held in such manner, it is a mere assumption not tenable in law.**
The High Court, accordingly, held that the repair and renovation expenses in respect of premises occupied by the company cannot be treated as deemed dividend in the hands of shareholder being the owner of the building.

(3)*<u>Pradip Kumar Malhotra v. CIT (2011) (Cal</u>*.): Can the loan or advance given to a shareholder by the company, in return for an advantage conferred on the company by the shareholder, be deemed as dividend under section 2(22)(e) in the hands of the shareholder? Issue: The issue under consideration is whether the advance given by the company to the assessee-shareholder by way of security deposit for keeping his property as mortgage on behalf of company to reap the benefit of loan, can be treated as deemed dividend within the meaning of section 2(22)(e).
The Calcutta High Court observed that, **the phrase "by way of advance or loan" appearing in section 2(22)(e) must be construed to mean those advances or loans which a share holder enjoys simply on account of being a person who is the beneficial owner of shares** (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than 10% of the voting power. **In case such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, such advance or loan cannot be said to a deemed dividend within the meaning of the Act.** Thus, gratuitous loan or advance given by a company to a share holder, who is the beneficial owner of shares holding not less than 10% of the voting power, would come within the purview of section 2(22)(e) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.
In the present case, the advance given to the assessee by the company was not in the nature of a gratuitous advance; instead it was given to protect the interest of the company. Therefore, the said advance cannot be treated as deemed dividend in the hands of the shareholder under section 2(22)(e). (Nov-15)

(4)<u>CIT v. Ambassador Travels (P) Ltd. (2009) (Del.)</u> Would the provisions of deemed dividend under section 2(22)(e) be attracted in respect of financial transactions entered into in the normal course of business? Under section 2(22)(e), loans and advances made out of accumulated profits of a company in which public are not substantially interested to a beneficial owner of shares holding not less than 10% of the voting power or to a concern in which such shareholder has substantial interest is deemed as dividend. However, this provision would not apply in the case of advance made in the course of the assessee's business as a trading transaction. The assessee, a travel agency, has regular business dealings with two concerns in the tourism industry dealing with holiday resorts.

The High Court observed that the assessee was involved in booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day –to-day business activities. The High Court, therefore, held that such financial transactions cannot under any circumstances be treated as loans or advances received by the assessee from these concerns for the purpose of application of section 2(22)(e). (May-12)

Section 115BB

CIT v Manjoo & Co. (2011) (Kerala) ;-Can winning of price money on unsold lottery tickets held by the distributor of lottery tickets be assessed as business income and be subject to normal rates of tax instead of the rate prescribe u/s 115JB*?* On the above issue, the Kerala High Court observed that winnings from lottery is included in the definition of income by virtue of section 2(24)(ix). Further, in practice, all prizes from **unsold tickets of the lotteries** shall be the property of the organising agent. Similarly, all unclaimed prizes shall **also be the property of** the organising agent and shall be refunded to the organising agent.

The High Court contended that the receipt of winnings from lottery by the distributor was **not on account of any physical or intellectual effort made by him** and therefore cannot be said to be "income earned" by him in business. The said view was taken on the basis that the unsold lottery tickets cease to be stock-in-trade of the distributor because, after the draw, those tickets are unsaleable and have no value except waste paper value and the distributor will get nothing on sale of the same except any prize winning ticket if held by him, which, if produced will entitle him for the prize money. Hence, the receipt of the prize money is not in his capacity as a lottery distributor but as a holder of the lottery ticket which won the prize. The Lottery Department also does not treat it as business income received by the distributor but instead treats it as prize money paid on which tax is deducted at source. **Held that the rate 30% prescribed u/s 115BB is applicable in the present case.**

Clubbing Provision

CIT v. Keshavji Morarji (SC):- **CROSS TRANSFERS:** If two transactions are inter-connected and are parts of the same transaction in such a way that it can be said that the circuitous method was adopted as a device to evade tax, the implication of clubbing provisions would be attracted. I gifted asset to my sister in law & in return my big brother gifted asset to my wife. **(May-14) (May-11)**

Section 64(1)

CIT v Smt. R. Bharati (Mad).:- Whether "model" wife of assessee amount to "professional qualification" and "knowledge" as per the proviso to section 64(1)*?* "Professional qualification" and "knowledge" do not necessarily connote a qualification conferred by a recognised university after examining the candidate who has undergone a course of study in a technical subject or course of study preparing him for a profession of law, accountancy etc. Accordingly, the term "qualification" must be given a wide meaning as referring to the qualities which are required to be possessed by a person performing the work that he does, so long as that work is capable of being regarded as technical or professional. The term "professional" is a term capable of very broad meaning and would encompass a variety of occupations. A large number of occupations are being practised which form a source of livelihood and are capable of being regarded, as profession as long as they require certain degree of skill. A person having skill, experience and competence in a line of work can be regarded as technical or professional.

Section 61(1A)

CIT v M. R. Doshi (SC). **:- Whether clubbing provision u/s 64(1A) would attract if income accruing to the trust would be accumulated and paid when child become major**? Held that where income from the trust was to be accumulated until child attained majority, the clubbing provisions would not get attracted, since no benefit accrues to minor child during the period when such child is minor. अगर benefit होता है during the period when child is minor**, then**, clubbing provision would get attracted for that benefit only. जैसै education and maintenance expense**. (May-16) (Nov-13)**

Set off and Carry forward

Section 78(2)

(1)Madhu Kant M. Mehta (SC): Where a person carrying on any business or profession has been succeeded in such capacity by another person, **otherwise than inheritance**, then the successor is not entitled to carry forward and set off the loss of predecessor agnist his income. ठस "**otherwise than inheritance**" पर बडा झगडा हुवा **Madhukant M. Mehta के case मे।** Proprietor of business loss कर के मरा and family वाले partnership मे business start किए। अब Proprietor वाला loss, firm के income से set off करना चाहते हैं। क्या वेलोग एसा कर पाऐगें? Yes, they can do so, as held by the Apex court in the case of **CIT v Madhukant M. Mehta**. **(May-12)**

(2)Pramod Mittal v. CIT (2013) (Delhi):- **Can the loss suffered by an erstwhile partnership firm, which was dissolved, be carried forward for set-off by the individual partner who took over the business of the firm as a sole proprietor, considering the succession as a succession by inheritance?** Therefore, the loss suffered by the erstwhile partnership firm before dissolution of the firm cannot be carried forward by the successor sole –proprietor, since it is not a case of succession by inheritance. The assessee sole –proprietor is, therefore, not entitled to set-off the loss of the erstwhile partnership firm against his income. ***(M-16)***

Section 79

CIT Vs Concord Industries Ltd (SC). This section shall not apply for unabsorbed depreciation.

Section 10(38)

LTCG on transfer of capital asset being Equity shares listed in recognised stock exchange of India where such transaction has been subjected to STT. In the case of **CIT v Thiagarajan. S.S. (Mad)** held that loss incurred by an assessee from an exempted source, cannot go **to set off** income from taxable source.

Double Taxation Avoidance Agreement

(1) ***CIT v. R. Venugopala Reddiar (1965) 58 ITR 439 (Mad).*** **House Property:** In case of a resident assessee has house property situated outside India, **taxes**, if any, **levied by and paid to** local authority of the country in which the property is situated is **deductible**. **(2)Agriculture Income from Land situated Outside India:** Such Income is chargeable to tax in the hands of resident individual (Assessee)**.** The head of income could be either PGBP or Income from other source. Section 10(1) exempt agriculture income from land situated in India and same is defined u/s 2(1A). [Further, a loss from agriculture land situated outside India shall be eligible for set off while computing taxable income of resident assessee in India. **CIT v Carew & Co. Ltd (SC)**].

(3)Dividend declared/distributed by a foreign Company: This dividend is taxable in the hand of resident assessee since such dividend is not subject to the provisions of section 115-O and therefore, will not exempt u/s 10(34).

(4)Business loss for Business carried in foreign country (Outside India): It shall be allowed to be carried forward and set off in accordance with provision of Section 72 of the Income Tax Act, 1961.

(5)Income is earned from two or more countries: Relief u/s 91 is computed country-wise and not on the basis of aggregation of income of all countries. Therefore, an assessee is entitled to double income tax relief u/s 91 in respect of income from a branch in one country without adjusting losses from a branch in another country. **CIT v Bombay Burmag Trading Corpn. Ltd. (Bom). सभी countries का separate computation करना है। उसके बाद** assessee का gross total income निकालना है।

(6)Relief: Relief u/s 91 is available only in respect of doubly taxed income. Therefore, on the amount of deduction allowed under chapter VI-A, no relief u/s 91 should be allowed. **CIT v R.N. Jhanji (Raj)** जैसे विदेश मे literary book ls royalty income कमाया तो 80QQB dk deduction मिलेगा तो doubly taxed income क्या **होना चाहिए।**

(7) ***CIT v PVAL Kunlandagan Chettiar (SC):-*** If an assessee is deemed to be a resident of a contracting state where his personal and economic relations are closer, then in this case, the fact that he is a resident in India to be taxed in terms of section 4 and 5 would become irrelevant, since DTAA prevails over section 4 & 5. **(M-16)**

Tax Deducted at Source

Section 192

(1*) CIT (TDS) v. ITC Ltd. [2011] (Del.):-* Do the tips collected by hotel and disbursed to employees constitute salary to attract the provisions for tax deduction at source under section 192?: The High Court, therefore, held that the tips would constitute income within the meaning of section 2(24) and thus, taxable under section 15. It was obligatory upon the company to deduct tax at source from such payments under section 192. In this case, the assessee-company had not deducted tax at source on tips under a *bona fide* belief that tax was not deductible. This practice had been accepted by the Revenue by accepting the assessments in the form of annual returns of the assessees in the past. ***The High Court held that since no dishonest intention could be attributed to the assessees, they could not be made liable for levy of penalty as envisaged under section 201.*** The High Court, however, **observed that payment of interest under section 201(1A) is mandatory**. **The payment of interest under that provision is not penal**. There was, therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis.

(2) *CIT v Manipal Healh System (P) Ltd (Kar):-* Where remuneration paid to doctors is variable based on number of patients and treatment given to them, would the liability to TDS arise u/s 192 or 194J? The High Court observed that to decide whether the relationship of employer-employee existed or not, the contract entered into between the parties has to be seen - whether the same is a "contract for service" or a "contract of service". In order to ascertain the nature of contract, multiple-factor tests have to be applied. The independence test, control test, intention test are some of the tests adopted to distinguish between 'contract for service' and 'contract of service'. The High Court examined the terms of the contract entered into between the asseesee-company and the doctors. As per the said terms,

(i)The remuneration paid to the doctors depends on the treatment given to patients and on the number of patients - if the number of patients are more, remuneration would be on a higher side or if no patients, no remuneration; (ii)The timing of the doctors is fixed; and (iii)They cannot have private practice or attend any other hospital.

It was observed that mere provision of non-competition clause in the agreement shall not change the nature of contract from profession to that of employment. Imposing a condition of bar to private practice is to make use of the expertise, skill of a doctor exclusively for the assessee-company, i.e., to get the attention and focus of the professional skill and expertise only to the patients of the assessee-company and to discourage doctors from transferring patients to their own clinics or any other hospital. The High Court also noted the Tribunal's finding that none of the doctors are entitled to gratuity, provident fund, leave travel allowance and other terminal benefits. It is also pertinent to note that the doctors have filed their returns of income for the relevant assessment years showing the income received from the assessee-company as professional income and the same is said to have been accepted by the Department.

In ***CIT (TDS) v. Apollo Hospitals International Ltd. (2013) 359 ITR 78***, the Gujarat High Court took a view that consultant doctors were not getting salary but payment to them was in the nature of professional fees liable to tax deduction at source under section 194J.

Considering the totality of facts and terms of the agreement, the Court held that in this case, the consultancy charges paid to doctors rendering professional service would be subject to tax deduction under section 194J and not section 192.

Eli Lilly & Co. (India) Pvt. Ltd v CIT (SC).:- Whether salary paid by an Indian collaborator to employee of a foreign company for working within in India amount to salary for the purpose of section 192(2)? In this case Section 9(1)(ii) and 192 gat attracted. (May-14)

Section 194J

CIT v. Kotak Securities Ltd (2016) (SC): Would transaction charges paid by the members of the stock exchange for availing fully automated online trading facility, being a facility provided by the stock exchange to all its members, constitute fees for technical services to attract the provisions of tax deduction at source under section 194J? The Apex Court made the following observations:

(I)The services provided by the stock exchange are available to all members in respect of every transaction that is entered into. **There is nothing special, exclusive or customized in the service that is rendered by the stock exchange**.

(II)A member who wants to conduct his daily business in the stock exchange **has no option but to avail such services**. Each and every transaction by a member involves the use of such services provided by the stock exchange for which the member is required to pay transaction charge based on the transaction value besides charges for the membership of the stock exchange.

(III)Technical services like managerial and consultancy service are **in the nature of specialised services made available by the service provider to cater to the special needs of the customer-user as may be felt necessary**. ***It is the above feature that would distinguish or identify a service provider from a facility offered.***

(IV) However, there is **no exclusivity in the services rendered by the stock exchange** and each and every member has to avail such service in the normal course of trading in securities in the stock exchange.

The Apex Court, accordingly, held that the service provided by the BSE for which transaction charges are paid failed to satisfy the test of specialized, exclusive and individual requirement of the user or the consumer who may approach the service provider for such assistance or service.

Therefore, the transaction charges paid to BSE by its members are not for technical services but are in the nature of payments made for facilities provided by the stock exchange. Such payments would, therefore, not attract the provisions of tax deduction at source under section 194J.

Section 206AA

Smt. A. Kowsalya Bai v. UOI (2012) (Kar.):- Is a person having income below taxable limit, required to furnish his PAN to the deductor as per the provisions of section 206AA, even though he is not required to hold a PAN as per the provisions of section 139A?: In order to avoid undue hardship caused to such persons, the Karnataka High Court, in the present case, held that it may not be necessary for such persons whose income is below the maximum amount not chargeable to income –tax to obtain PAN and in view of the specific provision of section 139A, section 206AA is no t applicable to such persons. Therefore, the banking and financial institutions shall not insist upon such persons to furnish PAN while filing declaration under section 197A. However, section 206AA would continue to be applicable to persons whose income is above the maximum amount not chargeable to income –tax.

Section 194A

(1) *UCO Bank v. Dy. CIT (2014) (Del)* :- Is section 194A applicable in respect of interest on fixed deposits in the name of Registrar General of High Court?: The High Court observed that in the absence of a payee, the machinery provisions for deduction of tax to his credit are ineffective. The expression "payee" under section 194A would mean the recipient of income whose account is maintained by the person paying interest. The Registrar General is neither recipient of the amount credited to his account nor to interest accruing thereon. Therefore, he cannot be considered as a payees' for the purposes of section 194A. The credit by the bank in the name of the Registrar General would, thus, not attract the provisions of section 194A.

(2) *CIT v Avenue Super Chits (P) Ltd(Kar):-* Whether chit dividend paid to subscriber of chit fund is in the nature of "interest" in terms of section 2(28A) to attract TDS u/s 194A? Held that the auction chit dividend paid to subscribers of the chit is not "interest" as defined u/s 2(28A) and therefore, TDS u/s 194A is not attracted.

Section 194B

CIT v. Hindustan Lever Ltd. (2014) (Kar.):- **Where the assessee fails to deduct tax at source under section 194B in respect of the winnings, which are wholly in kind, can he be deemed as an assessee –in-default u/s 201? The provisions contained in section 194B do not cast any duty to deduct tax at source where the winnings are wholly in kind. If the winnings are wholly in kind, as a matter of fact, there cannot be any deduction of tax at source. The word "deduction" employed in this provision postulates a reduction or subtraction of an amount from a gross sum to be paid and payment of the net amount thereafter.** Where the winnings are wholly in kind the question of deduction of any sum therefrom does not arise and in that eventuality, the only responsibility, as cast under section 194B, is to ensure that tax is paid by the winner of the prize before the prize or winnings is or are released in his favour.

The High Court observed that if the assessee fails to ensure that tax is paid before the winnings are released in favour of the winner, then, section 271C empowers the Joint Commissioner to levy penalty equivalent to the amount of tax not paid, and under section 276B, such non-payment of tax is an offence attracting rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine. However, the High Court held that proceedings under section 201 cannot be initiated against the assessee. (Nov-14)

Section 194H

(1) CIT v. Qatar Airways (Bom):- **Can the difference between the published price and the minimum fixed commercial price be treated as additional special commission in the hands of the agents of an airline company to attract TDS provisions under section 194H, where the airline company has no information about the exact rate at which tickets are ultimately sold by the agents?:** On this issue, High Court observed that the difference between the published price and minimum fixed commercial price cannot be taken as additional special commission in the hands of the agents, since the published price was the maximum price and airline company had granted permission to the agents to sell the tickets at a price lower than the published price. In order to deduct tax at source, the exact income in the hands of the agents must necessarily be ascertainable by the airline company. However, the airline company would have no information about the exact rate at which the tickets were ultimately sold by its agents, since the agents had been given discretion to sell the tickets at any rate between the minimum fixed commercial price and the published price. It would be impracticable and unreasonable to expect the airline company to get a feedback from its numerous agents in respect of each ticket sold.

Thus, **tax at source was not deductible** on the difference between the actual sale price and the minimum fixed commercial price, even though the amount earned by the agent over and above minimum fixed commercial price would be taxable as income in his hands. **(May-12)** It may be noted that in the case of **CIT v. Singapore Airlines Ltd. (2009)** 319 ITR 29, the billing analysis statement clearly indicated the extra commission in the form of special or supplementary commission that was paid to the travel agent with reference to the deal code. Therefore, in that case, **the Delhi High Court**, held that the supplementary commission in the hands of the agent was ascertainable by the airline company and hence the airline company was liable to deduct tax at source on the same under section 194H.

(2) *CIT v. Mother Dairy India Ltd. (2013) (Delhi):- Are TDS provisions under section 194H attracted in a case where an assessee, a dairy, makes an outright sale of milk to its concessionaires at a certain price (which is lower than the MRP fixed by the assessee-dairy) and the concessionaires make full payment for the purchases on delivery and bear all the risks of loss, damage, pilferage and wastage?:* The High Court opined that the issue had to be decided on the basis of the fact as to when and what point of time the property in the goods passed to the concessionaire. In this case, the concessionaire became the owner of the milk and products on taking delivery of the same from the assessee –dairy. Therefore the relationship between the assessee and the concessionaire is a Principal to Principal relationship. The High Court, therefore, held that the difference between the purchase price (price paid to the Dairy) and the MRP is the concessionaire's income from business and cannot be categorized as commission to attract the provisions of section 194H.

(3) *Bharti Cellular Ltd. v. ACIT (2013) (Cal.):-* Can discount given on supply of SIM cards and pre-paid cards by a telecom company to its franchisee be treated as commission to attract the TDS provision s under section 194H? The High Court, on perusal of the agreement between the assessee –telecom company and the franchisees, observed that –

→ the property in the start-up pack and pre-paid coupons, even after transfer and delivery to the franchisee, remained with the assessee –telecom company;
→ the franchisee really acted as a facilitator and/or instrument of providing services by the assessee-telecom company to the ultimate subscriber;
→ the franchisee had no free choice to sell the pre –paid coupons and sim cards and everything including the selling price was regulated by the assessee –telecom company;
→ the rate at which the franchisee sells to the retailers is also regulated and fixed by the assessee-telecom company.

In the real sense, the franchisee acted on behalf of the assessee –telecom company for selling start-up pack, prepaid recharge coupons to the customer. Therefore, the relationship between the assessee and the franchisee is essentially that of principal and agent, though the nomenclature used is "franchisee". The franchisees were, thus, agents of the assessee, getting a fixed percentage of commission, in the form of discount.

High Court's Decision: Considering the above, the High Court held that there is an indirect payment of commission, in the form of discount, by the assessee –telecom company to the franchisee. Therefore, the assessee is liable to deduct tax at source on such commission as per the provisions of section 194H.

(4) *CIT v. Ahmedabad Stamp Vendors Association(SC):-* Can discount given to stamp vendors on purchase of stamp papers be treated as "commission or brokerage" to attract the provisions for tax deduction under section 194H?:

If the licensed stamp vendors were mere agents of the State Government, **no sales tax would have been leviable when the stamp vendors sell the stamp papers to the customers,** because it would have been sale by the Government " **through**" stamp vendors. However, entry 84 in Schedule I to the Gujarat Sales Tax Act, 1969 specifically exempts sale of stamp papers by the licensed vendors from sales-tax. The very basis of the State Legislature enacting such exemption provision in respect of sale of stamp papers by the licensed vendors makes it clear that the sale of stamp papers by the licensed vendors to the customers would have, but for such exemption, been subject to sales tax levy. **The question of levy of sales tax arises only because the licensed vendors themselves sell the stamp papers on their own and not as agents of the State Government**. Had they been treated as agents of the State Government, there would be no question of levy of sales tax on sale of stamp papers by them, and consequently, there would have been no necessity for any exemption provision in this regard.

Therefore, although the Government has imposed a number of restrictions on the licensed stamp vendors regarding the manner of carrying on the business, **the stamp vendors are required to purchase the stamp papers on payment of price less discount on "principal to principal" basis and there is no "contract of agency" at any point of time.** The definition of "commission or brokerage" under clause (i) of the *Explanation* to section 194H indicates that the **payment should be received, directly or indirectly, by a person acting on behalf of another person, *inter alia,* for services in the course of buying or selling goods**. Therefore, the **element of agency is required in case of all services and transactions** contemplated by the definition of "commission or brokerage" under *Explanation (i)* to section 194H. When the licensed stamp vendors take delivery of stamp papers on payment of full price less discount and they sell such stamp papers to the retail customers, neither of the two activities (namely, buying from the Government and selling to the customers) can be termed as service in the course of buying and selling of goods. The High Court, therefore, held that discount on purchase of stamp papers does not fall within the expression "commission or brokerage" to attract the provisions of tax deduction at source under section 194H.

The Supreme Court affirmed the above decision of the High Court holding that the given transaction is a sale and the discount given to stamp vendors for purchasing stamps in bulk quantity is in the nature of cash discount and consequently, section 194H has no application in this case.

Section 194C

(1)CIT (TDS) v. Shree Mahalaxmi Transport Co. (Guj.):- **Can the payment made by an assessee engaged in transportation of building material and transportation of goods to contractors for hiring dumpers, be treated as rent for machinery or equipment to attract provisions of tax deduction at source under section 194-I?:** The High Court observed that the assessee had given contracts to the parties for the transportation of goods and had **not taken machinery and equipment on rent**. The Court observed that the **transactions being in the nature of contracts** for shifting of goods from one place to another would be covered as works contracts, thereby attracting the provisions of section 194C. Since the assessee had given sub-contracts for transportation of goods and not for the renting out of machinery or equipment, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194 –I would, therefore, not be applicable.

(2) ***CIT v. Singapore Airlines Ltd. (2015)(SC):- Are landing and parking charges paid by an airline company to Airports Authority of India in the nature of rent to attract tax deduction at source under section 194-I?*** The landing and parking charges which are fixed by the Airports Authority of India are not merely for the "use of the land". These charges are also for services and facilities offered in connection with the aircraft operation at the airport which include providing of air traffic services, ground safety services, aeronautical communication facilities, installation and maintenance of navigational aids and meteorological services at the airport.

Section 195

(1)CIT v. V.S. Dempo & Co P Ltd (2016) (Bom) (FB)**:- Is tax is required to be deducted under section 195 on the demurrage charges paid to a foreign shipping company which is governed by section 172 for the purpose of levy and recovery of tax?** The High Court took note of the Tribunal's observation that section 40(a)(i) would apply only when there is an obligation to deduct tax at source. The Tribunal placed reliance upon the CBDT Circular No. 723 dated September 19, 1995 to support its conclusion that there was no obligation to deduct tax at source in respect of payment made towards demurrage charges to non-resident shipping company falling within the scope of section 172. The Revenue did not dispute that section 172 applied in the present case. Section 172 is a charging as well as machinery provision in respect of non-resident shipping companies. It provides for determination and collection of tax. Thus, no obligation to deduct at source under section 195 would arise in respect of payment of demurrage charges to such companies.

The High Court also noted that section 172 is a complete code that applies to non-resident Indians and section 195 is part of recovery provision under the Income-tax Act, 1961.

The provisions of section 172 would apply notwithstanding anything contained in the other provision of this Act, for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident which carries passengers, etc. shipped at a port in India. Since section 172(1) begins with a non-obstante clause, it would prevail over other provisions of the Act including section 195. Thus, the provisions contained thereunder would take care of the manner of determination of income from shipping business of non-residents as well as the levy and recovery of tax thereon.

The High Court, accordingly, held that since section 172 dealing with shipping business of non -residents contains a non- obstante clause and applies both for the purpose of the levy and recovery of tax in the case of any ship carrying passengers etc., belonging to or chartered by a non-resident and shipping at a port in India, there would be no obligation on the payer-assessee to deduct the tax at source under section 195 on payment of demurrage charges to the non-resident shipping company.

(2)DIT (International Taxation) v. Wizcraft International Entertainment (P) Ltd (2014) (Bom) **:- Is payment made to an overseas agent, who did not perform any service in India, liable for tax deduction at source?:**

Facts of the case: The assessee, an event management company, engaged the services of an agent to bring artistes to India. The assessee –company (i) paid commission to overseas agent; (ii) reimbursed the expenses in connection with the visit of the artistes in India; and (iii) paid fees to the artistes in India. The assessee –company deducted tax at source on the fees paid to the international artistes in India but did not deduct tax at source on the commission paid to the agent and on the reimbursement of expenses incurred in India by the artistes.

Issue: The issue under consideration before the High Court was with regard to deduction of tax on commission paid to overseas agent who never took part in the events organized in India and amount paid as reimbursement of expenses incurred on travelling of artistes.

High court's Observations: The High Court observed that the assessee has deducted tax on the payments made to artistes for the services rendered in India. In so far as reimbursement of expenses is concerned, it has been verified with supporting documents that it was towards their air travel on which no tax was required to be deducted. With regard to the payment of commission, the agent did not act as a performing artist or entertainer. He was concerned only with the services rendered outside India. Thus, the Tribunal had recorded the finding of fact that the income of the agent did not arise from the personal activities in the contracting status of an entertainer or artist. He only contacted the artistes and negotiated with them for performance in India in terms of the authority given by the assessee. Hence, the commission paid to the overseas agent was not liable to tax in India. Consequently, there was no obligation for deducting tax at source at the time of making payment to the overseas agent.

High Court's Decision: The High Court, therefore, affirmed the decision of the Tribunal and Commissioner (Appeals) holding that the service rendered by the agent was outside India and hence, was not chargeable to tax in India. Thus, the requirement for deducting tax at source under section 195 on such payment does not arise.

Section 234B

CIT v. Bhagat Construction Co (P) Ltd (2016)(SC):* *Is levy of interest under section 234B attracted in a case where the assessment order does not contain any specific direction for payment of interest, but is accompanied by form ITNS 150 containing a calculation of interest payable on tax assessed?

Facts of the case: The assessment order passed did **not contain any direction for the payment of interest under section 234B**. The appellate order also simply stated that interest is payable under section 234B, without any further substantiation. The amount of interest payable under section 234B was contained in the Income-tax Computation Form or 'Form for Assessment of Tax/Refund (I.T.N.S 150)'.

Apex Court's Observations: The Apex Court observed that the facts of the present case are squarely covered by the three judges' bench decision of this court in the case of ***Kalyankumar Ray v. CIT (1991)****,* wherein it was held that the Form I.T.N.S 150 is also a form for determination of tax payable and when it is signed or initialled by the Assessing Officer, it is certainly an order in writing by the Assessing Officer determining the tax payable within the meaning of section 143(3). The said form also contains the calculation of interest payable on the tax assessed. This form must, therefore, be treated as part of the assessment order.

The Supreme Court further observed that the provisions of section 234B are attracted the moment an assessee liable to pay advance tax has failed to pay such tax or the advance tax paid by him is less than 90% of the assessed tax. The assessee, thus, becomes liable to pay simple interest at 1% for every month or part of the month.

Supreme Court's Decision: The Apex Court, accordingly, held that the levy of interest under section 234B is automatic when the conditions specified therein are satisfied and the assessment order is accompanied by the prescribed form containing the calculation of interest payable.

Section 206C

CIT v. Priya Blue Industries (P) Ltd (2016) 381 ITR 210 (Guj):- **Can items of finished products from ship breaking activity which are usable as such be treated as "Scrap" to attract provisions for tax collection at source under section 206C?**

Facts of the case: The assessee-company, engaged in ship breaking activity, sold old and used plates, wood etc. It did not produce any document or papers to show collection of tax at source on sale of such items and payment thereof to the credit of the Central Government nor was certificate in Form No.27C produced. The AO observed that such items were in the nature of scrap and therefore, the assessee was under an obligation to collect tax at source from the buyers of scrap. Accordingly, he raised a demand under section 201(1) and interest under section 201(1A). The assessee claimed that such items are usable as such, and are hence not 'scrap' to attract the provisions for collection of tax at source.

Appellate Authorities' views: The Commissioner (Appeals) observed that the assessee was engaged in ship breaking activity and the products obtained from the activity were finished products which constituted sizable chunk of production done by the ship breakers. The Commissioner (Appeals) agreed with the assessee that such products though commercially known as 'scrap' were definitely not "waste and scrap". He further agreed with the contention of the assessee that the items in question were usable as such and, therefore, do not fall within the definition of "scrap" as given in clause (b) of *Explanation* to section 206C(1).

The Tribunal firstly recorded a list of items sold by the assessee from the ship breaking activity. It found that the assessee collected and paid tax, for seven items, but did not collect tax at source on certain items viz. old and used plates; non-excisable (exempted) goods like wood etc. It observed that the 'waste and scrap' must be from manufacture or mechanical working of material which is *definitely not usable as such because of breakage, cutting up, wear and other reasons.* Since the assessee is engaged in ship breaking activity, these items/products are finished products obtained from such activity which are usable as such and hence, are not 'waste and scrap' though commercially known as scrap. Accordingly, the Tribunal also decided the issue in favour of the assessee.

The High Court concurred with the views of the Tribunal and held that any material which is usable as such would not fall within the ambit of the expression 'scrap' as defined in clause (b) of the *Explanation* to section 206C.

Assessment

(1) ***CIT v. Govind Nagar Sugar Ltd. (2011) (Delhi) :- Can unabsorbed depreciation be allowed to be carried forward in case the return of income is not filed within the due date?*** **:** As per the provisions of section 32(2), the unabsorbed depreciation becomes part of next year's depreciation allowance and is allowed to be set-off as per the provisions of the Income-tax Act, 1961, irrespective of whether the return of earlier year was filed within due date or not. **Therefore, in the present case, the High Court held that the unabsorbed depreciation will be allowed to be carried forward to subsequent year even though the return of income of the current assessment year was not filed within the due date**.

(2) ***CIT v Mahalakshmi Sugar Mills Co. Ltd (SC*** :- ***"The AO is bound to allow the set-off of brought forward losses u/s 72 even if the assessee has not claimed the same in the return filed*****".** Held that it is the duty of AO to apply the relevant

provisions of the Act for the purpose of determining the true figure of the assessee's total income and consequential tax liability. Merely because the assessee has not claimed the set-off in the return filed, it cannot relieve the AO of his duty to apply section 72 in the appropriate case.) **Statement is correct**. **(Nov-13)**

Section 139(5)

(3) ***CIT v Periyar v District Co-op Milk Producer Union Ltd. (Mad):-*** **Loss due to revision of return:** If original return filed declaring income but revision as per 139(5) result in loss, then, it shall be allowed to be carried forward. Since revised return replace original return from the date on it was filed.

(4) ***Kumar Jagdish Chandra Shinha v CIT (SC):-*** **Question of revision of Belated return:** Belated return u/s 139(4) is not specified u/s 139(5) therefore it cannot be revised.

(5)Can an assessee revise the particulars filed in the original return of income by filing a revised statement of income?: On this issue, the Orissa High Court held that the assessee can make a fresh claim before the Assessing Officer or make a change in the originally filed return of income only by filing revised return of income under section 139.

*(6)**Orissa Rural Housing Development Corpn. Ltd. v. ACIT (2012) (Orissa)**:-* **Can an assessee revise the particulars filed if n the original return of income by filing a revised statement of income?:-** There is no provision under the Income-tax Act, 1961 to enable an assessee to revise his income by filling a revised statement of income. Therefore, filling of revised statement of income is of no value and will not be considered by the Assessing Officer for assessment purposes. The High Court, relying on the judgement of the Supreme Court in *Goetze **(India) Ltd. v. CIT (2006)***, held that the Assessing Officer has no power to entertain a fresh claim made by the assessee after filing of the original return except by way of filing a revised return.

Scope of fresh assessment on direction of appellate authority:

(1)Question 44 of PM:- An assessment completed by the Assessing Officer was set aside by the ITAT on 30-01-2016 with a specific direction to re-examine certain disallowances. Before the fresh assessment is made, the Assessing Officer **discovers that some other income has escaped assessment**. How should he proceed to make fresh assessment?

Kartar Singh vs. CIT (1978)(P&H):- If an assessment is set aside and a direction is given to make a fresh assessment, then, the Assessing Officer shall make the fresh assessment **under the same section in which the original assessment is made** (i.e., under section 143(3)/144/147). For making such assessment, **no fresh notice needs to be issued.**

However, where an assessment is **set aside by** the Appellate Tribunal **and remanded to** the Assessing Officer, it is **not open to him to introduce into the assessment new sources of income so as to enhance the assessme**nt. Any power to modify is confined to the specific disallowances which were the subject-matter of appeal to the Appellate Tribunal.

(2*)Saurashtra Cement and Chemical Industries Ltd. v. ITO(1992)(* *Gujarat*)**: Whether liability to py income tax depend on assessment order of Assessing officer?** The Gujarat High Court held that the liability to pay income-tax arose under section 4(1) of the Act and did not depend upon an assessment order being made by the Assessing Officer. It depends upon the enactment of the annual Finance Act laying down the rates of taxation for the relevant assessment year. Thus, as soon as the rates are prescribed, the liability to pay tax crystallizes.

(3) ***CIT v. Shelly Products (2003)(SC):*** **Whether pre-assessment tax paid on the basis of admitted income become refundable in the absence of an assessment?** As decided by the Supreme Court pre-assessment taxes paid on the basis of admitted income do not become refundable in the absence of an assessment

(4)CIT v. Mahalakshmi Sugar Mills Co. Ltd. (1986)(sc): **The Assessing Officer is bound to allow the set-off of brought forward losses under section 72 even if the assessee has not claimed the same in the return filed*".*** The Supreme Court has held that it is the duty of the Assessing Officer to apply the relevant provisions of the Act for the purpose of determining the true figure of the assessee's total income and consequential tax liability. Merely because the assessee has not claimed the set-off in the return filed, it cannot relieve the Assessing Officer of his duty to apply section 72 in the appropriate case***.***

Circular No.14 (XL-35) of 1955 dated 11.04.1955: *it is the duty of the Assessing Officer to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard, they should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him.*

Section 147

(1) ***ACIT v Rakesh Jhaveri Stock Brokers P. Ltd (SC):-***The assessee cannot challenge the legality of the notice issued u/s 148 reopening the assessment on the ground of change of opinion in a case where no assessment is made u/s 143(3), but only intimation is issued u/s 143(1).

(2)***Sun Engineering Pvt. Ltd. (SC):-*** Matter lost in original assessment proceeding which have since achieved acquired finality **cannot be claimed in the reassessment proceeding**. Because remedy against the matter in Original Assessment will available in appeal u/s 246, or rectification application u/s 154, or revision preferred u/s 264. If rectification, or appeal or revision is preferred, then, matter will have been decided under respective section & not accepted. Therefore, it's better to litigate matter in OA before appellate authority within specified limitation.

(3) ***Aventis Pharma Ltd. v. ACIT (2010) (Bom.):-*** **Can the Assessing Officer reopen an assessment on the basis of merely a change of opinion? :** The power to reopen an assessment is conditional on the formation of a reason to believe that income

chargeable to tax has escaped assessment. The existence of tangible material is essential to safeguard against an arbitrary exercise of this power. In this case, the High Court observed that there was no tangible material before the Assessing Officer to hold that income had escaped assessment within the meaning of section 147 and the reasons recorded for reopening the assessment constituted a mere change of opinion. Therefore, the reassessment was not valid.

(4) *ACIT v. ICICI Securities Primary Dealership Ltd. (2012) (SC)* :- Is it permissible under section 147 to reopen the assessment of the assessee on the ground that income has escaped assessment, after a change of opinion as to a loss being a speculative loss and not a normal business loss, consequent to a mere re-look of accounts which were earlier furnished by the assessee during assessment under section 143(3)?:

In the above case, the Assessing Officer had completed the assessment of assessee under section 143(3) after taking into consideration the accounts furnished by assessee. After the lapse of four years from relevant assessment year, the Assessing Officer had reopened the assessment of assessee under section 147 on the ground that after re-look of the accounts of the relevant previous year, it was noticed that the assessee company had incurred a loss in trading in share, which was a speculative one. Therefore, such loss can only be set off against speculative income. Consequently, the loss represents income which has escaped assessment. Accordingly, the Assessing Officer came to a conclusion that income had escaped assessment and passed an order under section 147. **The SC observed that the assessee had disclosed full details in the ROI in the matter of its dealing in stocks and shares. There was no failure on the part of assessee to disclose material facts as mentioned in proviso to section 147. Further, there is nothing new which has come to the notice of the Assessing Officer. The accounts had been furnished by the assessee when called upon. Therefore, re-opening of the assessment by the Assessing Officer is clearly a change of opinion and therefore, the order of re-opening the assessment is not valid.**

(6) *Samsung India Electronics P. Ltd. v. DCIT (2014) (Del.):- Can an assessee, objecting to the reassessment notice issued under section 148, directly approach the High Court in the normal course contending that such reassessment proceedings are apparently unjustified and illegal?* The High Court, thus, held that it will not be appropriate and proper in the facts of the present case to permit and allow the petitioner to bypass and forgo the procedure laid down by the Supreme Court in *GKN Driveshafts (India) Ltd. (supra),* since the said procedure has been almost universally followed and has helped cut down litigation and crystallise the issues, if and when the question comes up before the Court.

(7) ***CIT v. Sree Manjunatheswara Packing Products and Camphor Works(SC):-*** *The Supreme Court has held that the power of the Commissioner u/s 263 is of wide amplitude. Section 263 empowers Commissioner to make or cause to be made such inquiry as he deems fit in order to find out whether any order passed by the Assessing Officer is erroneous in so far as is prejudicial to the interests of Revenue.* **Question 40**

Change of opinion by incumbent AO + Reassessment

H.K. Buildcome Ltd. v ITO (2011)(Guj):- In case of change of incumbent of an office, can the successor AO initiate reassessment proceeding on the ground of change of opinion in relation to an issue, which the predecessor AO who framed the original assessment order had already applied his mind and come to a conclusion? The Gujarat High Court, applying the rationale of the Apex Court ruling, observed that in the entire reasons recorded in this case, there was nothing on record to show that income had escaped assessment in respect of which the successor Assessing Officer received information subsequently, from an external source. The reasons recorded themselves indicated that the successor Assessing Officer had merely recorded a different opinion in relation to an issue to which the Assessing Officer, who had framed the original assessment, had already applied his mind and come to a conclusion. The notice of reassessment was, therefore, not valid.

Section 147 against legal Heirs of deceased

Vipin Walia v ITO(2016)Del:- Would the reassessment proceeding initiated u/s 147 against legal heirs of the deceased assessee be valid if notice of reassessment was sent to the legal heirs after the limitation period, though the notice addressed to the deceased assessee was sent to prior to limitation period? The High Court took note of section 159 which sets out the procedure to be adopted when the assessment is made on the legal representatives. Section 159(2)(a) states that any proceeding already taken against an assessee 'before his death' shall be deemed to have been taken against the legal representative. As per section 159(2)(b), any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative of the deceased assessee, even if it had not been taken while the assessee was alive.

The Assessing Officer initiated proceedings under section 147 against the deceased for the assessment year 2008-09. The time limit for issue of notice was 31.03.2015, since the income escaping assessment exceeded ` 1 lakh. On March 27, 2015 when the notice was issued, the assessee was already dead. If the Department intended to proceed under section 147, it could have done so prior to 31.03.2015 by issuing a notice to the legal representatives of the deceased. Beyond that date, it could not have proceeded in the matter even by issuing notice to the legal representatives of the assessee.

The High Court, accordingly, held that issue of notice on the legal representatives beyond the limitation time would render the reassessment proceedings invalid.

Section 148

(1) <u>Hemant Traders v ITO(Bom):-</u> Can a notice u/s 148 for a particular AY be issued solely on the ground that survey u/s 133A was carried on at the business premises of the assessee, where nothing had been found therein which would indicate escapement of income chargeable to tax for the said AY? The High Court perused the survey report which recorded that there was a group of assessees who were engaged in wholesale trading of potato on commission basis. The survey was conducted based on the allegations that these parties were resorting to hoarding of potatoes and making huge profits by fluctuating the day-to-day price of potatoes in the market. During survey, the assessee's books of account, cash balance and stocks were physically verified and inventory prepared. The report revealed cash difference of ` 5,020 and the explanation given was that the same pertained to the day-to-day and miscellaneous expenditure incurred on the day of survey. The report also revealed physical stock difference of 672 bags of potatoes. The explanation for such difference was recorded.

Neither the survey report nor any other material indicated escapement of income chargeable to tax for A.Y.2010-11. The Assessing Officer had nothing before him to record his belief or satisfaction that escapement of income had taken place.

Merely because survey had taken place cannot be a ground for reopening the assessment without valid material or evidence at the time of issue of notice. Whenever there was shortage of potatoes in the market, such powers of survey were invoked. Where nothing has been found during the survey operations to indicate that income chargeable to tax has escaped assessment, then the survey report ought not to be the basis for reopening of assessment. Something more was required in law for the Assessing Officer to exercise his powers.

Held that since there is absolutely no material to indicate escapement of income for the relevant AY, the issue of notice to initiate reassessment proceeding u/s 148 on the basis of survey which had taken place is not valid. Therefore, the proceedings initiated u/s 148 are quashed at the threshold itself.

(2) *<u>Godrej Industries Ltd v B. S. Singh (Bom):-</u> Will the subsequent amendment of law with retrospective effect validate a reassessment notice issued on a different ground before the retrospective amendment was made?* The position of law on the date of issue of notice u/s 148 must be looked into and the retrospective amendment subsequent to issue of notice could not validate a notice issued earlier. It could only amount to change of opinion and the notice for reopening of assessment would become unsustainable. The HC, accordingly, allowed the writ and held that the reason for reopening the assessment cannot get validated by the retrospective amendment of law.

(3) *Can a assessing officer make a reassessment on fresh grounds when the original reasons recorded for reopening the assessment does not survive?*

<u>Delhi High Court ruling in Ranbaxy Laboratories Ltd. v. CIT (2011)</u>:- The issue under consideration is whether the Assessing Officer can make an assessment on the basis of an issue which came to his notice during the course of assessment, where the issues, which originally formed the basis of issue of notice under section 148, were dropped in its entirety. As per section 147, the Assessing Officer may assess or reassess such income **and also** any other income chargeable to tax which has escaped assessment and which comes to his notice in the course of proceedings under this section. The Delhi High Court observed that the words "and also" used in section 147 are of wide amplitude.

The correct interpretation of the Parliament would be to regard the words **'and also'** as being "conjunctive and cumulative with" and not "in alternative to" the first part of the sentence, namely, "the Assessing Officer may assess and reassess *such income*". It is significant to note that Parliament has not used the word 'or' but has used the word 'and' together and in conjuction with the word 'also'. The words '*such income*' in the first part of the sentence refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe for issue of the notice under section 148. Hence, the language used by the Parliament is indicative of the position that the assessment or reassessment must be in respect of the income, in respect of which the Assessing Officer has formed a reason to believe that the same has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. ***If the income, the escapement of which was the basis of the formation of the "reason to believe" is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If he intends to do so, a fresh notice under section 148 would be necessary.*** **(May-13)**

<u>Punjab & Haryana High Court ruling in CIT v. Mehak Finvest P Ltd (2014)</u>:- The issue under consideration is whether an addition can be made in reassessment when the original reasons on the basis of which notice for reassessment was issued did not survive. The High Court noted that *Explanation 3 to section 147* nowhere postulates or contemplates that the Assessing Officer cannot make any additions on any other ground unless some addition is made on the basis of the original ground for which reassessment proceeding was initiated. It cited the dismissal of special leave petition (SLP) against the High Court ruling in *Majinder Singh Kang's* case by the Supreme Court on 19.08.2011 as the binding precedent.

The High Court, accordingly, held that even though no addition is made on the original grounds which formed the basis of initiation of reassessment proceedings, the Assessing Officer is empowered to make additions on another ground for which reassessment notice might not have been issued but which came to his notice subsequently during the course of proceedings for reassessment.

Karnataka High Court ruling in N. Govindaraju v. ITO (2015):- One of the issues under consideration before the High Court was whether the reassessment based on fresh grounds would be valid when the original reason which prompted the reassessment, does not survive. The High Court observed that the controversy revolved around *Explanation 3* to section 147 inserted by the Finance (No.2) Act 2009 retrospectively with effect from 1.4.1989. The Court took note of Circular No.5/2010 issued by CBDT after the amendment in Paragraph 47 with caption 'Clarificatory amendment in respect of reassessment proceeding under section 147". Para 47.3 reads as under:

"Therefore, to articulate the legislative intention clearly *Explanation 3* has been inserted in section 147 to provide that the Assessing Officer may examine, assess or reassess any issue relevant to income which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under section 148(2)".

The High Court observed that it is true that if the foundation goes, then, the structure cannot remain. Meaning thereby, if notice has no sufficient reason or is invalid, no proceedings can be initiated. However, this can be verified at the initial stage by challenging the notice. If the notice is challenged and found to be valid, or where the notice is not at all challenged, then, in either case, it cannot be said that notice is invalid. As such, if the notice is valid, then the foundation remains and the proceedings on the basis of such notice can continue. The High Court reiterated that once the proceedings have been initiated on a valid notice, it becomes the duty of the Assessing Officer to levy tax on the entire income (including "any other income") which may have escaped assessment and comes to his notice during the course of the proceedings initiated under section 147.

The High Court held that, in effect, once satisfaction of reasons for the notice is found sufficient i.e. if the notice under section 148(2) is found to be valid, then, the Assessing Officer may do reassessment in respect of any other item of income which may have escaped assessment, even though the original reason for issue of notice under section 148 does not survive. This decision has dissented from the decisions in the case of *CIT v. Jet Airways (I) Ltd (2011) 331 ITR 236 (Bom); Ranbaxy Laboratories Ltd v. CIT (2011) 336 ITR 136 (Del).*

Section 151

(1) *Allanasons Ltd v. Dy. CIT (2014) (Bom)* :- Is initiation of reassessment beyond a period of 4 years on the basis of subsequent Tribunal and High Court ruling valid, if there is no failure on the part of the assessee to disclose fully and truly all materials facts? The High Court observed that it is well settled in terms of the proviso to section 147, that where any assessment is sought to be opened beyond a period of four years from the end of the relevant assessment year, two conditions have to be fulfilled cumulatively. The first condition is that there must be reason to believe that income chargeable to tax has escaped assessment. The second condition is that such escapement of income should have arisen due to failure on the assessee's part to fully and truly disclose all material facts required for the assessment.

Thus, escapement of income prompting reopening of assessment beyond the period of 4 years from the end of the assessment year is not possible unless it is due to the failure of the assessee to disclose fully and truly all material facts necessary for assessment.

Even a subsequent change of law cannot be taken as income escaping assessment for triggering reassessment provisions beyond 4 years from the end of the assessment year unless there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The High Court observed that in this case, the reasons

The High Court, accordingly, held that a subsequent decision of Tribunal or High Court by itself is not adequate for reopening the assessment completed earlier under section 143(3) unless there is a failure on the part of the assessee to disclose complete facts.

(**2) *Amarnath Agrawal v. CIT (2015 (All)* :- is recording of satisfaction and quantification of escaped income a pre–condition for issuing notice u/s 148 after 4 years from the end of the relevant assessment year?** The High Court observed that two distinct conditions must be satisfied for assuming jurisdiction to issue a notice under section 148 after a period of 4 years viz. (i) escapement of income; and (ii) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

Under section 149(1)(b), it is imperative for the Assessing Officer, in his reasons, to state that the escaped income is likely to be ` 1 lakh or more. This is an essential ingredient for seeking approval and the basis on which satisfaction is to be recorded by the competent authority under section 151. If the condition precedent to substantiate the satisfaction of escapement of income is not made, the issuance of notice would be invalid.

In this case, since no reasons were recorded that the escaped income is likely to be ₹1 lakh or more so that the Chief Commissioner or Commissioner may record his satisfaction under section 151, the initiation of reassessment proceedings after four years was barred by time. The reasons recorded by the Assessing Officer were that the assessee had computed long-term capital gains tax liability, whereas he was liable to pay short -term capital gains tax, since he had sold a portion of the property within 3 years from the date of conversion of leasehold land into a freehold land.

The High Court observed that the property was held for more than 3 years and the conversion from leasehold to freehold being an improvement of the title did not have any effect on the taxability of profits. The reasons recorded by the Assessing Officer did not indicate any failure on the part of the assessee to disclose fully and truly all material facts at the time of assessment; it also did not indicate that the quantum of escapement of income exceeds ` 1 lakh. Accordingly, the High Court held that, in this case, the issue of notice under section 148 after the four year time period was not valid.

Section 150 read with Explanation 2 to section 153

CIT v PP Engineering Work (2014) (Del) **:-Does the finding or direction in an appellate order that income relates to a different AY empower reopening of assessment for the AY, irrespective of expiry of the six years time limit?** The High Court made reference to section 150 which overrides the time limitation specified in section 149. Also, *Explanation 2* to section 153 makes it clear that when an order in appeal, revision or reference is made whereby any income is excluded from the total income of an assessee for an assessment year, an assessment of such income for another assessment year shall be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order for the purposes of section 150 and section 153.

The High Court made reference to the Delhi High Court ruling in the case of *Rural Electrification Corporation Ltd v. CIT (2013) 355 ITR 345* and opined that the findings of Commissioner (Appeals) and Tribunal on the question of limitation as legally untenable and incorrect.

The High Court observed that in view of the order of the Tribunal that the credit entries related to the earlier assessment year i.e., A.Y.2000-01, the Assessing Officer initiated reassessment proceedings under section 147 by issue of notice under section 148 for the year and passed an order dated 29/12/2009 making an addition of ` 32 lakhs. The High Court held that by virtue of section 150 read with *Explanation 2* to section 153, the said order was not barred by limitation.

Section 154

(1) ***Hind Wire Industries Ltd. v CIT (1995) (SC);-*** **Rectification of earlier rectified order:** It has been held by the Apex Court that the order once amended can also be rectified subsequently provided the mistake apparent from record is rectifiable under section 154. Order does not necessarily mean the original order. It should be even a rectified or amended apporder, 4 years from the end of FY in which the earlier rectification order was passed. If the order giving effect to the CIT(A)'s decision was passed, the 4 years has to be reckoned from the end of FY in which such order was passed.Furthe held that the order once amended can also be rectified subsequently provided the mistake apparent from the record is rectifiable u/s 154.

(2) ***CIT v. E. Sefton and Co. (P.) Ltd. (Cal):-*** **Rectification of assessment order u/s 154 due to subsequent change of law on retrospective basis**?: If the assessment order is **plainly and obviously inconsistent** with the specific and clear provision as amended retrospectively, **undisputedly there is a mistake apparent from record**. **In the light of the retrospective amendment**, the assessment order had to be revised.**. (Nov-14) (May-13) (May-11)**

(3) ***CIT v. Subodh chandra S. Patel (Guj):-*** **Rectification of assessment order u/s 154 on account of subsequent judgement of supreme Court:** Held that a subsequent exposition of law by the Supreme Court does **not render assessment order as made on mistake**. **Geo Miller and Co v DCIT (Cal**). However, Gujarat HC expressed a different view that Non-consideration of a judgment of the jurisdictional High Court or the Apex Court would always **constitute a mistake apparent** from the record, regardless of the judgment being rendered prior to or subsequent to the order proposed to be rectified.

(4) ***CIT v. Haryana State Handloom and Handicrafts Corporation Ltd. (2011) (P&H):-*** **Can the Assessing Officer issue notice under section 154 to rectify a mistake apparent from record in the intimation under section 143(1), after issue of a valid notice under section 143(2)?:** In the present case, the Punjab and Haryana High Court relying, *inter alia,* on the said decision held that the scope of proceedings under section 143(2) is wider than the power of rectification of mistake apparent from record under section 154. The notice under section 143(2) is issued to ensure that the assessee has not understated the income or has not computed excessive loss or underpaid the tax. It is only on consideration of the matter and on being satisfied that it is necessary or expedient to do so that the Assessing Officer issues the notice under section 143(2). Therefore, the Assessing Officer has to proceed under section 143(3) and issue an assessment order. If issue of notice under section 154 is permitted to rectify the intimation issued under section 143(1), then it would lead to duplication of work and wastage of time. Therefore, it was concluded that proceedings under section 154 for rectification of intimation under section 143(1) cannot be initiated after issuance of notice under section 143(2) by the Assessing Officer to the assessee.

(5) ***CIT v. Tony Electronics Limited (2010) (Del.)*** **:- Would the doctrine of merger apply for calculating the period of limitation under section 154(7)? Issue :** The issue under consideration is whether the time limit of 4 years as per section 154(7) would apply from the date of original assessment order or the order of the Appellate Authority. The High Court held that once an appeal against the order passed by an authority is preferred and is decided by the appellate authority, the order of the Assessing Officer merges with the order of the appellate authority **.** After merger, the order of the original authority ceases to exist and the order of the appellate authority prevails. Thus, the period of limitation of 4 years for the purpose of section 154(7) has to b e counted from the date of the order of the Appellate Authority.

Appeal

CIT v McMilan & Co (SC):- Whether the power of CIT(A) to enhance the assessment are plenary and quite wide? *Held* that in disposing of an appeal before him, the appellate authority can travel over a whole range of the assessment order. The scope of

his power is co-terminus with that of the AO. He can do what the AO can do and can also direct him to do, what he has failed to do. He can assess the income from sources which have been considered by the AO but not brought to tax. He can consider every aspect of the assessment order and give appropriate reliefs.
Held that the appellate authority is empowered to consider and decide any matter arising out of the proceeding in which the order appealed against was passed notwithstanding the fact that such matter was not raised before him by the assessee. The CIT(A) is entitled to direct additions in respect of items of income not considered by the AO**. CIT v Kashi Nath Chandiwala (ALL).** Further, held that the appellate authority is vested with all the plenary power which the subordinate authority may have in the matter. **Jute Corporation of India Ltd v CIT (SC)**

(1) Sree Ayyanar Spinning and Weaving Mills Ltd. v. CIT (2008)(SC):- Can a rectification order u/s 254 of the Income-tax Act, 1961 be passed by the Income tax Appellate Tribunal beyond 6 months from the end of the month in which the order sought to be rectified was passed? Such power of ITAT is dealt in 2 parts.
1st part:- it refers to the suo moto exercise of the power of rectification by the ITAT:- in this case order has to be passed within six months from the date of order sought to be revised.
2nd part:- it refers to rectification on an application filed by the assessee or AO bringing any mistake apparent from the record to the attention of the ITAT:- If application is made within 6 months from the date of order, the ITAT is bound to decide the application on merits ans not on the ground of limitation i.e. order can be passed after expiry of 6 months from the date order sought to be revised. However, the application for rectification cannot be filed belatedly after 6 months.

(2)CIT v Vardhman Spinning (CAL):-Whether at the time of hearing of rectification application, the ITAT can re-appreciate the evidence produced during the proceeding of the appeal hearing? The powers of ITAT u/s 254(2) relating to rectification of its order are very limited. Such powers are confined to rectifying any mistake apparent from the record. The mistake has to be such that for which no elaborate reason or enquiry is necessary. Accordingly, the re-appreciation of evidence placed before the ITAT during the course of appeal hearing is not permitted. It cannot re-adjudicate the issue afresh under the grab of rectification.

(3)*Can High court interfere with the factual finding recorded by the lower authorities and the ITA, without any valid reasons*? A finding of fact cannot be disturbed by the HC in exercise of power u/s 260A. The ITAT is final fact finding authority and the finding of fact recorded by the ITAT can be interfered with by the HC u/s 260A **only on the ground** that the same were without evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between conclusion of fact and the primary fact upon which that conclusion is based.

Additional Claim before the appellate authority or assessing authority

Question: PQR firm, did not make a claim of ₹20 lakhs in the ROI files for AY 2015-16 which was disallowed in previous AY u/s 43B. However, the said claim was also not considered by the AO during assessment proceeding on the ground that no revised return was filed. Can the assessee now make claim before the appellate authority? **Yes.**
***(1)CIT v. Pruthvi Brokers & Shareholders (2012) (Bom.)* Can an assessee make an additional/new claim before APPELATE AUTHORITY, which was not claimed by the assessee in the ROI (though he was legally entitled to), otherwise than by way of filing a revised ROI?** Therefore, in the present case, the Bombay High Court, considering the above mentioned decisions, held that **additional grounds can be raised** before the Appellate Authority **even otherwise than** by way of filing ROI. However, in case the claim has to be made before the Assessing Officer, the same can only be made by way of filing a revised return of income. **(Nov-13) Section 43B.**

(2)*Addl. CIT v. Gurjargravures (P.) Ltd. (SC):* The Apex Court held that in case an additional ground was raised before the appellate authority **which could not have been raised at the stage** when the return was filed or when the assessment order was made, or the ground became available on account of change of circumstances or law, the appellate authority can allow the same.

***(3)Goetze (India) Ltd v. CIT (2006)(SC): .)* Can an assessee make an additional/new claim before ASSESSING OFFICER, which was not claimed by the assessee in the ROI (though he was legally entitled to), otherwise than by way of filing a revised ROI?** The Apex Court held restriction that an additional claim has to be made by filing a revised return applies only in respect of a claims made before the Assessing Officer. An assessee cannot make a claim before the Assessing Officer otherwise than by filing a revised return. (**Nov-13)**

***(4)National Thermal Power Co.* Ltd. v CIT (1998)(SC*): Whether ITAT has the power to allow the assessee to urge any ground of appeal which was not raised by him before the CT(A) i.e. raised for the first before the ITAT*?** ITAT has the power to entertain question raised for the 1st time. The ITAT is not confined only to the issues arising out of the appeal before the CIT(A). It has the power to urge any ground not raised before the CIT(A). However, relevant facts in respect f such ground should be on record. {The Income-tax Appellate Tribunal has the power to entertain question raised for the first time. The Tribunal is not confined only to the issues arising out of the appeal before the Commissioner (Appeals). It has the power to allow the assessee to urge any ground not raised before the Commissioner (Appeals). However, the relevant facts in respect of such ground should be on record.}

Section 254(2)

(1) Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) (Delhi):- Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety, where there is a mistake apparent from record? Issue is required to be tested on the basis of the law laid down by the apex court in ***Honda Siel Power Product Ltd v CIT***, dealing with ITAT's power to u/s 254(2) to recall its order where prejudice has resulted to a party due to an apparent omission, mistake, or error committed by the ITAT while passing the order. Such recalling of order for correcting an apparent **mistake committed by the Tribunal** has nothing to do with the doctrine or concept of inherent power of review. It is a well settled position of law that the tribunal has no power to review its own judgement or order on merits or re-appreciates the correctness of its earlier decision on merits. However, the power to recall has to be distinguished from the power to review. While the Tribunal does not have the inherent power to review its own order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record. Applying the above-mentioned decision of the Apex Court to this case, the Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety **if it is satisfied** that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission **and** the error committed is apparent.

(2) Peterplast Synthetics (P) Ltd v. Asstt. CIT (2014) (Guj):- Should the four year time limit for rectification of order by the Tribunal under section 254(2) be reckoned from the date of its order or from the date of receipt of order by the assessee? Applying the rationale of the above Bombay High Court ruling pronounced in relation to an application for revision, to the issue on hand pertaining to the date of reckoning the period of limitation for rectification under section 254(2), the Gujarat High Court held that the period of limitation has **to be reckoned from the date of receipt of order by the assessee** and **not from the date of order.** Therefore, the Tribunal had erred in dismissing the rectification application on the ground that it was barred by limitation by computing the time limit from the date of order instead of from the date of receipt of order by the assessee.

(3) ***CIT v. Earnest Exports Ltd. (2010) (Bom):- Does the Appellate Tribunal have the power to review or re-appreciate the correctness of its earlier decision under section 254(2)?*** In this case, the Tribunal, while dealing with the application under section 245(2), virtually reconsidered the entire matter and came to a different conclusion. This amounted to a reappreciation of the correctness of the earlier decision on merits, which is beyond the scope of the power conferred under section 254(2).

Section 260A(7)

CIT v Meghalaya Steels Ltd. (2015)(SC):- Does the High Court have an inherent power under the Income-tax Act, 1961 to review an earlier order passed on merits? The Supreme Court observed that the power of review would inhere on High Courts, being courts of record under article 215 of the Constitution of India. There is **nothing** in article 226 of the Constitution to **preclude a High Court from exercising the power of review** which inheres in every court of plenary jurisdiction **to prevent miscarriage of justice or to correct grave and palpable errors committed by i**t. The Supreme Court further observed that section 260A(7) does **not purport in any manner to curtail or restrict the application of the provisions of the** Code of Civil Procedure. Section 260A(7) only states that all the provisions that would apply qua appeals in the Code of Civil Procedure would apply to appeals under section 260A. The Supreme Court opined that this does not in any manner suggest either that the other provisions of the Code of Civil Procedure are necessarily excluded or that the High Court's inherent jurisdiction is in any manner affected.

Section 263

(1) ***CIT v Alagendran Finance Ltd. (SC):- An Issue under original assessment is not considered in Reassessment and thereafter, concept of Merger applied for the purpose of revision of an issue not considered in reassessment proceeding by taking into account limitation period from the date of order of reassessment.*** The doctrine of merger would apply in a case where the subject-matter of reassessment and the subject-matter of assessment are the same. If the matter of reassessment is different from assessment, then, limitation period of **2 year** for revision of original assessment is to be reckoned **from the date of order of original assessment**.

(2) ***CWT v Sampathmal Chordia(Mad):-*** **Can the CIT make a revision u/s 263 both in respect of matter covered in appeal and other matters? In the case where assessment made u/s 143(3) is pending before the CIT(A).** In case where the appeal is pending but not decided, the CIT cannot exercise his jurisdication in respect of matter which are the subject matter of appeal. (4)The CIT has the power to revise an order prejudicial to revenue, even if the order is the subject matter of an appeal before CIT(A). However, the power of the CIT u/s 263 shall extend to only such matters as had not been considered and decided in such appeal. Here, concept of partial merger would apply.

(3) ***CIT v. Lark Chemicals Ltd (2014) (Bom) :-*** **Should time limit under section 263 to be reckoned with reference to the date of assessment order or the date of reassessment order, where the revision is in relation to an item which was not the subject matter of reassessment?** The High Court, thus, held that the jurisdiction under section 263 could not be assumed on issues which were not the subject matter of issues dealt with in the order of reassessment but were part of the original assessment, for which the period of limitation expired long ago. Time limit is to be reckoned with reference to the date **of original assessment order** where revision is in relation to an issue which was not subject matter of reassessment.

(4) ***CIT v. ICICI Bank Ltd. (2012) (Bom.):-*** **Would the period of limitation for an order passed under section 263 be reckoned from the original order passed by the Assessing Officer under section 143(3) or from the order of reassessment passed under section 147, where the subject matter of revision is different from the subject matter of reassessment under section 147?** Considering the above mentioned facts, the Bombay High Court held that the order of assessment under section 143(3) allowed deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate difference. The order of reassessment, however, had not dealt with these issues. Therefore, the doctrine of merger cannot be applied in this case. The order under section 143(3) cannot stand merged with the order of reassessment in respect of those issues which did not form the subject matter of the reassessment. Therefore, the period of limitation in respect of the order of the Commissioner under section 263 with regard to a matter which does not form the subject matter of reassessment shall be reckoned from the date of the original order under section 143(3) and not from the date of the reassessment order under section 147. **(Nov-15)**

(5) *CIT v Krishna Capbox (P) Ltd (All):-* Can mere non-mention or non-discussion of enquiry made by the AO in the assessment order justify invoking revisionary jurisdiction u/s 263? Held that since the relevant enquiries and replies are available on "record", the commissioner cannot invoke revisionary jurisdiction merely because there was no mention of such enquiry and verification in the assessment order.

(6) *CIT v Fortaleza Developers (Bom):-* Can the commissioner invoke revisionary jurisdiction u/s 263, when the subject matter of revision (i.e. whether the manner of allocation of revenue amongst the member of AOP would affect the allowability and/or quntum of deduction u/s 80-IB) has been decided by the CIT(A) and the same is pending before the tribunal? When the order of 1st appellate authority is complete and the appeal is pending before the Tribunal, the Commissioner is precluded from invoking section 263 for revision of the very same matter decided by the 1st appellate authority since clause (c) of the Explanation 1 to section 263 debars the same. Accordingly, court held that the order passed by the AO got merged with the order of the 1st appellate authority. The very same issue cannot be revised by invoking section 263.

(7) *CIT v New Mangalore Port Trust (2016) (Kar) :-* Can the original Assessment order u/s 143(3), which was subsequently modified to give effect to the revision order u/s 264, be later on subjected to revision u/s 263? High court held that the order passed by the commissioner u/s 263, revising the non-existing order is void ab initio and is nullity in the eyes of law.

Section 264

(1) *Hindustan Aeronautics Ltd v CIT (SC).* :- (Revision of order appealed) The Principal Commissioner or commissioner has no power to revise any order u/s 264, if the order has been made subject to an appeal to CIT(A) or the Appellate tribunal, even if the relief claimed in the revision is different from the relief claimed in the appeal. This bar remains unaffected by the scope of the appeal to the CIT(A) or ITAT. **Total merger affirmed. (No-14)**

(2)Where assessment order u/s 143(3) is made subject matter appeal before the CIT(A), can revision petition u/s 264 be made by the assessee? The CIT cannot revise an order which is pending before the CIT(A), even if the revision pertains to a matter, other than the matter(s) covered in appeal. **The concept of total merger applies in the case of section 264**.

(3) *Sanchit Software and Solutions Pvt. Ltd. v. CIT (2012) (Bom.):-* Can an assessee file a revision petition u/s 264, if the revised return to correct an inadvertent error apparent from record in the original return, is filed after the time limit specified under section 139(5) on account of the error coming to the notice of the assessee after the specified time limit? High court observed that the entire object of administration of tax is to secure the revenue for the development of the country and not to charge the assessee more tax than which is due and payable by the assessee. **(M-16)**

Penalty

(1) *CIT v. Nayan Builders & Developers (2014) (Bom):-*Is concealment penalty leviable when the High Court admits the quantum appeal as involving substantial question of law? The High Court observed that the issue of quantum addition was admitted by the High Court since it involved substantial question of law. When the High Court admits substantial question of law on an addition, **it becomes apparent that the addition is certainly debatable**. In such circumstances, **penalty cannot be levied under section 271(1)(c**). Thus, the High Court held that when the quantum proceeding is admitted by the High Court, it amounts to a debatable issue and hence, concealment penalty is not leviable.

(2) *MAK Data P. Ltd. v. CIT (2013) (SC):-* Can an assessee who has surrendered his income in response to the specific information sought by the Assessing Officer in the course of survey, be absolved from the penal provisions under section 271(1)(c) for concealment of income? The Apex Court was, therefore, of the view that surrender of income in this case is not voluntary, in the sense, that the offer of surrender was made in view of detection made by the Assessing Officer in the survey conducted in the sister concern of the assessee. The Apex Court, therefore, concurred with the view of the High Court that levy of penalty is correct in law.

(3) *CIT v. Reliance Petro Products Pvt. Ltd. (2010) (SC):-* Would making an incorrect claim in the return of income *per se* amount to concealment of particulars or furnishing inaccurate particulars for attracting the penal provisions under section 271(1)(c), when no information given in the return is found to be incorrect? The Apex Court, therefore, held that where there is no finding that any details supplied by the assessee in its return are incorrect or erroneous or false, there is no question of imposing penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. ***(M-16)*** **(Nov-13)**

(4) *CIT v. Amit Jain (2013) (Delhi)* Can reporting of income under a different head tantamount to furnishing of inaccurate

particulars or suppression of facts to attract penalty under section 271(1)(c)? The High Court, after considering the above observations of the Tribunal and the decision of the Supreme Court in ***CIT v. Reliance Petro Products Pvt. Ltd. (2010,*** held that mere reporting of income under a different head would not characterize the particulars reported as "inaccurate" to attract levy of penalty under section 271(1)(c). ***(M-16)***

(5)Can penalty under section 271(1)(c) be imposed on the ground of disallowance of a certain deduction under Chapter VI-A owing to the subsequent decision of the Supreme Court? The Bombay High Court affirmed the decision of Appellate Tribunal deleting the penalty under section 271(1)(c) on the ground that the additions made on account of disallowance were neither due to the failure on the part of the assessee to furnish accurate particulars nor on account of furnishing inaccurate particulars. ***CIT v. Celetronix Power India P. Ltd. (2013) (Bom.)***

(6) *CIT v. Indersons Leather P. Ltd. (2010) (P&H):*-Can penalty under section 271(1)(c) for concealment of income be imposed in a case where the assessee has raised a debatable issue? On this issue, the High Court observed that, mere raising of a debatable issue would not amount to concealment of income or furnishing inaccurate particulars and therefore, penalty under section 271(1)(c) cannot be imposed.

Section 271D and Section 269SS

***CIT v Muthoot Financiers (2015) (Del)*:- Is penalty u/s 271D imposable for cash loan/deposit received from partners?** The High Court further observed that, in this case, there was no dispute as regards the money brought in by the partners of the assessee-firm. The source of money was also not doubted. The transaction was bona fide and not aimed to avoid any tax liability. The credit worthiness of the partners and genuineness of the transactions coupled with relationship between the „two persons" and two different legal interpretations put forward, could constitute a reasonable cause in a given case for not invoking sections 271D /271E read with section 273B.

***CIT v V. Sivakumar (2013) (Mad)* :- Can loan, exceeding the specified limit, advanced by a partnership firm to the sole-propriertorship concern of its partner be viewed as a violation of section 269SS to attract levy?**

The Tribunal, relying upon the various court decisions, confirmed the finding of the Commissioner (Appeals) that partnership firm is not a juristic person and there is no separate identity for the firm and the partners; Being a partner, the assessee had withdrawn amounts from the firms and there were no reasons to doubt the genuineness of the transactions. Consequently, the transactions between the firm and the partner cannot be brought within the meaning of section 269SS.

The High Court, relying upon the various court decisions, upheld the decision of the Tribunal holding that there is no separate identity for the partnership firm and that the partner is entitled to use the funds of the firm. In the present case, the assessee has acted *bona fide* and that there was a reasonable cause within the meaning of section 273B. Therefore, the transaction cannot be said to be in violation of section 269SS and no penalty is attracted in this case.

Section 271E and Section 269T

CIT v. Triumph International Finance (I.) Ltd. (2012) (Bom.):- **Where an assessee repays a loan merely by passing adjustment entries in its books of account, can such repayment of loan by the assessee be taken as a contravention of the provisions of section 269T to attract penalty under section 271E?** the obligation to repay the loan or deposit by account payee cheque/bank draft as specified in section 269T is mandatory in nature. The contravention of the said section will attract penalty under section 271E.

However, the cause shown by the assessee for repayment of the loan otherwise than by account payee cheque/bank draft was on account of the fact that the assessee was liable to receive amount towards the sale price of the shares sold by the assessee to the person from whom loan was received by the assessee. It would have been mere formality to repay the loan amount by account payee cheque/draft and receive back almost the same amount towards the sale price of the shares. Also, neither the genuineness of the receipt of loan nor the transaction of repayment of loan by way of adjustment through book entries carried out in the ordinary course of business has been doubted in the regular assessment. Therefore, there is nothing on record to suggest that the amounts advanced by Investment Trust of India to the assessee represented the unaccounted money of the Investment Trust of India or the assessee and also it cannot be said that the whole transaction was entered into to avoid tax. This is accepted as a reasonable cause under section 273B.

In effect, the assessee has violated the provisions of section 269T by repaying the loan amount by way of passing book entries and therefore, penalty under section 271E is applicable. However, since the transaction is bona fide in nature being a normal business transaction and has not been made with a view to avoid tax, it was held that the assessee has shown reasonable cause for the failure under section 269T, and therefore, as per the provisions of section 273B, no penalty under section 271E could be imposed on the assessee for contravening the provisions of section 269T.

HUF

(1) *Gowli Buddanna v CIT (SC):-* Whether more than one co-parcener is required to constitute a HUF? Held that there need not be more than one male member to form a HUF as a taxable entity under the Income Tax Act, 1961.

(2) Whether the income of garage will be assessed in the hands of HUF, if interest free loan is provided by HUF to run such garage to the co-parcener of such HUF and where such co-parcener has professional and technical qualification? Observation of court that if the investment made by the HUF in the business started by co-parcener plays a minor role and it is primarily the personal efforts, specialized skill and enterprise of the individual co-parceners which resulted in setting up of a new business and earning of profits, then it may not essential be said the income belong to the HUF. ***CIT v Charan Dass Khana & Sons (Del)*** Above view is also supported by the Supreme Court in the case of ***K.S. Subbiah Pillai v CIT(SC)***

(3) *Pushpa Devi v CIT (SC):-* Whether the personal property of the wife of co-parcener blended into the property of HUF can be treated as a property of HUF? Held that "to blend" means to share along with others and not to surrender one's interest in favour of others to the exclusion of oneself. If a Hindu female, who is a member of undivided family impress her absolute, exclusive property with the character of joint family property, she creates new claimnent to her property to the exclusion of herself because, not being a co-parcener, she has no right to demand a share in the joint family property by asking for a partition. The expression "blending" is inapposite (i.e. unsuitable) in the case of a Hindu female who puts her separate property, be it the absolute property or limited estate, in the joint family stock.

Search

***UOI v Ajit Jain(SC):-* Whether the information received from Central Bureau of Investigation (CBI) amount to "Information" for action u/s 132?** Held that mere intimation by the CBI that money was found in the possession of the assessee, which according to CBI was undisclosed, without something more, does not constitute "information" within the meaning of section 132, on the basis of which a search warrant could be issued.

Settlement commission

(1) ***CIT v Anjum M.H. Ghaswala(SC):-*** Whether the set comm have the power to reduce or waive interest levied u/s 234A, 234B and 234C? Held that the section 245D(6) is only in the nature providing for fixing the term by which the amount settled u/s 245D(4) will have to be paid. It does not empower the set com either to reduce or waive the interest. Any settlement made by the ser com must be in accordance with the provisions of the Act.

(2) ***CIT v Om Prakash Misttal (SC):-*** CIT application to declare order void and for withdrawal of benefit. Section 245D(4) provides that every order has to provide for:-

(1) The term of settlement; and
(2) That the settlement would become void, if it subsequently found by the set com that it has been obtained by fraud or misrepresentation of facts.

Order to become void is that of the decision of Set com. No requirement that the action be initiated by the set comm., suo moto. Merely because Section 245-I provides that the order of set comm is conclusive, it does not take away the power of set comm to decide above issue.

(3) *Supreme agro foods P Ltd v IT set com(MP&H):-* Section 245D(4) SET com pass such order "as it think fit". Section 245D(4) Set Com member **consider** the matter brought in the record before passing order. "Consideration" means independent examination of evidence and material brought on record before the set com by the members and application of mind thereto with a view to independently assess the material and evidence, whether adduced by the applicant or by the CIT, and come to the conclusion by themselves.

Assessment of Various Entities

Co-operative Society and Principle of Mutuality

(1) *Sind Co-operative Housing Society v. ITO (2009) (Bom):-* Can transfer fees received by a co-operative housing society from its incoming and outgoing members be exempt on the ground of principle of mutuality? On this issue, the High Court observed that under the bye-laws of the society, charging of transfer fees had no element of trading or commerciality. Both the incoming and outgoing members have to contribute to the common fund of the assessee. The amount paid was to be exclusively used for the benefit of the members as a class.

The High Court, therefore, held that transfer fees received by a co-operative housing society, whether from outgoing or from incoming members, is not liable to tax on the ground of principle of mutuality since the predominant activity of such co-operative society is maintenance of property of the society and there is no taint of commerciality, trade or business.

Further, section 28(iii), which provides that income derived by a trade, professional or similar association from specific services performed for its members shall be treated as business income, can have no application since the co-operative housing society is not a trade or professional association. (M-16)

(2) Madras Gymkhana Club v DCIT (2010) (Mad):- Would the interest earned on surplus funds of a club deposited with Institutional members satisfy the principle of mutuality to escape taxability? The assessee-club providing facilities like gym, library, etc, to its members earned interest from fixed deposits which it had made by investment of its surplus funds with its corporate members. **The High Court held that interest earned from investment of surplus funds in the form of fixed deposits with institutional members does not satisfy the principle of mutuality and hence cannot be claimed as exempt on this ground. The interest earned is, therefore, taxable.**

Section 115BBA

***Indcom v CIT (2011) (Cal)* :- Would non-resident match referees and umpires in the games played in India fall within the meaning of "sportsman" to attract taxability u/s 115BBA, and consequently attract TDS provisions u/s 194E in the hands of the payer**? On this issue, the Calcutta High Court observed that, in order to attract the provisions of the section 194E, the

person should be a non-resident sportsperson or non-resident sports association or institution whose income is taxable as per the provisions of section 115BBA.
The umpires and the match referees can be described as professionals or technical persons who render professional or technical services, but they cannot be said to be either non-resident sportsmen (including an athlete) or non-resident sports association or institution so as to attract the provisions of section 115BBA and consequently, the provisions of tax deduction at source under section 194E are also not attracted in this case. Though for the purpose of section 194J, match referees and umpires are considered as professionals, the tax deduction provisions thereunder are attracted only in case where the deductee is a resident individual, which is not so in the present case.
Therefore, although the payments made to non-resident umpires and the match referees are "income" which has accrued and arisen in India, the same are not taxable under the provisions of section 115BBA and thus, the assessee is not liable to deduct tax under section 194E. **(Nov-12)**

(1)CIT v Govindbhai Mamaiya (2014) (SC):- Where land inherited by three brothers is compulsorily acquired by the state Government, whether resultant capital gain would be assessed in the status of "AOP" or in their individual status? The issue under consideration is regarding the status in which capital gain arising on transfer of property would be assessed. The assessees' offered income in their status as "individual" but the Revenue sought to tax the same in their status as "Association of Persons" (AOP). The Apex Court noted that "Association of Persons" means an association in which two or more persons join in a common purpose or common action. it was held that an association of persons could be formed only when two or more persons voluntarily combined together for certain purposes.
In this case, the property in question came to the assessees' possession through inheritance i.e., by operation of law. It is not a case where any 'association of persons" was formed by volition of the parties. Further, even the income earned in the form of interest is not because of any business venture of the three assessees, but is the result of the act of the Government in compulsorily acquiring the said land. Thus, the basic test to be satisfied for making an assessment in the status of AOP is absent in this case.
The Apex Court, accordingly, held that the income from asset inherited by the legal heirs is taxable in their individual hands and not in the status of AOP. **(Nov-15)**

(2)CIT v D.L. Nandgopal Reddy (2014) Kar):- Would the ancestral property received by the assessee after the death of his father, be considered as HUF Property or his individual property, where the assessee's father had received such property as his share when he went out of the joint family under a release deed? The High Court observed that the property originally belonged to Hindu Undivided Family (HUF). One of the members of the family (i.e., the assessee's father) went out of the joint family under a release deed and the remaining members continued to be the members of joint family. After the death of assessee's father and mother, the assessee, being the adopted son, became the sole surviving co-parcener. When such property came to the hands of the assessee it was not his individual property; it was the property of his Hindu Undivided Family.
The High Court held that that when the property came to the hands of the assessee, it was not his self-acquired property; it was property belonging to his HUF. The assessee had given a portion of the property to his wife without a registered document, which is possible only if the property is a HUF property. If such property is treated as a self-acquired property, then assessee would have been able to give the portion of the property to his wife only by registered document.

(3)Sudhir Nagpal v ITO (2012) (P&H):- Under which head of income is rental income from plinths inherited by individual co-owner from their ancestors taxable – Income from HP or Income from other source? Further, would such income would be assessable in the hands of individual co-owners or in the hands of AOP?
First Issue: it was observed that it is the income from property consisting of any building or land appurtenant thereto which is assessed under section 22 and not the income from renting out of open land or some kutcha plinth only. Therefore, the Court held that the income from letting out the plinths is assessable under section 56 as "Income from other sources" and not under the head "Income from house property".
Second Issue: The second issue relates to whether such rental income is assessable in the hands of the individual co-owners or in the hands of the Association of Persons. To appreciate this issue, it is necessary to understand the complete facts of the case.
On appeal, the High Court observed that in order to assess individuals as "association of persons", the individual co-owners should have joined their resources and thereafter, acquired property in the name of association of persons and the property should have been commonly managed. It is only in such a case that income could be assessed in the hands of "association of persons". Mere accruing of income jointly to more persons than one would not constitute them an association of persons in respect of such income. In other words, unless the associates have done some acts or performed some operations together, which have helped to produce the income in question, they cannot be termed as an association of persons. Unless the members combine or join in a common purpose, it cannot be held that they have formed themselves into an association of persons.
In this case, the co-owners had inherited the property from their ancestors and there was nothing to show that they had acted as an association of persons. Thus, the High Court held that the rental income from the plinths has to be assessed in the status of individual and not association of persons and consequently, section 167B would not be attracted in this case.

Section 115JB

(1) Joint CIT v Rolta India Ltd. (2011) (SC):- Can interest u/s 234B and 234C be levied where a company is assessed on the basis of Book profit u/s 115JB? On this issue, the Supreme Court observed that there is a specific provision in section 115JB(5) providing that all other provisions of the Income-tax Act, 1961 shall apply to every assessee, being a company, mentioned in that section. Section 115JB is a self-contained code pertaining to MAT, and by virtue of sub-section (5) thereof, the liability for payment of advance tax would be attracted. Therefore, if a company defaults in payment of advance tax in respect of tax payable under section 115JB, it would be liable to pay interest under sections 234B and 234C. **The Supreme Court, therefore, held that interest under sections 234B and 234C shall be payable on failure of the company to pay advance tax in respect of tax payable under section 115JB. (Nov-13)**

(2) N.J. Jose and Co. (p) Ltd. v ACIT (2010) (Ker):- Can LTCG exempted by virtue of section 54EC be included in the book profit computed u/s 115JB? The High Court held that once the Assessing Officer found that total income as computed under the provisions of the Act was less than 30 per cent of the book profit, he had to make the assessment under section 115J which does not provide for any deduction in terms of section 54E. As long as long-term capital gains are part of the profits included in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (*now, Statement of Profit and Loss prepared in accordance with Part II of Schedule III to the Companies Act, 2013*), capital gains cannot be excluded unless provided under the Explanation to section 115J(1A). **(May-16A) (Nov-11)**
(3) Appolo Tyres Ltd v CIT(SC):- Assessing Officer power to compute book profit u/s 115JB. **(Nov-13)**
(4) *CIT v. Echjay Forgings (P) Ltd. (2001) (Bom.):* Provision for gratuity based on actuarial valuation is an ascertained liability.

Income tax authorities

(1) *Hemant Kumar Sindhi v CIT (2014) (All):*-Can the assessee's application, for adjustment of tax liability on income surrendered during search by sale of seized gold bars, be entertained where assessment has not been completed? This would obviate his liability to pay interest under sections 234B and 234C. The High Court observed that section 132B(1)(i) uses the expression "the amount of any existing liability" and "the amount of the liability determined". The words "existing liability" postulates a liability that is crystallized by adjudication; Likewise, "a liability is determined" only on completion of the assessment. Until the assessment is complete, it cannot be postulated that a liability has been crystallized.
As per the first proviso to section 132B(1)(i), the assessee may make an application to the Assessing Officer for release of the assets seized. However, he has to explain the nature and source of acquisition of the asset to the satisfaction of the Assessing Officer. It is not the *ipse dixit* of the assessee but the satisfaction of the Assessing Officer on the basis of the explanation tendered by the assessee which is material.
The High Court, accordingly, held that the Assessing Officer was justified in his conclusion that it is only when the liability is determined on the completion of assessment that it would stand crystallized and in pursuance of which a demand can be raised and recovery can be initiated. Therefore, in the present case, the first proviso to section 132B(1)(i) would not be attracted. The High Court, thus, dismissed the writ petition.

(2) ***Kathiroor Service Co-operative Bank Ltd. V CIT (CBI) (2014)(SC):-*** **Where no proceeding is pending against a person, can AO call for information u/s 133(6), which is useful or relevant to any inquiry with the permission of director or Commissioner?** The Supreme Court observed that the Assessing Officer has been empowered to requisition information which will be useful for or relevant to **any enquiry** or proceeding under the Income-tax Act, 1961 in the case of any person. However, an income-tax authority below the rank of the Director or Commissioner can exercise this power in respect of an **enquiry** in a case where no proceeding is pending, only with the prior approval of the Director or the Commissioner.
The Supreme Court held that information of general nature could be called for from banks. In this case, since notices have been issued after obtaining approval of the Commissioner, the assessing authority had not erred in issuing the notices to assessees requiring them to furnish information regarding account holders with cash transactions or deposits of more than ` 1 lakh. The Supreme Court, therefore, held that for such enquiry under section 133(6), the notices could be validly issued by the assessing authority. (N-15)

(3) ***Sahara Hospitality Ltd. v CIT (2013) (Bom):*-Is the requirement to grant a reasonable opportunity of being heard, stipulated u/s 127(1), mandatory in nature?** On this issue, the Bombay High Court observed that the provisions of section 127(1) stipulate, *inter alia,* that the income tax authority mentioned therein **may** give an opportunity of being heard to the assessee, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him to any other Assessing Officer or officers subordinate to him.
The Bombay High Court held that the word "may" used in this section should be read as "shall" and such income-tax authority has to mandatorily give a reasonable opportunity of being heard to the assessee, wherever possible to do so, and thereafter, record the reasons for taking any action under the said section. "Reasonable opportunity" can only be dispensed with in a case where it is not possible to provide such opportunity. In such a case also, the authority should record its reasons for making the transfer, even though no opportunity was given to the assessee. The discretion of the authority is only to consider as to what is a reasonable opportunity in a given case and whether it is possible to give such an opportunity to the assessee or not. The authority cannot deny a reasonable opportunity of being heard to the assessee, wherever it is possible to do so.

(4) ***Lodhi Property Company Ltd. v Under Secretary (Del) 2010):-*** Does the CBDT has the power u/s 119(2)(b) to condone the delay in filling ROI? The issue under consideration is whether the CBDT has the power under section 119(2)(b) to condone the delay in filing return of income. The High Court held that the Board has the power to condone the delay in case of a return which was filed late and where a claim for carry forward of losses was made. The delay was only one day and the assessee had shown sufficient reason for the delay of one day in filing the return of income. If the delay is not condoned, it would cause genuine hardship to the petitioner. Therefore, the Court held that the delay of one day in filing of the return has to be condoned. **(Nov-11)**

Advance Rulings

Hyosung Corporation v AAR(2016) (Del) :- Can AAR reject an application for advance ruling on the ground that proceeding are already pending before ITO, where notice u/s 143(2) in printed format has been served on the applicant-assessee before the date of filling the said application for advance ruling? What would be the position if the notice u/s 142(1) along with detailed questionnaire has also been issued to applicant assessee before the date of filing of the said application for advance ruling?

The High Court observed that the assessee received notices under section 143(2) in a standard pre-printed format and also received notices under section 142(1) accompanied by questionnaire for all the assessment years. The High Court noted that mere issue of notice under section 143(2) in pre-printed format will not amount to 'already pending' proceedings for the purpose of applying proviso to section 245R(2).

However, issue of notices under section 142(1) accompanied by a questionnaire which raised the question of supply contracts which were executed overseas would nevertheless make the proceedings pending. This is more so when such notices were issued before filing of the applications by the assessee with the AAR.

The High Court, accordingly, held that rejection of application filed by the assessee for the assessment years 2008-09 and 2009-10 was not erroneous and did not call for any interference, since the notice under section 142(1) along with questionnaire were issued before the date of making an application for advance ruling.

However, notice under section 142(1) issued for the assessment year 2010-11 after the date of filing of application will not result in the proceedings being 'already pending' before an Income-tax authority for the purpose of applying proviso to section 245R(2).

Thus, the application for the assessment year 2010-11 cannot be rejected by the AAR. However, for the assessment years 2008-09 and 2009-10, the rejection of the application by AAR is tenable in law, since notice under section 142(1) along with detailed questionnaire was issued before the date of filing of such application.

The High Court, accordingly, held that rejection of application filed by the assessee for the assessment years 2008-09 and 2009-10 was not erroneous and did not call for any interference, since the notice under section 142(1) along with questionnaire were issued before the date of making an application for advance ruling.

However, notice under section 142(1) issued for the assessment year 2010-11 after the date of filing of application will not result in the proceedings being 'already pending' before an Income-tax authority for the purpose of applying proviso to section 245R(2).

Thus, the application for the assessment year 2010-11 cannot be rejected by the AAR. However, for the assessment years 2008-09 and 2009-10, the rejection of the application by AAR is tenable in law, since notice under section 142(1) along with detailed questionnaire was issued before the date of filing of such application

Chapter deduction

CIT v. Swarnagiri Wire Insulations Pvt. Ltd. (2012) (Kar.):- **Can unabsorb depreciation of a business of an industrial undertaking eligible for deduction under section 80-IA be set off against income of another non-eligible business of the assessee? (N-14)**

Liberty India v. CIT (2009) (SC), *(Nov-12)*