

These case laws are in addition to what I have got marked in your study material, like Ponnama Lakshmi Narayan Asiatic Society, VTM etc.....

1. Techno Shares & Stocks Ltd. v CIT [2010] 193 TAXMAN 248 (SC)

Right of membership conferred upon a member under BSE membership card in terms of rules and Bye-laws of BSE, as they stood during relevant assessment years, was a 'business or commercial right' which gave a non-defaulting continuing member a right to access exchange and to participate therein and, in that sense, it was a licence or akin to a licence in terms of section 32(1)(ii). Therefore, for relevant assessment years, depreciation was allowable on cost of BSE membership card under section 32(1)(ii).

On the analysis of the rules of the BSE, it is clear that the right of membership (including right of nomination) gets vested in the exchange on the demise/default committed by the member; that on such forfeiture and vesting in the exchange, the same gets disposed of by inviting offers and the consideration received thereof is used to liquidate the dues owed by the former/defaulting member to the exchange, clearing house, etc. It is this right of membership which allows the non-defaulting member to participate in the trading session on the floor of the exchange. Thus, the said membership right is a 'business or commercial right' conferred by the rules of the BSE on the non-defaulting continuing member.

The right of membership, which includes right of nomination, is a 'licence' or 'akin to a licence' which is one of the items which falls in section 32(1)(ii). The right to participate in the market has an economic and monetary value. It is an expense incurred by the assessee which satisfies the test of being a 'licence' or "any other business or commercial right of similar nature" in terms of section 32(1)(ii).

However, it should not be understood to mean that every business or commercial right would constitute a 'licence' or a 'franchise' in terms of section 32(1)(ii).

2. GE India Technology Cen. (P.) Ltd. v CIT [2010] 193 TAXMAN 234 (SC)

The moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9. Section 195(2) is not a mere provision to provide information to ITO(TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable.

Where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, 'chargeable under the provisions of the Act'. It is for this reason that vide Circular No. 728, dated 30-10-1995, the CBDT has clarified that the tax deductor can take into consideration the effect of the DTAA in respect of payment of royalties and technical fees while deducting TAS.

The application of section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO(TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO(TDS), that the question of making an order under section 195(2) will arise.

3. Sri Sakthi Textiles Ltd. v JT CIT [2010] 193 TAXMAN 216 (MAD.)

An assessment already completed cannot be reopened for the purpose of reassessment merely on the basis of the change of opinion by the subsequent Assessing Officer. Such reopening is possible only on tangible materials in the event of the Assessing Officer finding reason to believe that there was escapement of income from assessment. There is no legal necessity that the material referred to in section 147 of the Act should be fresh material collected subsequent to the original assessment order. Even from the materials which are already available on record, if the subsequent Assessing Officer has reason to believe that there has been escapement of assessment, surely he can issue notice under section 148. Such course will not amount to reviewing the earlier assessment. There is a vast difference between the original assessment and reassessment. In the instant case there were sufficient materials available on record to hold that there had been escapement of income from assessment. It was only out of the available materials, the Assessing Officer had found the reasons to believe that there had been escapement of chargeable income from assessment since instead of treating the expenditure in question as capital expenditure, the then Assessing Officer had treated the same as revenue expenditure. This would not amount to either 'change of opinion' or 'reviewing the earlier assessment order'.

4. Ajmera Housing Corpn. V CIT [2010] 193 TAXMAN 193 (SC)

Section 245C(1) mandates 'full and true' disclosure of particulars of undisclosed income and 'manner' in which such income was derived and, therefore, unless Settlement Commission records its satisfaction on this aspect, it will not have jurisdiction to pass any order on matters covered by application. Even when Settlement Commission decides to proceed with application, it will not be denuded of its power to examine as to whether in his application under section 245C(1), assessee has made a full and true disclosure of his undisclosed income. In scheme of Chapter XIX-A, there is no stipulation for revision of income disclosed in an application filed under section 245C(1) and, thus, determination of income by Settlement Commission has necessarily to be with reference to income disclosed in an application filed under said section in prescribed form.

It is plain from the language of section 245D(4) that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under section 245D(1)/(3). A 'full and true' disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under section 245C(1), the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, section 245C(3), which prohibits the withdrawal of an application once made under section 245C(1) of the said section, is instructive inasmuch as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings.

In the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed under section 245C(1) and, thus, the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said section in the prescribed form.

5. Vodafone International Holdings B.V. v UOI [2010] 193 TAXMAN 100 (BOM.)

Hutchison Group of Hong Kong acquired interests in mobile telecommunication industry in India through a joint venture vehicle HEL. HEL is an Indian company in which shares were indirectly acquired by Hutchison Group, Hong Kong.

HTIL was a Hutchison group company incorporated in Cayman Island. It had a 100% subsidiary CGP, another company incorporated in Cayman Islands. HTIL had, through CGP, acquired controlling interest in HEL.

As a result of Sale Purchase Agreement, HTIL transferred its entire shareholding in CGP to, a company controlled by Vodafone Group Plc. U.K. (Assessee).

The income tax department was of the view that the sale of controlling interest controlling of HTIL to CGP in effect resulted in transfer of interest of HTIL in HEL. It was a composite transaction involving a transfer of rights in HEL by HTIL resulting in an accrual or deemed accrual of income to HTIL from a source of income in India or from an asset in India or through transfer of a capital asset situated in India. Show-cause notice was issued to the assessee under section 201 for purpose of holding the assessee as an assessee-in-default for not deducting tax at source from consideration paid to HTIL.

In writ petition before the High Court, the assessee contended that transaction was merely transfer of a share of CGP in Cayman Islands and that being a capital asset situated outside India, neither had any income accrued or arisen in India, nor would any income be deemed to have accrued or arisen in India and, therefore, Indian income-tax authorities had no jurisdiction to issue impugned notice

The High Court observed that since transaction between HTIL and assessee was structured so as to achieve object of discontinuing operations of HTIL in relation to Indian mobile telecommunication operations by transferring rights and entitlements of HTIL to petitioner, income accrued and arose and derived as a consequence of divestment of HTIL's interest in India. Since transaction between parties covered within its sweep diverse rights and entitlements and essence of transaction was a change in controlling interest in HEL, an Indian Company which constituted a source of income in India. Assessee by the diverse agreements that it entered into, had a nexus with the Indian jurisdiction and were chargeable to tax, therefore required withholding of taxes.

The commercial understanding of the parties was that the transaction related to the transfer of a controlling interest in HEL from HTIL to the petitioner. The transfer of control was not relatable merely to the transfer of the CGP share. Inextricably woven with the transfer of control were other rights and entitlements which HTIL and/or its subsidiaries had assumed in pursuance of contractual arrangements with its Indian partners and the benefit of which would stand transferred to the petitioner. By and as a result of the Agreement, HTIL was relinquishing its interest in the telecommunications business in India and the petitioner was acquiring the interest which was held earlier by HTIL.

The fulfilment of the transaction required the putting into place of structural arrangements in India that would regulate the conduct of the business of the Indian company, the relationship between the shareholders of the company and the contractual entitlements accruing or arising in respect of agreements with the Indian partners. Valuable rights came to be recognized and conferred in the term 'sheet agreements'. Those were tangible rights having a direct nexus with India which enabled the petitioner to control and carry on business.

The diverse clauses of the SPA were indicative of the fact that parties were conscious of the composite nature of the transaction and created reciprocal rights and obligations that included, but were not confined to the transfer of the CGP share. The commercial understanding of the parties was that the transaction related to the transfer of a controlling interest in HEL from HTIL to the petitioner. The transfer of control was not relatable merely to the transfer of the CGP share. Inextricably woven with the transfer of control were other rights and entitlements which HTIL and/or its subsidiaries had assumed in pursuance of contractual arrangements with its Indian partners and the benefit of which would stand transferred to the petitioner.

These rights and entitlements constituted in themselves capital assets within the meaning of section 2(14) which expression is defined to mean property of any kind held by an assessee.

The commercial and business understanding between the parties postulated that what was being transferred from HTIL to the petitioner was the controlling interest in HEL. HTIL had, through its investments in HEL, carried on operations in India which HTIL, in its annual report of 2007, represented to be the Indian mobile telecommunication operations. The transaction between HTIL and the petitioner was structured so as to achieve the object of discontinuing the operations of HTIL in relation to the Indian mobile telecommunication operations by transferring the rights and entitlements of HTIL to the petitioner. HEL was, at all times, intended to be the target company and a transfer of the controlling interest in HEL was the purpose which was achieved by the transaction. The object and intent of the parties was to achieve the transfer of control over HEL and the transfer of the solitary share of CGP was put into place at the behest of HTIL, subsequently, as a mode of effectuating the goal.

The price paid by the petitioner to HTIL of US \$ 11.01 billion factored in, as part of the consideration, diverse rights and entitlements that were being transferred to the petitioner. Many of those entitlements were not relatable to the transfer of the CGP share. Indeed, if the transfer of the solitary share of CGP could have effectuated the purpose, it was not necessary for the parties to enter into a complex structure of business documentation. The transactional documents were not merely incidental or consequential to the transfer of the CGP share, but recognized independently the rights and entitlements of HTIL in relation to the Indian business which were being transferred to the petitioner.

The manner in which the consideration should be apportioned was not something which could be determined at the instant stage. Apportionment lies within the jurisdiction of the Assessing Officer during the course of the assessment proceedings. Undoubtedly, it would be for the Assessing Officer to apportion the income which had resulted to HTIL between that which had accrued or arisen or what was deemed to have accrued or arisen as a result of a nexus within the Indian taxing jurisdiction and that which lay outside. Such an enquiry would lie outside the realm of the instant proceedings. But once the transaction between HTIL and the petitioner had a sufficient nexus with the Indian fiscal jurisdiction, the issue of jurisdiction would have to be answered by holding that the Indian tax authorities acted within their jurisdiction in issuing a notice to show cause to the petitioner for not deducting tax at source.

In the instant case, the income accrued and arose and was derived as a consequence of the divestment of HTIL's interest in India. If there was no divestment or relinquishment of its interest in India, there was no occasion for the income to arise. The real taxable event was the divestment of HTIL's interests which comprised in itself various facets or components which included a transfer of interests in different group entities.

6. Akbar Travels of India (P.) Ltd. v Income-tax Settlement Commission [2010] 192 TAXMAN 457 (BOM.)

The assessee filed its return of income wherein the tax deducted at source was more than the tax payable on the income declared. The returns of income were accepted and an intimation was issued under section 143(1).

A search was conducted under section 132. Pursuant thereto, notices were issued to the assessee under section 153A, in response to which, the assessee filed its returns of income. Thereafter, notices were issued to the assessee under section 142(1). The assessee filed an application to the Settlement Commission under section 245C. The Settlement Commission passed an order under section 245D(4) under which the total taxable income for five assessment years was determined at higher figure than that of returned income. The Settlement Commission, on the issue of interest under section 234B(4), held that interest would be charged only if interest had been initially charged in the original order of assessment and since in instant case no interest had been charged in the original order of assessment, no interest under section 234B could be levied.

On appeal the High Court ruled that the words 'amount on which interest was payable' as occurring in section 234B(4) have been used in a descriptive sense to identify amount specified in 234B(1)/(3) as the case may be. These words do not impose a condition that for interest to be attracted under section 234B(4), interest should actually have been levied under original order of assessment under section 234B(1). Therefore, Settlement Commission, when it passes an order under section 245D, can award interest under section 234B, even though no interest was chargeable under original order of assessment.

The Settlement Commission, while passing original order, committed an error apparent by not following the earlier decision of the Special Bench of the Settlement Commission which was confirmed by the Gujarat High Court. The Settlement Commission was, therefore, justified in allowing the application under section 254 and setting right the error apparent which occurred in the original order.

7. Mckinsey & Company Inc. v UOI [2010] 192 TAXMAN 421 (BOM.)

Assessee was an American company engaged in business of providing consultancy on strategic planning and related activities. It operated in India through its branches. It was filing returns in India from assessment year 1993-94 and had received nil withholding certificates under section 195(3) for payments received for services rendered to clients/customers, group entities and for interest received on deposits made with banks. However, Assessing Officer rejected assessee's application for grant of a nil withholding certificate for assessment year 2011-12 on grounds :

- (i) that for assessment year 2006-07, draft assessment order was completed and a demand had been raised to tune of Rs. 44.98 crores, though matter was pending before Dispute Resolution Procedure (DRP); and
- (ii) that for assessment year 2005-06, gross demand raised was Rs. 26.23 crores and after payments till 31-3-2009, net balance outstanding demand was Rs. 9.33 crores, which was under MAP proceedings

As regards first ground, since impugned order itself made it clear that what had been issued was a draft assessment order and matter in question was pending before DRP, denial of certificate under section 195(3) on that ground was not justified. As regards second ground, assessee having invoked Mutual Agreement Procedure (MAP), consequence under MoU between Government of India and Government of USA was suspension of collection of tax demands and withholding taxes on income and, therefore, denial of certificate under section 195(3) on ground of balance outstanding for assessment year 2005-06, was contrary to law.

The conditions, which have been spelt out in rule 29B(2) are that :

- (i) the person concerned must be regularly assessed to income-tax in India and ought to have furnished returns of income for the assessment years for which the returns became due prior to the date on which an application under sub-rule (1) is made;
- (ii) there should be no default or deemed default in respect of any tax, interest, penalty, fine or sum payable under the Act;
- (iii) no penalty ought to have been imposed under section 271(1)(iii); and
- (iv) where the person is not a banking company, he ought to be carrying on the business or profession in India continuously for at least five years prior to the date of the application and the value of the fixed assets must be in excess of Rs. 50 lakhs for the previous year ending immediately prior to the date of the application.

As all the conditions of Rule 29B stands satisfied, the action of the AO is not proper.

8. Maruti Suzuki India Ltd. v Addl CIT (TPO) [2010] 192 TAXMAN 317 (DELHI)

The assessee-company (Maruti) was engaged in the business of manufacture and sale of automobiles, besides trading in spares and components of automotive vehicles. The trademark/logo 'M' was the registered trademark of the assessee-company. Since Maruti wanted a licence from the Japanese company 'Suzuki' for its SH model and Suzuki had granted licence to it for the manufacture and sale of certain other models of Suzuki four-wheel motor vehicles. Maruti entered into a licence agreement with Suzuki with the approval of the Government of India. Prior to the agreement, the assessee was using the logo 'M' on the front of the cars manufactured and sold by it. After the agreement, it started using the logo 'S', which is the logo of Suzuki, in the front of new models of the cars manufactured and sold by it, though it continued to use the mark 'Maruti' along with the word 'Suzuki' on the rear side of the vehicles manufactured and sold by it. A reference under section 92CA(1) was made by the Assessing Officer to the assessee to the Transfer Pricing Officer ('TPO') for determination of arm's length price for the international transaction undertaken by the assessee with Suzuki.

In terms of the agreement, all products and parts manufactured, assembled and sold in India by Maruti, pursuant to the agreement, required to bear the trademark 'Maruti Suzuki' and Maruti was also required to use and apply the same trademark on containers, packaging and wrappings used for and in connection with the sale of such parts and products in India. Thus, not only did the assessee continue to use the name 'Maruti', it was under a contractual obligation to Suzuki to continue to use that name in conjunction with the name Suzuki. It was true that there was use of the name 'Maruti' in the co-brand 'Maruti Suzuki', on the products manufactured and sold by Maruti in India, as well as on containers, packaging, wrapping, etc., but Suzuki, even if it so wanted, could not use the joint trademark 'Maruti Suzuki' either on its products or on the containers packaging, wrapping, etc., which might be used by it in connection with its products. There was a provision in the agreement for registration of the trademark 'Maruti Suzuki' in the names of the Maruti and Suzuki but, admittedly, no such registration had actually taken place.

If an independent domestic entity uses a foreign trademark and/or logo on its products or on containers, packaging, etc., manufactured and/or sold in India, no payment to the foreign entity in this regard is necessary, unless agreed by it, irrespective of whether the use of the foreign trademark and/or logo is obligatory or discretionary. The expenditure incurred by an independent domestic entity on advertising, promotion and marketing of its products using a foreign trademark/logo does not require any payment or compensation by the owner of the foreign trademark/logo to the domestic entity on account of use of the foreign trademark/logo in the promotion, advertising and marketing undertaken by it, unless agreed to by the domestic entity.

If a domestic entity, which is an associate enterprise of a foreign entity within the meaning of section 92A, uses a foreign trademark and/or logo on its products or on containers, packaging, etc., manufactured and/or sold in India, no payment to the foreign entity on account of such user is necessary in case the use of the foreign trademark and/or logo is discretionary for the domestic entity. However, the income arising from such international transaction(s) needs to be determined at arm's length price in terms of section 92C.

If the domestic entity, which is an associate enterprise of the foreign entity within the meaning of section 92A, is mandatorily required to use the foreign trademark and/or logo on its products and/or containers, packaging, etc., appropriate payment in this regard should be made by the foreign entity to the domestic entity on account of the benefit it derives in the form of marketing intangibles, obtained by it from such mandatory use of its trademark and/or logo.

The expenditure incurred by a domestic entity, which is an associate enterprise of a foreign entity, on advertising, promotion and marketing of its products using a foreign trademark/logo does not require any payment or compensation by the owner of the foreign trademark/logo to the domestic entity on account of use of the foreign trademark/logo in the promotion, advertising and marketing undertaken by it, so long as the expenses incurred by the

domestic entity do not exceed the expenses which a similarly situated and comparable independent domestic entity would have incurred.

If the expenses incurred by a domestic entity which is the associate enterprise of foreign entity, using a foreign brand trademark and/or logo while advertising, marketing and promoting its products, are more than what a similarly situated and comparable independent domestic entity would have incurred, the foreign entity needs to suitably compensate the domestic entity in respect of the advantage obtained by it in the form of brand building and increased awareness of its brand in the domestic market.

In order to ascertain whether the expenses incurred by the domestic entity, which is an associate enterprise of a foreign entity, on the marketing, promotion and advertising of its products using the brand trademark/logo of the foreign entity, are more than what a similarly situated and comparable independent domestic entity would have incurred, it would be necessary to identify appropriate comparables for the purpose of comparison of their expenditure with the expenditure incurred by the domestic entity in this regard. Suitable adjustments will have to be made considering the individual profiles of these entities and other facts and circumstances justifying such adjustments.

The TPO/Assessing Officer, before he determines arm's length price in relation to the income from an international transaction, needs to give appropriate notice to the assessee, giving him an opportunity to produce evidence in support of the arm's length price computed by him. In case the TPO/Assessing Officer proposes to make adjustments to the income of the assessee by revising the arm's length price computed by him, he needs to give a notice to the assessee, conveying the grounds on which the adjustment is proposed to be made followed by an opportunity to reply to that notice and produce evidence to controvert the grounds, on which the adjustment is proposed.

9. Director of Income tax (Exemption) v Bagri Foundation [2010] 192 TAXMAN 309 (DELHI)

The assessee had shown the gross total income for the relevant year as Rs. 6,92,453 and deducted therefrom the amount applied for charitable purposes to the extent of Rs. 27,28,001. The assessee had made application of income by donation of Rs. 26,66,000 comprising of donation of Rs. 25 lakhs to BLB Trust as corpus donation and Rs. 1,66,000 to others. The source of the balance amount over and above the income of Rs. 6,92,453 was from FDR encashment, MIP units and MIP-97 encashment which was the accumulation of income of the past and encashment made out of these accumulations/funds.

The ITO found that that donation of Rs. 25 lakhs as corpus donation to BLB Trust was not from current year's income but out of accumulations from the income of earlier years. The ITO, being of the opinion that owing to the Explanation¹ appended to section 11(2), any donation made out of income accumulation or set apart during the period of accumulation or thereafter to any trust or institution registered under section 12AA, as BLB Trust was, was liable to be added in the income of the donor trust, accordingly, computed the income as aforesaid of the assessee.

On Appeal the High Court ruled that:

The additional condition by way of Explanation to section 11(2) is intended to apply only to accumulations in excess of 15% under section 11(2) and not to accumulations up to 15% under section 11(1)(a). Therefore, even if donations are made by assessee-trust out of accumulations from previous years and not out of surplus reserves (amounts accumulated in excess of 15% in terms of section 11(2)), same would still not be liable to be included in income of assessee so far as said accumulations are not beyond accumulation of 15% permitted by section 11(1)(a).

¹ Any amount credited or paid, out of income which is not applied, but is accumulated or set apart, to any trust or institution registered under section 12AA /10(23C), shall not be treated as application of income for charitable or religious purposes, either during the period of accumulation or thereafter.

10. CIT v Saurashtra Cement Ltd. [2010] 192 TAXMAN 300 (SC)

The assessee, engaged in the manufacture of cement, etc., entered into an agreement with the supplier for purchase of additional cement plant for certain consideration. As per terms of the agreement, in the event of delay caused in the delivery of the machinery, the assessee was to be compensated by the supplier at the rate of 0.5 per cent of the price of the respective portion of the machinery for delay of each month by way of liquidated damages without proof of actual loss. The supplier defaulted and failed to supply the plant and machinery on the scheduled time and, therefore, as per the terms of the contract, the assessee received certain amount from the supplier by way of liquidated damages. The Assessing Officer treated the amount as a Revenue Receipt.

It was clear from the agreement that the liquidated damages were to be calculated at 0.5 per cent of the price of the respective machinery and equipment of which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It was evident that the damages to the assessee were directly and intimately linked with the procurement of a capital asset, i.e., the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement. The amount received by the assessee towards compensation for sterilization of the profit-earning source and not in the ordinary course of its business, was a capital receipt in the hands of the assessee.

11. CIT v Walfort Share & Stock Brokers (P.) Ltd. [2010] 192 TAXMAN 211 (SC)

The assessee earned income, mainly from share trading and brokerage. It purchased some units of a mutual fund before the record date, as a result of which it became entitled to receive dividend on the units. As a result of declaration of dividend, the value of the unit reduced and the assessee sold all the units within 3 days at a loss. The assessee claimed exemption of dividend income and also set-off the short-term capital loss incurred on sale of the units. The Department, however, contended that the loss on purchasing the cum-dividend units and selling the ex-dividend units will be an expenditure attributable towards earning tax free dividend income, which is not allowable under section 14A. Therefore, the Department disallowed the set-off claimed.

The Supreme Court observed that the insertion of section 14A is the serious attempt on the part of the Parliament not to allow deduction in respect of any expenditure incurred by the assessee in relation to income, which does not form part of the total income under the Act against the taxable income. In other words, section 14A clarifies that expenses incurred can be allowed only to the extent they are relatable to the earning of taxable income. In many cases, the nature of expenses incurred by the assessee may be relatable partly to the exempt income and partly to the taxable income. In the absence of section 14A, the expenditure incurred in respect of exempt income was being claimed against taxable income. The mandate of section 14A is clear. It desires to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time, avail the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income.

The basic principle of taxation is to tax the net income, i.e., gross income minus the expenditure. On the same analogy, the exemption is also in respect of net income. Expenses allowed can only be in respect of earning of taxable income. This is the purport of section 14A.

The Apex Court held that the assessee had received income which was exempt under section 10(35) and there has been a sale of units, which resulted in a short-term capital loss. The assessee had taken advantage of the provisions of law and earned tax free income, which is not an abuse of law. Even if the transaction was pre-planned, it does not impeach the genuineness of the transaction. The provisions of section 94(7) relating to dividend stripping will apply to this case and not section 14A. In such a case, loss to the extent of dividend income will be ignored and not the entire loss. Losses over and above the dividend received would be allowed to be set-off, which makes it clear that the dividend stripping transaction is not a sham or bogus transaction.

For attracting section 14A, there has to be a proximate cause for disallowance, which is its relationship with the tax exempt income and since pay-back or return of investment is not such proximate cause, section 14A was not applicable in the instant case. Thus, in the absence of such proximate cause for disallowance, section 14A could not be invoked.

Expenditure incurred' in section 14A refers to expenditure on rent, taxes, salaries, interest, etc., in respect of which allowances are provided for under sections 30 to 37; a return of investment or a pay back is not 'expenditure incurred' in terms of section 14A. For attracting section 14A, there has to be a proximate cause for disallowance, which is its relationship with tax exempt income and since pay-back or return of investment is not such proximate cause, section 14A is not applicable in such cases.

In this case, it was observed that section 14A and 94(7) operate in two different fields. Section 14A would apply to cases where the assessee incurs expenditure to earn tax-free income. This section was introduced to apportion expenditure between taxable and non-taxable income and disallow the portion of expenditure incurred to earn non-taxable income. The basic principle of section 14A is to tax net income i.e., gross income less expenditure. However, section 94(7) would be attracted where there is an acquisition of securities or unit and the loss arises subsequently at the time of sale of such securities or unit, after receipt of exempt income. Therefore, section 14A comes into play when there is a claim for deduction of an expenditure, whereas section 94(7) would apply when there is a claim for allowance of loss.

12. Kanchanganga Sea Foods Ltd. v CIT [2010] 192 TAXMAN 187 (SC)

The assessee-company was engaged in the sale and export of sea food and for that purpose it had obtained permit to fish in the exclusive economic zone of India. To exploit the fishing rights, it entered into an agreement² chartering two fishing vessels with a non-resident company. The charter fee was payable from earnings from the sale of fish and for that purpose, 85 per cent of the gross earnings from the sale of fish was to be paid to the non-resident company. Trawlers were delivered to the assessee with full equipment and complement of staff at the Chennai Port. Actual fishing operations were done outside the territorial waters of India but within the exclusive economic zone. The voyage commenced and concluded at the Chennai Port. The catch made at high seas were brought to Chennai

² The Deponent Owners will provide fishing vessels, as approved by Government of India, for all inclusive charter fee of US\$ 600,000.00 per vessel per annum. The charter fee is inclusive of fuel cost, maintenance repairs, wages, food for the crew and any other expenses incurred in connection with the operation of the vessel. They will provide training to the Indian crew in all aspects of fishing techniques, maintenance and running of the engine. In addition :

(a) The Deponent Owners should pay the charterers Rs. 75,000 or 15 per cent of the gross value of the catch whichever is more.

(b) Annual charter fee shall be maximum of US\$ 600,000 per vessel per annum payable by way of 85 per cent of gross earning from the fish sales subject to the condition that this will not exceed 85 per cent of the sales value of the catch per vessel per annum on voyage to voyage basis. Minimum 15 per cent of the earning by way of sales value of catch of fish should accrue to the charterer. Payment to the Deponent Owners should not exceed the above charter fee.

(c) Export value of catch from the chartered vessels should not be lower than the prevailing international market price at the time of export.

where a surveyor of the Fishery Department verified the log books and assessed the value of the catch over which local taxes were levied and paid. The assessee, after paying the dues, arranged customs clearance for the export of the fish and the trawlers, which were used for fishing, carried the fish to the destination chosen by non-resident company. The trawlers reported back at the Chennai Port after delivering the fish at the destination and commenced another voyage. The assessee did not deduct tax from the payments made to the non-resident company contending that the non-resident company did not carry out activities or operations in India which had resulted in accrual of income in India and, hence, it was not obliged to make any deduction. The Assessing Officer held that the income earned by the non-resident company was chargeable to tax under section 5(2) and the assessee, having made payment to the foreign company of the sums representing hire charges, without deducting taxes at source, had committed default under the provisions of section 195.

On appeal the Supreme Court ruled that:

Assessee-company was engaged in sale and export of sea food and for that purpose it obtained permit to fish in EEZ of India. To exploit fishing rights, it entered into an agreement, chartering two fishing vessels with a non-resident company. Charter fee was payable from earnings from sale of fish and for that purpose 85% of gross earnings from sale of fish was to be paid to non-resident company. Actual fishing operations were done outside territorial waters of India but within EEZ. Thereafter, chartered vessels with entire catch were brought to Indian Port, catch were certified for human consumption, valued, and after customs and port clearances, non-resident company received 85% of catch.

So long as the catch was not apportioned, the entire catch was the property of the assessee and not of non-resident company, as the latter did not have any control over the catch. It was after the non-resident company was given share of 85 per cent of the catch, it did come within its control. It is trite to say that to constitute income, the recipient must have control over it. Thus, the non-resident company effectively received the charter fee in India. Therefore, the receipt of 85 per cent of the catch was in India and that being the first receipt in the eyes of law and being in India, would be chargeable to tax. The non-resident company having received the charter fee in the shape of 85 per cent of the fish catch in India, sale of fish and realization of sale consideration of fish by it outside India would not mean that there was no receipt in India. When 85 per cent of the catch was received after valuation by the non-resident company in India, in sum and substance, it amounted to receipt of value of money. Had it not been so, the value of the catch ought to have been the price for which non-resident company sold it at the destination chosen by it. According to the terms and conditions of the agreement, charter fee was to be paid in terms of money, i.e., US \$ 600,000 per vessel per annum “payable by way of 85 per cent of gross earning from the fish-sales”. In the light of what had been stated above, there was no escape from the conclusion that income earned by the non-resident company was chargeable to tax under section 5(2).

Therefore, the assessee was liable to deduct tax under section 195 on the payment made to the non-resident company.

13. 3i Infotech Ltd. v ACIT [2010] 192 TAXMAN 137 (BOM.)

Proviso stipulates that where an assessment has been carried out under section 143(3), action after the expiry of four years from the end of the relevant assessment year would stand barred unless income chargeable to tax has escaped assessment, inter alia, by the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year. Hence, where reopening of the assessment takes place beyond a period of four years from the end of the relevant assessment year, the test which the statute requires to be applied is based on the nature of the disclosure that is made by the assessee. If the assessee has made a full and true disclosure of all the material facts for his assessment, the action of reopening the assessment would stand barred. Contrarily, where there is a failure on the part of the assessee to disclose fully and truly all material facts necessary

for the assessment, the reopening of the assessment would stand validated, even if it takes place beyond the expiry of a period of four years.

An assessee cannot rest content merely with the production of account books or other evidences during the course of the assessment proceedings and challenge the reopening of the assessment on the ground that if the Assessing Officer was to initiate a line of enquiry, he could, with due diligence, have arrived at the material evidence. The primary obligation to disclose is on the assessee and the burden of making a full and true disclosure of material facts does not shift to the Assessing Officer. The assessee has to disclose fully and truly all material facts. Producing voluminous records before the Assessing Officer does not absolve the assessee of the obligation to disclose material facts and the assessee cannot be heard to say that if the Assessing Officer would have conducted a further enquiry, he would have come into possession of material evidence with the exercise of due diligence. An assessee cannot throw reams of paper at the Assessing Officer and rest content in the belief that the Officer better beware or ignore the hidden crevices in the pointed material at his own peril.

The Parliament has used the words 'necessarily' in the Explanation 1. The expression 'necessarily' means inevitably or as a matter of a compelling inference. The production of account books or other evidence before the Assessing Officer will not, therefore, inevitably amount to an inference of disclosure within the meaning of the first proviso. The words 'not necessarily' indicate that 'whether it is a disclosure or not within the meaning of the said section would depend on the facts and circumstances of each case, that is, the nature of the document and circumstances in which it is produced'. The nature of the documents and the circumstances in which these are produced before the Assessing Officer will determine the question. If the material is not written large on the document, but is embedded in voluminous records or books of account which require careful scrutiny by the Assessing Officer, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and the case would attract the Explanation.

14. CIT v Goel Builders [2010] 192 TAXMAN 28 (ALL.)

The assessee was a firm engaged in the business of manufacture and sale of heavy pipes and coolers. It took on lease a plot of land from Lucknow Development Authority for construction of a commercial complex. It let out the open space of its complex and the rental income so earned was offered for taxation under the head, 'Profits and gains of business or profession'. For the initial assessment years the department accepted the claim of the assessee to the effect that the rental income was taxable under the head 'Profits and gains of business or profession'. However, for the subsequent assessment years, the Assessing Officer taxed said income under the head 'Income from house property'. On appeal the High Court ruled:

A plain reading of section 27 shows that the owner of the house property means a house or building owned by an individual or a person as an impartible estate. It cumulatively shows that the initial acquisition of an estate should be for dwelling or habitation or non-commercial purpose used to generate income. Further a plain reading of sections 22 to 27 shows that 'the house property' means property constructed for dwelling or residential purpose, a portion of which or whole of the property or its appurtenant land is let out on rent to earn profit. It does not include a property or building constructed or purchased under the planned business activity. That is why the Legislature in its wisdom has included the house property with rental value and possession by way of transfer to spouse, etc. Section 27 further provides that the co-operative society, company or an association from whom the property is allotted or leased out to a person shall be deemed to be the owner of the building or part thereof. Accordingly, to assess the income under the head 'Income from house property', it shall be necessary to find out from the record the aim and object and purpose of the building's owner while acquiring or constructing or purchasing the same and use for the rental purpose to earn income.

In the instant case, from the very beginning, the plot purchased and building constructed by the assessee was for commercial use. That was why, continuously since almost a decade, the rental income of the assessee was assessed as 'business income' and not as income from house property. Nothing had been brought on record to show that the assessee had constructed the building as house property for own use. The investment made by the assessee while constructing the commercial complex seemed to be a business investment and, hence, the rental income earned from the building as a natural consequence would be business income.

Apart from consistency factor, from the material on record, it might be safely inferred that the assessee constructed the building exclusively as a part of its commercial activity to earn income by letting it on rent. Accordingly, the income so drawn would be business income.

Note : Students should also keep in mind the judgement of Neha Builders (P) Ltd. wherein the Court had ruled that rental income earned on a property held as SIT would be business income.

Although there is a contrary judgement in case of CIT v Chennai Properties and Investments Ltd³, wherein the Court took a view that even if the business of the assessee is to own and give houses on rent or to trade in houses, the annual value of the houses owned by him during the PY would be taxable under section 22. It will be so taxable even if property is held by the assessee as stock in trade.

15. CIT v Zoom Communication (P.) Ltd. [2010] 191 TAXMAN 179 (DELHI)

So long as assessee has not concealed any material fact or any factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty under section 271(1)(c), even if claim made by him is unsustainable in law, provided that he either substantiates explanation offered by him or explanation, even if not substantiated, is found to be bona fide. If assessee makes a claim which is not only incorrect in law, but is also wholly without any basis and explanation furnished by him for making such a claim is not found to be bona fide, Section 271(1)(c) would come into play and assessee will be liable to penalty.

Note : CIT v. Reliancepetro Products (P.) Ltd. [2010] 322 ITR 158/189 Taxman 322 (SC) [Para 18] distinguished.

16. Hindustan Unilever Ltd. v DCIT [2010] 191 TAXMAN 119 (BOM.)

A. Date of investment for the purposes of section 54EC must be regarded as date on which payment was made and was received by National Housing Bank. The date on which the bonds were received were of no relevance. If the date of deposit of money with the issuer was within a period of six months from date of transfer of asset, provisions of section 54EC had been complied with by assessee.

B. Loss sustained by an export oriented unit can be set off against normal business income.

All the four units of the assessee were eligible under section 10B. Three units had returned a profit during the course of the assessment year, while the one unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income.

C. Where power to rectify an order of assessment under section 154(1) is adequate to meet a mistake or error in order of assessment, Assessing Officer must take recourse to that power as opposed to wider power to reopen assessment.

³ (2004)266 ITR 685 (MAD)

- (i) Where the issue was only of a computational error that had been made by the Assessing Officer which was capable of being rectified under section 154(1) and
- (ii) the time period under section 154(7) was also available .
- (iii) The computational error could not be attributed to any act or omission on the part of the assessee,

Rectification under section 154 for correcting the computational error would be the most appropriate action and, consequently, recourse to the provisions of section 147 was not warranted.

Where the power to rectify an order of assessment under section 154(1) is adequate to meet a mistake or error in the order of assessment, the Assessing Officer must take recourse to that power as opposed to the wider power to reopen the assessment. The assessee cannot be penalized for a fault of the Assessing Officer. The provisions of the statute lay down overlapping remedies which are available to the revenue, but exercise of these remedies must be commensurate with the purpose that is sought to be achieved by the Legislature. The reopening of an assessment under section 147 has serious ramifications.

All statutory powers have to be exercised reasonably. Where a statute confers an area of discretion, the exercise of that discretion is structured by the requirement that discretionary power must be exercised reasonably. Where the statute provides for several remedies, the choice of the remedy must be appropriate to the underlying basis and object of the conferment of the remedy. A simple computational error can be resolved by rectifying an order of assessment under section 154(1). It would be entirely arbitrary for the Assessing Officer to reopen the entire assessment under section 147 to rectify an error or mistake which can be rectified under section 154. An arbitrary exercise of power is certainly not a consequence which the Parliament contemplates.

Case name missed out

The assessee, as a part of its plantation business, carried on a composite activity of growing tea leaves which were then utilized for the manufacture and sale of dried tea leaves.

The assessee has claimed deduction of Rs. 10,84,07,449 as loss of Plantation division deductible under rule 8, (being 40% of the overall loss which was sustained as the loss that was attributable to the business activity of the manufacture and sale of tea at its two plantation units), the business income included in the total income determined by the assessee is at Rs. 18,15,59,78,868. In the same computation of income, while determining the business income, the assessee has deducted an amount of Rs. 10,84,07,449 as loss of Plantation division.

According to assessee, in terms of rule 8, 60 per cent of loss, which was sustained as a result of its composite operations, should be attributable to agricultural activity and balance representing 40 per cent attributable to business activities should be set off against normal business profit.

Rule 8 provides that income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it was income derived from business and 40 per cent of such income would be deemed to be the income liable to tax. Rule 8, in other words, enacts a legal fiction for segregation of agricultural income from business income, where an assessee grows tea, which constitutes an agricultural activity and also manufactures and sells tea, which is a non-agricultural business activity.

In computation of income from the sale of tea as if it was income derived from business, for purposes of rule 8, it is impossible to comprehend that the expenditure incurred by an assessee, wholly and exclusively for the purposes of business should be disregarded. Obviously the expenditure cannot be disregarded. The assessee was lawfully entitled to adjust loss which arose as a result of business activity under rule 8.

17. Authority for Advance Ruling

As per section 245R, The ruling of AAR would apply and be binding only on applicant and revenue in relation to transaction for which it is sought. Ruling in any other case cannot displace binding character of advance ruling rendered between assessee and revenue.

An assessment order, which gives effect to a binding ruling of AAR, cannot be regarded as being erroneous or as being prejudicial to interest of revenue.

18. Director of Income tax v Society For Worldwide Inter Bank Financial, Telecommunications [2010] 323 ITR 249 (DELHI)

Revenue had stated that the return was filed by the assessee on 27-3-2000, and the notice under section 143(2) was served upon the authorized representative of the assessee by hand when the authorized representative of the assessee came and filed return. However, the date of the notice was mistakenly mentioned as 23-3-2000. Assuming the aforesaid to be true, the notice was served on the authorized representative simultaneously on his filing the return which clearly indicated that the notice was ready even prior to the filing of the return. Thus, even if one took the statement of the Assessing Officer at face value, it would amount to gross violation of the scheme of section 143(2).

The notice was, thus, not valid.

19. CIT v Gopala Naicker Bangaru [2010] 193 TAXMAN 71 (MAD.)

As per profile submitted by the assessee, he was born in a village. During his childhood, Goddess Adhiparasakthi frequented his dreams to make it known that she wanted to build a temple and use it to alleviate the sufferings of humanity and, accordingly, the assessee had built a temple which was also known as 'Sakthi peedam'. The devotees, on important occasions, used to throng the temple and as per the practice prevailing in the temple, the devotees, irrespective of their gender, could perform poojas and abishegams to the presiding deity, namely, Goddess Parasakthi. The abovesaid practice of devotees performing abishegams and poojas to the presiding deity was not prevalent in the State and, therefore, out of love and affection and veneration, they used to assemble in great numbers on the eve of the assessee's birthday and offer gifts. The amounts of gifts so received by the assessee were shown as capital receipts in his balance sheet. However, during assessment, the Assessing Officer treated the gifts as having nexus to his profession as a religious head and, hence, brought the entire income within the net of tax.

On appeal the High Court ruled that:

The religion is a matter of faith stemming from the depths of the heart and mind and is a belief which binds the spiritual nature of men to supernatural being. Faith, in the strict sense, constitutes firm reliance on the truth of religious doctrines in every system of religion and religion, faith or devotion are not easily interchangeable.

In the instant case, the assessee, as a religious head, was not involving himself in any profession or vocation and also not performing any religious rituals/poojas for his devotees for some consideration or the other. In fact, he was doing charitable and spiritual work and made his devotees to follow the same for the benefit of the mankind.

The devotees out of natural love, affection and veneration used to assemble in large numbers on the birthdays of the assessee and voluntarily made gifts, and by any stretch of imagination, it could not be said that the amounts received by the assessee by way of gifts would amount to vocation or profession. It was not the case of the department that the devotees were compelled to make gifts on the occasion of the assessee's birthday. The amounts/gifts received by the assessee could not be said to have any direct nexus with any of his activities as a religious person/head.

On facts, amounts/gifts received by assessee could be said to have direct nexus with any of his activities as a religious person or would amount to his vocation or profession. Therefore the said amounts were not taxable under Act.

20. Timken Co. [2010] 193 TAXMAN 20 (AAR - NEW DELHI)

Section 115JB would not be applicable to a foreign company which has no presence or PE in India

Applicant does not have any physical presence in India in the form of an office or branch or a PE, the provisions of section 115JB are not applicable on the sale of shares of a listed company TIL, by the applicant, which has suffered securities transaction tax and accordingly, tax exempt under section 10(38).

21. CIT v Udupi Builders P. Ltd. (2009) 319 ITR 440 (Kar.)

The assessee-company treated the amount of subsidy received from the State Government, as a capital investment. The subsidy was granted by the State Government to encourage the hotel industry. The Assessing Officer opined that the same was a revenue receipt. The Commissioner (Appeals) held that the subsidy had been granted to the assessee by the State Government as per the package of incentives and concessions and that it was towards investment and not a revenue receipt. The Tribunal confirmed the order passed by the Commissioner (Appeals).

The Revenue filed an appeal to the High Court contending that since the subsidy is received by the assessee after completion of the hotel project and commencing of the business, such receipt has to be taken as a revenue receipt and not a capital investment.

The High Court held that the hotel industry was established based on the subsidy announced by the State Government to encourage tourism and the State Government was in the habit of releasing the subsidy amount depending upon the budgetary allocation in each year. In several cases, the State Government had released the subsidy amount even after ten years of the commencement of the project. Therefore, the subsidy received has to be treated as a capital receipt and would not be liable to tax.

22. CIT v VTM Limited (2009) 319 ITR 336 (Mad.)

The assessee is a company engaged in the business of manufacture of textile goods. It claimed additional depreciation on the setting up of wind mills for generation of power. The Revenue contended that the setting up of a windmill for generation of power had absolutely no connection with the business of the company i.e. for the manufacture of textile goods, and, therefore, the company was not entitled to claim the additional depreciation under section 32(1)(ia).

The High Court held that in order to claim the benefit of section 32(1)(ia), what is required to be satisfied is that the new machinery or plant should have been acquired and installed, by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The provision does not state that the setting up of a new machinery or plant should have any operational connectivity to the article or thing that is already being manufactured by the assessee. Hence, it was held that the assessee is entitled to additional depreciation on setting up of a wind mill.

23. CIT v Sundaram Clayton Ltd. (2010) 321 ITR 69 (Mad)

The Delhi High Court observed that this issue is covered by its decision in the case of CIT v. Southern Roadways Ltd. (2007) 288 ITR 15. In that case, it was held that the upgradation of computers by changing certain parts thereby enhancing the configuration of the computers for improving their efficiency, but without making any structural alterations is not a change of an enduring nature.

Therefore, applying the ratio of the above decision in this case, the Madras High Court held that the expenditure incurred on purchase of software components has to be treated as a revenue expenditure.

24. CIT v Samtel Color Ltd. (2010) 326 ITR 425 (Delhi)

The issue in this case relates to the admissibility of corporate membership fee paid to a club (viz., Indian Habitat Centre and Sports and Cultural Club).

The Assessing Officer disallowed the same on the ground that the expenditure resulted in benefit of an enduring nature hence, was on capital account.

The High Court held that the expenditure incurred towards admission fee for corporate membership was for the benefit of the company. The “business purpose” basis adopted for eligibility of expenditure under section 37 was the right approach and this was further strengthened by the Tribunal’s findings that it was the assessee-company which nominated the employees who would be eligible to avail the benefit of the corporate membership. The High Court further observed that an expenditure which gives enduring benefit is by itself not conclusive as regards the nature of the expenditure. The true test for qualification of expenditure under section 37 is that it should be incurred wholly and exclusively for the purposes of business and the expenditure should not be towards capital account. In the instant case, the admission fee paid towards corporate membership is an expenditure incurred wholly and exclusively for the purposes of business and not towards capital account as it only facilitates smooth and efficient running of a business enterprise and does not add to the profit-earning apparatus of the business enterprise.

25. CIT v. Sagar Talkies (2010) 325 ITR 133 (Karn.)

The High Court observed held that the assessee had provided certain amenities to its customers by replacing the old system with a better sound system and by introducing such system, the assessee had not increased its income in any way. The assessee installed dolby stereo system instead of repairing the existing old stereo system. This had not benefited the assessee in any way with regard to the total income since there was no change in the seating capacity of the theatre or increase in the tariff rate of the ticket. In such a case, the expenditure on such change of sound system could not be considered capital in nature.

26. CIT v. Chandni Buchar (2010) 323 ITR 0510 (Pun.& Har.)

The Assessing Officer added the difference between purchase price disclosed in the sale deed and purchase price of the property adopted for the purpose of paying the stamp duty to the total income of the assessee as income from unexplained sources. The Commissioner of Income-tax (Appeals) deleted this addition by holding that section 50C is a deeming provision for the purpose of bringing to tax the difference as capital gain. Further, he also held that in the absence of any legally acceptable evidence, valuation done for the purpose of section 50C would not represent actual consideration passed on to the seller. The Tribunal also held that valuation done by any State agency for the purpose of stamp duty would not ipso facto substitute the actual sale consideration as being passed on to the seller by the purchaser in the absence of any admissible evidence. The Assessing Officer is obliged to bring on record positive evidence indicating the fact that the assessee has paid anything more than the sum disclosed in the purchase deed.

In this case, the assessee has discharged the burden of proving the sale consideration as projected in the sale deed by producing the original bank statement.

The High Court, therefore, held that the view taken by the Tribunal while accepting the order of the Commissioner of Income-tax (Appeals) does not suffer from any legal infirmity.

27. CIT v. Nestor Pharmaceuticals Ltd. / Sidwal Refrigerations Ind Ltd. v. DCIT (2010) 322 ITR 631 (Delhi)

In this case, the assessee had started trial production in March 1998 whereas commercial production started only in April, 1998. Therefore, the assessee claimed deduction under section 80-IB for the assessment years 1999-2000 to 2003-04, whereas the Assessing Officer denied deduction for A.Y.2003-04 on the ground that the five year period would be reckoned from A.Y.1998-99, since the trial production began in March, 1998.

The Tribunal observed that not only the trial production had started in March 1998 but there was in fact sale of one water cooler and air-conditioner in the month of March 1998. The explanation of the assessee was that this was done to file the registration under the Excise Act and Sales-tax Act.

The High Court observed that with mere trial production, the manufacture for the purpose of marketing the goods had not started which starts only with commercial production, namely, when the final product to the satisfaction of the manufacturer has been brought into existence and is fit for marketing. However, in this case, since the assessee had effected sale in March 1998, it had crossed the stage of trial production and the final saleable product had been manufactured and sold. The quantum of commercial sale and the purpose of sale (namely, to obtain registration of excise / sales-tax) is not material. With the sale of those articles, marketable quality was established. Therefore, the conditions stipulated in section 80-IB were fulfilled with the commercial sale of the two items in that assessment year, and hence the five year period has to be reckoned from A.Y.1998-99.

28. CIT v. Anil Hardware Store (2010) 323 ITR 0368 (HP)

The partnership deed of the assessee firm provided that in case the book profits of the firm are up to Rs. 75,000, then the partners would be entitled to remuneration up to Rs. 50,000 or 90 per cent of the book profits, whichever is more. In respect of the next Rs. 75,000, it is 60 per cent and for the balance book profits, it is 40 per cent. Thereafter, it is further clarified that the book profits shall be computed as defined in section 40(b), or any other provision of law as may be applicable for the assessment of the partnership firm. It has also been clarified that in case there is any loss in a particular year, the partners shall not be entitled to any remuneration. Clause 7 of the partnership deed laid down that the remuneration payable to the partners should be credited to the respective accounts at the time of closing the accounting year and clause 5 stated that the partners shall be entitled to equal remuneration.

The High Court held that the manner of fixing the remuneration of the partners has been specified in the partnership deed. In a given year, the partners may decide to invest certain amounts of the profits into other venture and receive less remuneration than that which is permissible under the partnership deed, but there is nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed. The method of remuneration having been laid down, the assessee-firm is entitled to deduct the remuneration paid to the partners under section 40(b)(v).

29. CIT v. Tony Electronics Limited (2010) 320 ITR 378 (Del.)

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 be counted from the date of the order of the Appellate Authority.

Note - In this case, the Delhi High Court has followed the decision of the Supreme Court in case of Hind Wire Industries v. CIT (1995) 212 ITR 639.

30. CIT v. Earnest Exports Ltd. (2010) 323 ITR 577 (Bom.)

In this case, the High Court observed that the power under section 254(2) is limited to rectification of a mistake apparent on record and therefore, the Tribunal must restrict itself within those parameters. Section 254(2) is not a carte blanche for the Tribunal to change its own view by substituting a view which it believes should have been taken in the first instance. Section 254(2) is not a mandate to unsettle decisions taken after due reflection.

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 reappraisal of the correctness of the earlier decision on merits, which is beyond the scope of the power conferred under section 254(2).

31. CIT v. Bharti Cellular Ltd. (2009) 319 ITR 139 (Del.)

The assessee-companies engaged in providing cellular telephone facilities to their subscribers, had been granted licences by the Department of Telecommunication for operating in specified circles. The licences stipulated that the Department of Telecommunication/MTNL/BSNL would continue to operate in the service areas in respect of which licences were issued. Where calls were to be made by subscribers of one network to another network, such calls were to be routed through MTNL/BSNL through interconnection points known as ports. For providing interconnection, the assessees entered into agreements with MTNL/BSNL, which were regulated by the Telecom Regulatory Authority of India. Under the agreement, the assessees had to pay interconnection, access charges and port charges to the interconnection providers. The Department was of the view that interconnect/port access charges were liable for tax deduction at source in view of the provisions of section 194J on the understanding that these charges were in the nature of fee for technical services.

The High Court held that the services rendered relating to interconnection, port access did not involve any human interface and, therefore, the services could not be regarded as "technical services" as contemplated under section 194J. The interconnect/port access facility was only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies did not provide any assistance to the assessees in managing, operating, setting up their infrastructure and networks. Even though the facility of interconnection and port access provided by MTNL/other companies was "technical" in the sense that it involved sophisticated technology, the expression "technical service" is not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expressions "managerial service" and "consultancy service" under Explanation 2 to section 9(1)(vii). The expression "technical service" would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots. The interconnect charges/port access charges could not, therefore, be regarded as fees for technical services, and hence TDS provisions under section 194J are not attracted.

32. CIT v. Japan Airlines Co. Ltd. (2010) 325 ITR 298 (Del.)

On this issue, the Delhi High Court referred to the case of United Airlines v. CIT (2006) 287 ITR 281, wherein the issue arose as to whether landing and parking charges could be deemed as rent under section 194-I. The Court observed that rent as defined in the said provision had a wider meaning than “rent” in common parlance. It included any agreement or arrangement for use of land. The Court further observed that when the wheels of the aircraft coming into an airport touch the surface of the airfield, use of the land of the airport immediately begins. Similarly, for parking the aircraft in that airport, again, there is use of the land. Therefore, the landing and parking fee were definitely “rent” within the meaning of the provisions of section 194-I as they were payments for the use of the land of the airport.

33. CIT v. Emilio Ruiz Berdejo (2010) 320 ITR 190 (Bom.)

The High Court held that the person who fails to deduct tax is liable to pay interest under section 201(1A). Sections 234A, 234B and 234C cast liability on the assessee to pay interest for the default committed by him in the circumstances mentioned in the sections. Interest charged under sections 234A, 234B and 234C are compensatory and not in the nature of penalty.

Therefore, where the deductor had already discharged tax liability with interest payable under section 201(1A), no further interest could be claimed by the Revenue from the deductee-employee either under section 234A or section 234B or section 234C.