Significant Legal Decisions

Direct Tax Laws

1. Would refund of excise duty and grant of interest subsidy under the incentive scheme formulated by Central Government for public interest, namely, to accelerate industrial development, generate employment and create opportunities for self-employment in state of Jammu and Kashmir be treated as a revenue receipt or a capital receipt?

   Shree Balaji Alloys v. CIT (2011) 333 ITR 335 (J&K)

   In the present case, the Tribunal contended that excise duty refund and grant of interest subsidy received by the assessee in pursuance of the New Industrial Policy introduced in Jammu and Kashmir were revenue receipt and not capital receipt on the grounds that:-

   (i) the aforesaid incentives were not given to establish industrial units because the industry was already established.
   (ii) the incentives were available only on commencement of commercial production.
   (iii) the incentives were recurring in nature.
   (iv) the incentives were not given for acquisition of capital assets.
   (v) the incentives were given for easy market accessibility and to run the business more profitably.

   The High Court observed that the fact that incentives would become available to industrial units entitled thereto from the date of commencement of commercial production and the fact that these were not granted for creation of new assets were not the sole criteria for determining the nature of subsidy. The fact that such incentives were provided to achieve a public purpose should also be considered to determine the nature of subsidy and hence, such subsidy could not be construed as a production or operational incentive for the benefit of the assessee. Hence, the aforesaid incentives are capital receipts not liable to taxation.

2. Can an assessee engaged in letting out of rooms in a lodging house also treat the income from renting of a building to bank on long term lease as business income?

   Joseph George and Co. v. ITO (2010) 328 ITR 161 (Kerala)

   On the above issue, it was decided 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.

3. Would the phrase "used for purpose of business" in respect of discarded machine include use of such asset in the earlier years for claim of depreciation under section 32?

   CIT v. Yamaha Motor India Pvt. Ltd. (2010) 328 ITR 297 (Delhi)

   The issue under consideration in this case is whether depreciation is allowable on the written down value of the entire block, even though the block includes some machinery which has already been discarded and hence, cannot be put to use during the relevant previous year.

   On the above issue, it was observed that the expression "used for the purposes of the business" in section 32 when used with respect to discarded machinery would mean the use in the business, not in the relevant financial year/previous year, but in the earlier financial years. The discarded machinery may not be actually used in the relevant previous year but depreciation can be claimed as long as it was used for the purposes of business in the earlier years provided the block continues to exist in the relevant previous year. So, the condition for claiming depreciation in respect of the discarded machine would be satisfied if it is used in the earlier previous years for the business.

4. **Is the assessee entitled to depreciation on value of goodwill considering it as "other business or commercial rights of similar nature" within the meaning of an intangible asset?**

   B. Raveendran Pillai v. CIT (2011) 332 ITR 531 (Kerala)

   Under section 32(1)(ii), depreciation is allowable on intangible assets, being know-how, patents, copyrights, trade marks, license, franchise, or any other business or commercial rights of similar nature.

   In this case, a hospital was run in the same building, in the same town, in the same name for several years prior to purchase by the assessee. By transferring the right to use the name of the hospital itself, the previous owner had transferred the goodwill to the assessee and the benefit derived by the assessee was retention of continued trust of the patients, who were patients of the previous owners. When goodwill paid was for ensuring retention and continued business in the hospital, it was for acquiring a business and commercial right and it was comparable with trade mark, franchise, copyright etc., referred to in the first part of clause (ii) of section 32(1) and so, goodwill was covered by the above provision of the Act entitling the assessee for depreciation.

5. **Can EPABX and mobile phones be treated as computers to be entitled to higher depreciation at 60%?**

   Federal Bank Ltd. v. ACIT (2011) 332 ITR 319 (Kerala)

   On this issue, the High Court held that the rate of depreciation of 60% is available to computers and 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%.

6. **Would expenditure incurred on feasibility study conducted for examining proposals for technological advancement relating to the existing business be classified as a revenue expenditure, where the project was abandoned without creating a new asset?**

   CIT v. Priya Village Roadshows Ltd. (2011) 332 ITR 594 (Delhi)

   In this case, the assessee, engaged in the business of running cinemas, incurred expenditure towards architect fee for examining the technical viability of the proposal for takeover of cinema theatre for conversion into a multiplex/ four-screen cinema complexes. The project was, however, dropped due to lack of financial and technical viability. The issue under consideration is whether such expenses can be treated as revenue in nature, since no new asset has been created.

   On this issue, the High Court observed that, 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. In this case, 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.

7. **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?

Echjay Forgings Ltd. v. ACIT (2010) 328 ITR 286 (Bom.)

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. Hence, 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.

8. Can the waiver of principal amount of loan taken for purchase of capital asset by the bank be treated as “benefit arising out of business” or “a remission of trading liability” for taxability as business income of the company?

   Iskraemeco Regent Ltd. v. CIT (2011) 331 ITR 317 (Mad.)

   The assessee company, engaged in the business of development, manufacturing and marketing of electro-mechanical and static energy meters, took a bank loan for purchase of capital assets. The grant of bank loan for purchase of a capital asset is a capital receipt and not a trading receipt. The provisions of section 41(1) are attracted only in case of remission of a trading liability. Since the loan was taken for purchase of capital assets, waiver of a portion of principal would not amount to remission of a trading liability to attract the provisions 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.

9. Would the special provisions for computing profits under section 44BB be applicable to a non-resident carrying on business of seismic data acquisition and processing under contract with Indian concerns?

   Global Geophysical Services Ltd., In re (2011) 332 ITR 418 (AAR)

   On an application made to the Authority of Advance Ruling by the non-resident on the above issue, the Authority observed that in an identical issue in *Geofizyka Torun SP. Z.O.O. (2010) 320 ITR 0268 (AAR),* it was observed that without seismic data acquisition and interpretation, it is impractical to carry out the activity of prospecting of mineral oil and gas which is a step in aid to its exploration. The seismic data (in processed form) is used to create highly accurate images of the earth's sub-surface which in turn are used by the exploration and production companies for locating potential oil and gas reserves based upon the geology observed.

   Accordingly, in this case, the AAR ruled that the said activities and services of the applicant clearly fell within the description of section 44BB and the income derived by the applicant under the contracts with Indian concerns, namely ONGC and Cairn Energy, for seismic data acquisition and processing were to be computed under the provisions of section 44BB.

10. Can the Assessing Officer bring to tax the actual profits as per books of accounts, if the same is higher than 10% of receipts which are deemed to be the profits under section 44BBB in case of a foreign company engaged in turnkey projects?

DIT v. DSD Noell GmbH (2011) 333 ITR 304 (Delhi)

In the present case, the assessee is a German company providing engineering and technical services for various projects eligible for presumptive taxation scheme under section 44BBB. The assessee filed its return declaring a sum equal to 10% of the amount paid or payable to the assessee under the projects undertaken by it as deemed profits and gains chargeable to tax under the head "Profits and gains of business or profession" as per the provisions of section 44BBB. The Assessing Officer contended that on the basis of books of account maintained by the assessee, the profits could be more than 10% and therefore, the actual profits should be brought to tax by invoking sub-section (2) of section 44BBB.

On the above issue, the Delhi High Court held that if an assessee fulfills all the conditions mentioned in section 44BBB(1), the provisions of sections 28 to 44AA of the Act would not be applicable for computation of its business income, and a sum equal to 10% of the amount paid or payable to such foreign company would be deemed as its business income. Further, under section 44BBB(2), the assessee has the benefit of declaring before the Assessing Officer that the actual profits earned by it were less than 10% but the Revenue cannot take recourse of this sub-section to claim that the profits earned by the assessee were more than 10%.

11. Can exemption under section 54 be claimed in respect of more than one residential flat acquired by the assessee under a joint development agreement with a builder, wherein the property owned by the assessee was developed by the builder who constructed eight residential flats in the said property, four of which were given to the assessee?

CIT v. Smt. K. G. Rukminiamma (2011) 331 ITR 211 (Kar.)

The assessee, being the owner of a property, entered into a joint development agreement with a builder to develop the property. Under the agreement, the builder constructed eight residential flats and handed over four residential flats to the assessee. The entire cost of construction and other expenses were borne by the builder.

The issue under consideration is whether capital gains exemption under section 54 can be claimed in respect of the four residential flats treating them as “a residential house”. In the present case, the Revenue contended that the benefit of deduction under section 54 could be availed only in respect of one residential flat and in respect of the remaining three residential flats, the assessee was not entitled to deduction under section 54.

The Karnataka High Court, applying the decision in *Anand Basappa (2009) 309 ITR 329 (Kar.)* to the present case, held that all the four flats are situated in the same residential building and hence, will constitute "a residential house" for the purpose of section 54. Therefore, the assessee would be entitled to deduction under section 54 in respect of all four flats.

12. What can be the tests to determine “substantial part of business” of lending company for the purpose of application of exclusion provision under section 2(22)?

CIT v. Parle Plastics Ltd. (2011) 332 ITR 63 (Bom.)

Under section 2(22), dividend does not include*, inter alia,* any advance or loan made to a shareholder by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company. The expression used in the exclusion provision of section 2(22) is "substantial part of the business". The expression "substantial part" does not connote an idea of being the "major part" or the part that constitutes majority of the whole. Sometimes a portion which contributes a substantial part of the turnover, though it contributes a relatively small portion of the profit, would be termed as a substantial part of the business. Similarly, a portion which is relatively small as compared to the total turnover, but generates a large portion, say more than 50% of the total profit of the company would also be a substantial part of its business. Percentage of turnover in relation to the whole as also the percentage of the profit in relation to the whole and sometimes even percentage of manpower used for a particular part of the business in relation to the total manpower or work force of the company would be required to be taken into consideration for determining the substantial part of business. The capital employed for a specific division of a company in comparison to total capital employed would also be relevant to determine whether the part of the business constitutes a substantial part.

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 by the Tribunal 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 or 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).

13. **Would the procurements of parts and assembling them to make windmill fall within the meaning of "manufacture" and "production" to be entitled for deduction under section 80-IB?**

CIT v. Chiranjjeevi Wind Energy Ltd. (2011) 333 ITR 192 (Mad.)

The Supreme Court, in *India Cine Agencies v. CIT(2009) 308 ITR 98,* laid down that the test to determine whether a particular activity amounts to "manufacture" or not is whether new and different goods emerge having distinctive name, use and character. Further, the Supreme Court, in *CIT v. Sesa Goa Ltd. (2004) 271 ITR 331,* observed that the word "production" or "produce" when used in comparison with the word "manufacture" means bringing into existence new goods by a process, which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods.

In this case, Madras High Court, applying the above rulings of the Apex Court, observed that the different parts procured by the assessee could not be treated as a windmill individually. Those different parts had distinctive names and only when assembled together, they got transformed into an ultimate product which was commercially known as a "windmill". Thus, such an activity carried on by the assessee would amount to "manufacture" as well as "production" of a thing or article to qualify for deduction under section 80-IB.

Note: The definition of manufacture has been incorporated in section 2(29BA) by the Finance (No. 2) Act, 2009 w.e.f. from 01.04.2009, and it means, *inter alia,* a change in a non-living physical object or article or thing resulting in transformation of the object or article or thing in to a new and distinct object or article or thing having a different name, character and use. Assembling of windmill at factory and putting them at site of customer apparently satisfies this definition of manufacture also.

14. **Can an assessee not claiming deduction under section 80-IB in the initial years claim the said deduction for the remaining years during the period of eligibility, if the conditions are satisfied?**

Praveen Soni v. CIT (2011) 333 ITR 324 (Delhi)

On the above issue, the Delhi High Court held that the provisions of section 80-IB nowhere stipulated a condition that the claim for deduction under this section had to be made from the first year of qualification of deduction failing which the claim will not be allowed in the remaining years of eligibility. Therefore, the deduction under section 80-IB should be allowed to the assessee for the remaining years up to the period for which his entitlement would accrue, provided the conditions mentioned under section 80-IB are fulfilled.

15. Does income derived from sale of export incentive qualify for deduction under section 80-IB?

CIT v. Jaswand Sons (2010) 328 ITR 442 (P&H)

On this issue, the High Court held that income derived from sale of export incentive cannot be said to be income "derived from" the industrial undertaking and therefore, such income is not eligible for deduction under section 80-IB.

16. Would grant of transport subsidy, interest subsidy and refund of excise duty qualify for deduction under section 80-IB?

CIT v. Meghalaya Steels Ltd. (2011) 332 ITR 91 (Gauhati)

The Supreme Court, in *Liberty India v. CIT [2009] 317 ITR 218*, observed that section 80-IB provides for deduction in respect of profits and gains "derived from the business" of the assessee and accordingly, the Parliament intended to cover sources of profits and gains not beyond the first degree. There should be a direct nexus between the generation of profits and gains and the source of profits and gains, the latter being directly relatable to the business of the assessee. Any other source, not falling within the first degree, can only be considered as ancillary to the business of the assessee.

In this case, the High Court observed that the transport and interest subsidies were revenue receipts which were granted after setting up of the new industries and after commencement of production. The transport subsidy would have the effect of reducing the inward and outward transport costs for the purposes of determining the cost of production as well as for sales. However, the subsidy had no direct nexus with the profits or gains derived by the assessee from its industrial activity and the benefit to the assessee was only ancillary to its industrial activity. The subsidies were not directly relatable to the industrial activity of the assessee, and hence they did not fall within the first degree contemplated by the Act. Therefore, the subsidies could not be taken into account for purposes of deduction under section 80-IB.

However, the payment of Central excise duty had a direct nexus with the manufacturing activity and similarly, the refund of the Central excise duty also had a direct nexus with the manufacturing activity, being a profit-linked incentive, since payment of the Central excise duty would not arise in the absence of any industrial activity. Therefore, the refund of excise duty had to be taken into account for purposes of section 80-IB.

Note: Similar ruling was pronounced by the Himachal Pradesh High Court in *CIT* v. *Gheria Oil Gramudyog Workers Welfare Association (2011) 330 ITR 117,* wherein it was held that interest subsidy received from the State Government cannot be treated as "profit derived from industrial undertaking" and hence was not eligible for deduction under section 80-IB.

17. Can interest under sections 234B and 234C be levied where a company is assessed on the basis of book profits under section 115JB?

Joint CIT v. Rolta India Ltd. (2011) 330 ITR 470 (SC)

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. Therefore, interest under sections 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable under section 115JB.

Note – According to section 207, tax shall be payable in advance during any financial year, in accordance with the provisions of sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year. Under section 115JB(1), where the tax payable on total income is less than 18% of "book profit" of a company, the "book profit" would be deemed to be the total income and tax would be payable at the rate of 18%. Since in such cases, the book profit is deemed to be the total income, therefore, as per the provisions of section 207, tax shall be payable in advance in respect of such book profit (which is deemed to be the total income) also.

18. Would the interest earned on surplus funds of a club deposited with institutional members satisfy the principle of mutuality to escape taxability?

Madras Gymkhana Club v. DCIT (2010) 328 ITR 348 (Mad.)

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.

19. Would the payments made by a company to BSNL/ MTNL for the services provided through interconnect / port / access / toll be treated as "fees for technical services" to attract the provisions of tax deduction at source under section 194J?

CIT v. Bharti Cellular Ltd. & Hutchison Essar Telecom Ltd. (2011) 330 ITR 239 (SC)

On this issue, the Delhi High Court had held that the services rendered in relation 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 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 Delhi High Court, therefore, concluded that interconnect charges/port access charges could not be regarded as fees for technical services, and hence, TDS provisions under section 194J were not attracted.

The Supreme Court observed that the problem which arises in these cases is that there is no proper evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place. During the traffic of calls from one place to another, whether there is any manual intervention is one of the points which requires to be examined.

Similarly, the basis for allotment of “capacity” to a service provider and consequences if such “capacity” is exhausted and “additional capacity” is required on an urgent basis, needs to be examined to study whether at that stage, any human intervention is involved. These types of matters cannot be decided without any technical assistance.

The Apex Court was of the view that the Department should not proceed solely on the basis of contracts placed before its officers, but should examine the matter with the support of technical experts so that such matters could be disposed of expeditiously on the basis of factual findings. Accordingly, the Apex Court remitted the matter to the Assessing Officer, directing him to examine the same with the assistance of a technical expert from the side of the Department and to decide the matter within a period of four months.

Note *– Students may note that the Delhi High Court decision was reported in the publication “Select Cases in Direct and Indirect Tax Laws – 2010”. A question has also been framed on the basis of the Delhi High Court ruling in the RTP for May 2011 examination. However, in view of this ruling of the Supreme Court remitting the matter to the Assessing Officer for further examination, the final decision is awaited.*

20. Can difference between commercial price and the published price be treated as additional special commission in the hands of the agents of an airline company to attract TDS provisions under section 194H?

CIT v. Qatar Airways (2011) 332 ITR 253 (Bom.)

In this case, the airline company sold tickets to the agents at a fixed minimum commercial price. The agents were permitted to sell the tickets at a higher price, however, up to the maximum of published price. Commission at the rate of 9% of published price was payable to the agents of the airline company, on which tax was deducted under section 194H. The issue under consideration is whether the difference between the published price and the minimum fixed commercial price amounts to additional special commission in the hands of the agents to attract the provisions of section 194H.

On this issue, the Bombay High Court observed that the airline company would have no information about the exact rate at which the tickets were ultimately sold by its agents. It would be impracticable and unreasonable to expect the assessee to get a feed back from its numerous agents in respect of each ticket sold. Thus, tax at source was not deductible on the difference between the fixed minimum commercial price and the published price, even though the amount earned by the agent over and above fixed minimum commercial price would be taxable as income in his hands.

21. Can discount given on sale of SIM cards and recharge coupons by a telecom company to its distributors under a prepaid scheme be treated as commission to attract the TDS provisions under section 194H?

Vodafone Essar Cellular Ltd. v. ACIT (TDS) (2011) 332 ITR 255 (Kerala)

On this issue, the Kerala High Court observed that it was the SIM card which linked the mobile subscriber to the assessee`s network. Therefore, supply of SIM card by the assessee-telecom company was only for the purpose of rendering continued services to the subscriber of the mobile phone. The position was the same so far as recharge coupons or e-topups were concerned which were only air time charges collected from the subscribers in advance under a prepaid scheme.

There was no sale of any goods involved as claimed by the assessee and the entire charges collected by the assessee from the distributors at the time of delivery of SIM cards or recharge coupons were only for rendering services to ultimate subscribers. The assessee was accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor. Therefore, the distributor only acted as a middleman on behalf of the assessee for procuring and retaining customers and therefore, the discount given to him was within the meaning of commission under section 194H on which tax was deductible.

22. Is disallowance under section 40(a)(i) for non deduction of tax at source attracted in respect of payment for purchase of software from a non-resident, by treating the same as royalty in case where the purchase is for subsequent resale in the Indian market?

CIT v. Dynamic Vertical Software India P. Ltd. (2011) 332 ITR 0222 (Delhi)

In this case, the Delhi High Court held that since the assessee had purchased the software from Microsoft and subsequently sold the same in the Indian market, he had acted as a dealer and therefore the payment to the non-resident, Microsoft, can not be termed as royalty. Therefore, section 40(a)(i) would have no application in this case and the payment made to the non-resident cannot be disallowed under section 40(a)(i) on the ground that no tax was deducted at source.

23. Can penalty under section 271(1)(c) for concealment of income be imposed in a case where the assessee has raised a debatable issue?

CIT v. Indersons Leather P. Ltd. (2010) 328 ITR 167 (P&H)

The assessee company, after discontinuing its manufacturing business, leased out its shed along with fittings and disclosed the income as income from business, whereas the Revenue contended that the same be assessed as "Income from house property. The issue under consideration is whether penalty under section 271(1)(c) can be imposed in such a case.

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.

24. Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety?

Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) 330 ITR 243 (Delhi)[FB]

On this issue, the Delhi High Court observed that the justification of an order passed by the Tribunal recalling its own order is required to be tested on the basis of the law laid down by the Apex Court in *Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466,* dealing with the Tribunal's power under section 254(2) to recall its order where prejudice has resulted to a party due to an apparent omission, mistake or error committed by the Tribunal 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 provision of law that the Tribunal has no inherent power to review its own judgment or order on merits or reappreciate 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 order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record.

The Apex Court, while dealing with the power of the Tribunal under section 254(2) in *Honda Siel Power Products Ltd.,* observed that one of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. In that case, the Tribunal had not considered the material which was already on record while passing the judgment. The Apex Court took note of the fact that the Tribunal committed a mistake in not considering material which was already on record and the Tribunal acknowledged its mistake and accordingly, rectified its order.

The above decision of the Apex Court is an authority for the proposition that the Tribunal, in certain circumstances can recall its own order and section 254(2) does not totally prohibit so. In view of the law laid down by the Apex Court in that case, the decisions rendered by the High Courts in certain cases to the effect that the Tribunal under no circumstances can recall its order in entirety do not lay down the correct statement of law.

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.

Note - In deciding whether the power under section 254(2) can be exercised to recall an order in entirety, it is necessary to understand the true principle laid down in the Apex Court decision. A decision should not be mechanically applied treating the same as a precedent without appreciating the underlying principle contained therein. In this case, the Apex Court decision was applied since prejudice had resulted to the party on account of the mistake of the Tribunal apparent from record.

25. In a case where there is a transfer of shares in a non-resident company from one non-resident to another non-resident, is it possible to infer that the transaction has significant nexus with India to attract the taxability provisions, if it ultimately resulted in transfer of controlling interest in Indian company?

Vodafone International Holdings B.V. v. UOI (2010) 329 ITR 126 (Bom.)

Hutchison Essar Limited (HEL) is an Indian company carrying on the business of providing telecommunication services in India. Hutchison Telecommunication International Limited (HTIL) is a foreign company, registered in Hong Kong. Vodafone International Holdings B.V. (VIH BV), is a Netherlands company controlled by the Vodafone group.

A sale/ purchase agreement was entered in to between VIH BV and HTIL, under which HTIL agreed to procure and transfer to VIH BV, the entire issued share capital of CGP (a foreign company registered in Cayman Islands, Mauritius) free from all encumbrances together with all rights attaching and accruing and together with assignment of loan interest.

VIB HV contended that the transaction represented a transfer of a capital asset, i.e., the share of CGP, and that any gain arising to the transferor or to any other person out of this transfer was not taxable in India because the asset was not situated in India as CGP is a foreign company and also the consideration was paid and received outside India, and hence, there was no sum chargeable to tax in India and the obligation to deduct tax at source by VIH BV under section 195 did not arise.

On the above issue, the Bombay High Court held that, that HTIL had an aggregate of 67% (approx.) of controlling interest in HEL by way of indirect equity shareholding, option agreements, finance agreements, shareholders agreements, etc., through CGP. The transaction between HTIL and VIH BV 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 in HEL to VIH BV. The rights and entitlements included transfer of control premium, use and rights to the Hutch brand in India, a non-compete agreement with the Hutch group, the value of non-voting non-convertible preference shares, various loan obligations and the entitlement representing indirect interest in HEL.

The rights and entitlements of HTIL in HEL constituted capital assets within the meaning of section 2(14) to be covered in the phrase "property of any kind held by an assessee". The consideration that was paid to HTIL by VIH BV included consideration for acquisition of diversified rights and entitlements. Therefore, the transaction had a significant nexus with India. The essence of the transaction was a change of controlling interest in HEL which represented a source of income in India.

26. Is wealth-tax leviable on the value of house under construction, where the construction was still incomplete on the relevant valuation date?

CIT v. Smt. Neena Jain (2011) 330 ITR 157 (P & H)

On this issue, the Revenue contended that the incomplete house of the assessee fell within the purview of assets in section 2(ea) of the Wealth-tax Act, 1957 and it was liable to wealth-tax. Consequently, the value of the plot and investment of assessee's share in construction of the residential house was added and tax was, accordingly assessed.

The High Court opined that the words "any building" could not be read in isolation and had to be harmoniously construed with the remaining portion of section 2(ea) i.e., whether the building was used for residential or commercial purposes or for the purpose of maintaining a guest house, because an incomplete building could not possibly either be used for residential or commercial purposes or for the purposes of maintaining a guest house. Therefore, the word "building" has to be interpreted to mean a completely built structure having a roof, dwelling place, walls, doors, windows, electric and sanitary fittings etc.

In this case, the assessee was constructing the building after obtaining sanction from the appropriate authorities. Explanation 1(b) under section 2(ea) defining "urban land" for levy of wealth-tax, specifically excludes from its scope, the land occupied by any building which has been constructed with the approval of the appropriate authority. Therefore, the incomplete building of the assessee neither fell within the meaning of a building nor within the purview of "urban land" under section 2(ea). Consequently, the incomplete building is not an asset chargeable to wealth-tax.