SOME RECENT CASE LAWS ON DIRECT TAXES

These are some selected additional case laws required to be studied for May-12 EXAM. Apart from these students are required to study the case laws already provided in our current study mat under respective chapters/ the case laws provided in earlier terms (for old students) as they are equally important.

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SCOPE OF TAX LIABILITY IN INDIA

(1) Vodafone International Holdings B.V. v. UOI (2010) 329 ITR 126 (Bom.):- Hutchison Telecommunication International Limited (HTIL) (a foreign company) sells the entire issued share capital along with all rights attaching and accruing and together with assignment of loan interest of CGP (a foreign company registered in Cayman Islands, Mauritius, 100% subsidiary of HTIL) held by it, to Vodafone International Holdings B.V (a Netherlands company).

The department is of the view that since HTIL (foreign company) holds an aggregate 67% (approx) controlling Interest in Hutchison Essar Limited (HEL) (an Indian company), therefore, it ultimately resulted in transfer of controlling interest in Indian company as well. Hence, it would be treated as transfer of business assets in India and therefore deemed to be accrue or arise India and liable to Capital Gain tax in India. Accordingly, the Department charge Vodafone International to deduct tax at source u/s. 195 on payment made to HTIL.

The Vodafone International is of the view that, since the asset i.e, the shares of CGP (foreign co.) was not situated in India and also the consideration was paid and received outside India, and hence, there is no sum chargeable to tax in India and the obligation to deduct tax at source on it u/s. 195 did not arise.

The Bombay High Court ruled in favor of Department and opined that, the above transaction lead to change of controlling interest in HEL which represented a source of income in India and therefore the transaction had a significant link with India. Hence, the rights and entitlements of HTIL in HEL constituted capital assets of India; accordingly, the above transaction would be treated as transfer of business assets situated in India.

However, on 20.1. 2012 the Apex Court set aside the Judgment of Bombay High Court and gives its landmark verdict in favor of Vodafone International on the following ground-

(1) Shareholding in Company Incorporated outside India is a property located outside India, where such shares become subject matter of offshore transfer between two non-residents, there is no liability for Capital gain Tax in India.

(2) Demanding 12,000 cr of capital Gain Tax, would amount to imposing capital punishment for Capital Investment penalty. Since it lacks authority of law and therefore stands quashed.

(3) The offshore transaction herein is a bona fide structure of Foreign Direct Investment into India which fell outside India's territorial tax Jurisdiction, hence it is not taxable. The offshore transaction evidences participative investment and not a sham or tax avoidant preordained transaction.

(2) Asia Satellite Telecommunications Co. Ltd. (2011) 51 DTR 1 (Del):

a) A non-resident company has leased out transponder capacity on its satellite to TV channel to relay there signals in the footprint area including India from where the cable operators receive the signals.

b) The Department is of the view that, the non-resident company is carrying out its business operation in India.
c) In the given case, it was observed that tracking, telemetering and control operatives are also performed outside India and no man, material or machinery or any combination thereof is used by the assessee in the Indian territory. Hence section 9(1)(*i*) is not attracted.

Therefore, it was held that, merely because the footprint area includes India and the ultimate viewers watch the programmes in India, it would not mean non-resident is carrying out its business operations in India.

MUTUAL CONCERN

(3) Madras Gymkhana Club (2010) (Mad.): Interest earned from investment of surplus funds in the form of fixed deposits with institutional members/corporate members does not satisfy the principle of mutuality and hence cannot be claimed as exempt on this ground. The interest earned is, therefore, taxable.

***Contrary ruling-Delhi Gymkhana Club Ltd.* (2011) 53 DTR 330 (Del):** Income of the club from FDR's in banks and Government securities, dividend income and profit on sale of investment is also covered by the doctrine of mutuality and is not taxable.

CHARITABLE TRUST

(4) Raghuvanshi Charitable Trust and others (2011) (Del): The excess of application can be set off against income of the subsequent year.

(5) Willington Charitable Trust (2011) (Mad): Where a charitable institution after acquiring an old building demolished the same and constructed marriage halls and a part of it run as a hostel it was held that such activity of letting is not business. Further the property is one of the permitted investments under section 11(5) and if it is treated as investment in property, the question of application under section 11(4A) could not arises.

SPECIAL TAX RATE

(6) Case of Manjoo and Co. (2011) (Kerala): We know that winning from lotteries are liable to special rate of tax @ 30% u/s. 115BB. In the given case the assessee is a distributor of lottery ticket, win prize money from unsold lottery ticket held by him and claimed that since lottery ticket is stock-in-trade for him, therefore income from unsold lottery ticket should be treated as business income and hence liable to tax at normal rate.

Held that, an unsold lottery tickets cease to be stock-in-trade of the distributor as soon as the draw is over and it has no value except waste paper value. Hence, the receipt of the prize money is not in his capacity as a lottery distributor but as a holder of the lottery ticket which won the prize, therefore it is not a business income.

Further, it must be noted that winning from lottery ticket shall be taxable u/s. 115BB, irrespective of the head under which such income is fall. Therefore, in any case special rate of 30% is applicable.

INCOME FROM HOUSE PROPERTY

(7) Whether notional Interest on interest free security deposit received by the assessee is chargeable to tax under House property?

(1) Earlier it was held in the case of **Asian Hotel Ltd. (2008) by the Delhi High Court** that in the absence of any specific provision similar to Wealth tax while determining the actual rent, no notional interest on security deposit received by the assessee from the tenant should be considered.

(2) However, the Punjab and Haryana High Court by referring the case of *Mcdowell and Co. Ltd v CTO* (1985) (SC), was held that where the owner of the property receives interest-free security deposit, which was highly

disproportionate to the monthly rent charged, then notional interest could be treated as income from house property. [*K. Streetlite Electric Corporation* **(2011) 336 ITR 348(P&H)]**

(8) Jasmine Commercials Ltd. (2011) (Cal): Compensation received from the lessee in respect of repair or damage to premises after the expiry of lease period shall not be taxable under house property. Further, it is also not taxable under "Capital gains" since the receipt cannot be held to be outcome of transfer of any tenancy rights.

(9) Joseph George and Co. (2010): Assessee is engaged in letting out of rooms in a lodging house. It also rented a building to bank on long term lease. It was held that, the rental income from bank has to be assessed as income from house property. Income from Lodging shall be treated as business income of the assessee.

PROFIT OR GAINS FROM BUSINESS OR PROFESSION

Revenue vs. Capital

Nature of payment/Receipts	Capital/ Revenue	Reasons
(10) At the stage of setting up Industrial Unit, the assessee earns interest from deposit of margin money for opening a LOC for import of machinery.	Capital receipts	Held that such interest is a capital receipt and is to be set off against preoperative expenses. **[Arihant Threads Ltd. (2011) (P&H)]**
(11) Forex gain arises on account of exchange rate fluctuation on share capital raised abroad by way of GDR (Global Depository Receipts).	Capital receipts	Hence, not taxable. [***Jagatjit Industries Ltd. (2011) (Del.)]***
(12) **A existing business unit incurred expenses related to feasibility study for a new project and such project is abandoned without creating a new asset**	Revenue Expenditure.	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. [**Priya Village Roadshows Ltd. (2011) (Delhi)]**
(13) **Excise refund and subsidy received by manufacturers of J&K**	Capital receipts	The tribunal is of the view that refund of excise duty and grant of interest subsidy received by a manufacturer in the territory of J&K should be a revenue receipt and not capital receipt on the grounds that:- (a) such incentives were not given to establish industrial units because the industry was already established; (b) the incentives were available only on commencement of commercial production; (c) the incentives were recurring in nature not meant for acquisition of capital goods. The High Court opined that the above grounds are not the sole criteria for determining a receipt as revenue or capital. Further, in determining the nature of subsidy it also to be considered that such incentives were provided to achieve a public purpose. Since in the given case the main intent was to serve or achieve a public purpose it has to be treated as capital receipts not chargeable to tax.(and not as production incentives). **Shree Balaji Alloys (J&K) 2011**
(**14**) Expenses incurred on the issue of convertible debentures	Revenue	***I.T.C. Hotels Ltd.* (2011) (kar) & East Indian Hotel Ltd.**

		Contrary ruling- Expenditure on issue of fully convertible debentures is capital in nature ***[Indian Rayon & Industries Ltd***]

Depreciation

(15) Cable Corporation of India Ltd. (2011) (Bom.): While computing WDV in a block u/s. 43(6) what is deductible is actual sale proceeds and not the FMV of the assets sold.

The expression 'Money payable' which is reduced from the opening WDV of the block as per section 43(6) should be the meaning given in explanation to section 43(1) which states that the "moneys payable" in relation to the sale of a building, machinery, plant or furniture would be the price for which it is sold. However, in case of scrap, the amount of scrap value (i.e. the fair market value) has to be reduced as per the provisions of section 43(6).

(16) Orient Ceramics & Industries Ltd. (2011) (Del): Assessee is entitled to add disputed customs duty paid by it under protest on the imported machinery and claim depreciation thereon.

(17) Federal Bank Ltd. (2011) (Kerala) : Mobile phones and EPABX are not liable to higher rate of depreciation of 60% as computer. They are communication equipment and not computer. Hence general rate of Plant and machinery of 15% is charged.

(18) Yamaha Motor India Pvt. Ltd. (2010) (Delhi): Depreciation is allowed on the written down value of the entire block, even though the block includes some machinery which has already been discarded, so long as block continues to exist and the assets was used in the business earlier years. Depreciation is allowable only when assets are used for business purposes. For discarded machinery, the term used means used in earlier years and not the current year.

Expenses Allowed/Disallowed

(19)Tobacco products Pvt. Ltd. vs. CIT (2011) 201 Taxman 292 (MP): A whole-time director of assessee-company had gone on business tour for purchase of tendu leaves where he was kidnapped for ransom by a dacoit. Police was unsuccessful to save him from criminals and assessee had no choice but to pay ransom money for release of its director. It was held that, amount of ransom money paid by assessee could be allowed as business expenditure as payment of ransom is not an offence covered under *Explanation* to section 37 (1). It is nowhere provided in any law or even in constitution that payments to save life of a person is an offence.

(20) Echjay Forgings Ltd. (2010) (Bom.): In the given case the company claims that e**xpenditure** incurred on higher studies of the director's son abroad as business expenditure u/s. 37 on the contention that he was appointed as a trainee in the company under "apprentice training scheme".

It was held that, there was no evidence that he was recruited as trainee by some open competitive exam or regular selection process. Hence, there was no link or connection between the education expenditure and the business of the assessee. Hence, the expenditure is not allowable in the given case.

(21) Mukti Properties P. Ltd. v CIT (2011) (Cal): Where the assessee derived income from real estate business and also income from house property, the assessee is claim for brokerage and commission cannot be disallowed against the business income on the ground that the assessee is not entitled to any further deduction other than those provided under section 24 of the Act.

(22) Iskraemeco Regent Ltd. (2011) (Mad.): Where loan is taken for purchase of capital assets then on waiver of loan nothing is taxable u/s. 41(1) because section 41(1) applies only in case of trading liability.

Further, such waiver is also not a benefit arising out of business and consequently cannot be taxed U/s 28. In this case the waiver of loan is a capital receipt and hence not taxable.

(23) ***Morgan Stanley India Securities Pvt. Ltd.*** **(2011)(Del): -** Expenditures such as Bad debts and provident fund related to discontinued business is not allowable expenditure unless established that it is also linked to other running business of the assessee. Further, it also cannot be deducted against deemed business income u/s. 41(1).

(24) **Cargile Global Trading (I) (P) Ltd. (2011)(Del):** Discounting charges paid by assessee to a foreign company for discounting export sale bills is not interest as defined in section 2(28A).

(25) Dynamic Vertical Software India P. Ltd. (2011) (Delhi): Where assessee is a dealer in software i.e. engaged in its purchase and sale then the payment to the Microsoft cannot be called royalty. Hence, disallowances us/. 40(a)(i) would not be applicable in this case on the ground that no tax was deducted.

(26) **V.S. Dempo & Co. P. Ltd. (2011) (Bom):** The assessee had purchased from its subsidiary company certain materials at prices which were significantly higher than the market rate with a an assurance of continuous supply of materials. Since both the holding and subsidiary company were subjected to the same tax rates section 40A(2) should not be invoked in the given case.

PTS scheme for Non-resident

(27) Global Geophysical Services Ltd., (2011) (AAR): Section 44BB is applicable to a non-resident carrying on business of seismic data acquisition and processing under contract with Indian concerns.

It was held that without seismic data acquisition and interpretation, it is very difficult to conduct the activity of prospecting of mineral oil and gas which is necessary for further exploration. It is used for locating potential oil and as reserves based upon the geology observed. Hence such activities are covered U/s 44BB and the income derived from Companies like ONGC and Cairn Energy were to be computed under the provisions of section 44BB.

(28) DSD Noell GmbH (2011) (Delhi): The assessee is a German company providing engineering and technical services for various projects eligible for presumptive taxation scheme under section 44BBB and paid tax @ 10%.

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.

Held that, so long as the assessee fulfills all the conditions mentioned in section 44BBB(1), the normal provisions 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, u/s. 44BBB(2), the assessee has the benefit of declaring before the A.O. that the actual profits earned by it were less than 10% but the A.O. cannot contend that the profits of the assessee exceeds the presumptive income of 10%.

CAPITAL GAINS

(29) In computing exemption u/s. 54F what we consider is the Net consideration (i.e, the Actual Sale price – selling Expenses) and not the FVC which is taken as per the value of SVA by virtue of section 50C.

(30) Whether exemption of more than one house is available u/s. 54?

Smt. K. G. Rukminiamma (2011) (Kar.): ***Allowed when situated under same residential building.***

The assessee, being the owner of a building. He entered into an agreement with another person for the purpose of development of the property. The agreement stipulated that latter party shall construct building with 8 residential flats and 4 residential flats would be given to the assessee. all the cost shall be incurred by the builder as per the agreement. Held, that deduction u/s. 54 shall be given for all the 4 flats as they are situated in the same building.
The court applied the Judgment of **Ananda Basappa (2009) 309 ITR 329 (Kar.).**

However, Exemption under section 54 is not available in respect of two independent residential house situated at different locations [***Pawan Arya v CIT* (2011) 49 DTR 123 (P&H)]- also** *K.C kaushik (1990)(Bom)*

DEEMED DIVIDEND

(31) <u>Shyam Charan Gupta v CIT (2011) (All)</u>: Salary/ commission paid to directors in advance is in the course of business and does not constitute advance refer to in section 2(22)(e).

(32) <u>Parle Plastics Ltd. (2011) (Bom.)</u>: Section 2(22) excludes 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 **<u>substantial part of the business</u>** of the company from the purview of deemed dividend. Substantial part does not always mean a major part. Even a small portion can influence the business. It may be contribution towards higher percentage of turnover or it may be a major part of profit or also even percentage of manpower used or may be seen from capital employed.

In the given case, 42% of the total assets of the lending company were distributed by it by way of loans and advances. It was found that, if the income earned by way of interest is excluded, the other business had resulted in a net loss. Hence, it was held that, lending of money was a substantial part of the business of the company and therefore, not covered u/s. 2(22).

TAX HOLIDAY

Consider the following whether they form part of profit for the purpose of claiming deduction u/s. 80IB-

Nature	Yes/NO	Reason
(33) <u>Transport subsidy received</u> **(34) <u>Interest subsidy received</u>**	NO NO	**<u>Since no direct kink with the business activity</u>** Applying the ruling of Liberty India (2009) (SC), it was held by the **<u>Meghalaya Steels Ltd. (2011) (Gauhati),</u>** that for the purpose of deduction u/s. 80IB the source of profit should be only first degree and there should be a direct link between the generation and source of profits and gains. Applying the said ratio it was held that transport and interest subsidies were revenue receipts which were granted after setting up of the new industries and after commencement of production and the subsidies were not directly relatable to the industrial activity of the assessee, and hence they did not fall within the first degree. Therefore, the subsidies could not be taken into account for purposes of deduction under section 80-IB.
(35) Refund of Central Excise duty	Yes	Had a direct relation with the business activity. **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. **<u>[Meghalaya Steels Ltd. (2011) (Gauhati)]</u>**

36) Income derived from sale of export incentives	NO	Cannot be said to be income "derived from" the industrial undertaking and therefore, not eligible for deduction u/s. 80IB. [**Jaswand Sons (2010) (P&H)]**

(37) Chiranjjeevi Wind Energy Ltd. (2011) (Mad.): By assembling various parts the assessee makes "windmills". The issue is whether such activity fall within the meaning of "manufacture" and "production" to be entitled for deduction under section 80-IB.

It was held, that the different parts had distinctive names and only when assembled together, they got transformed into a final 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.

Further, it is to be noted that as per the definition of manufacture u/s. 2(29BA)- it means, 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. Hence, assembling of windmill at factory and putting them at site of customer apparently satisfies this definition of manufacture also.

(38) Midas Polymnot Compounds Pvt. Ltd. (Ker)(FB): For claiming deduction u/s. 80-IB, the manufacture or production of articles need not be a final product rather it should be a manufacturing product. In the given case, Mixing Rubber with chemicals, process oil, etc. to make compound rubber for tyre manufacturing companies shall amount to production of an article and the assessee will be entitled to deduction.

(39) Praveen Soni v. CIT (2011) (Delhi): In order to claim deduction u/s. 80IB it is not necessary that eligible assessee should claim it from the first year of qualification of deduction. It can be claimed in subsequent year for the remaining years of eligibility. Since the provisions of section 80-IB does not state 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.

MAT

(40) Rolta India Ltd. (2011) (SC): Interest u/s. 234B and 234C are equally applicable for a company which paid tax as per book profit u/s. 115JB.

Reason – 1) As per the specific provisions of the section 15JB(5) which provided that all other provisions of the Income-tax Act, 1961 shall apply.

(2) Further, as per the provision of section 207 read with section 208 to 219, advance tax is charged on total income of the assessee. Since, the book profit u/s. 115JB is deemed to be that total income of the assessee, therefore, advance tax shall be payable in respect of such book profit (which is deemed to be the total income) also and on failure section 234B and 234C is applicable.

TAX DEDUCTED AT SOURCE

Determine whether Tax is deducted at source from the followings or not-

Nature of payment	**Yes/NO**	**Reason**
41) Payment to BSNL/MTNL for services provided through interconnect / port / access / toll.	**-**	The Answer to the given question is not concluded by the Apex court rather it remitted the case to the AO, directing him to examine the same with the assistance of a technical expert from the side of the Department. Hence the final decision is awaited. Therefore, the earlier ruling of Delhi high court 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" for the purpose of section 194J, shall not be considered as conclusive. **[Bharti Cellular Ltd. & Hutchison Essar Telecom Ltd. (2011) (SC)]**
42) Air ticket agent purchased the ticket at fixed lower price from the airline company and sold it at higher price subject to maximum published price. Whether this difference amount is considered as 'commission" and liable to TDS u/s. 19H.	**NO**	Since the airline company would have no information about the exact rate at which the tickets were ultimately sold by its agents, thus it is not at all practicable for the airline company to find out the difference amount for each ticket sold from its numerous agents. Hence, no TDS u/s. 194H. **[Qatar Airways (2011) (Bom.)]**
43) Discount given on sale of SIM cards and recharge coupons to distributors by telecom company.	**Yes.**	SIM cards and recharge coupons is an integral part to provide mobile service. It is not goods sold or intended to be sold to customer but supplied as part of the service. Therefore, the distributor only acted as a middleman on behalf of the telecom company for procuring and retaining customers and therefore, the discount given to him is fall under definition of commission. Hence TDS u/s. 194H is applicable. **[Vodafone Essar Cellular Ltd. 2011 (Kerala)]**
44) non-resident match referees and umpires in the games played in India.	**Yes**	TDS u/s. 195 applied since income accrued and arisen in India. i) It is to be noted that, they cannot be treated as sports person for the purpose of section 115BBA and consequently TDS u/s. 194E is not applicable. ii) Further, u/s. 194J match referees and umpires are considered as professionals but section 194J is only applicable for resident assessee. Hence, TDS u/s. 194J is also not applicable. **[Case of Indcom (2011) (Calcutta)]**

ASSESSMENT PROCEDURES

(45) <u>Lucknow Public Education Society (2011) (ALL)</u>: Reference to Valuation Officer under section 142A is valid only when the Assessing Officer first rejects books of account in terms of section 145(3).

(46) <u>Haryana State Handloom and Handicrafts Corporation Ltd. [2011] (P & H)</u>: It was held that rectification of intimation cannot be made after issuance of notice under section 143(2) and during the pendency of proceedings u/s. 143(3). If it is permitted then it would lead to mere duplication of work and wastage of time. Hence, if any change was permissible to be effected, the same can be done in the assessment u/s. 143(3)

(47) <u>Manish Ajmera (2011) (Raj)</u>: Assessing Officer having reopened the assessment on the sole basis that the system of accounting adopted by the assessee which has been accepted while framing the original assessment is not appropriate, without making any allegation that there was non-discloser of material facts by the assessee at that time of original assessment. It is case of mere change of opinion and therefore, reopening of assessment after expiry of four years from the end of the relevant assessment years was not valid

(48) Ranbaxy Laboratories Ltd. (2011) (Delhi):- Held that, if no addition has been made on the original ground for which notice u/s. 148 was issued then the AO cannot make addition on other ground which subsequently found during the reassessment proceedings. For that, the AO required to be issue fresh notice u/s. 148.

The court interpreted that, by applying the provisions of explanation 3 to section 147 the AO can make addition on the other ground only if there is some addition on account of original ground mentioned in the notice as well. If at all there is no escapement of income liable to tax on account of original ground then the AO cannot invoke explanation 3 to section 147 for reassessment proceeding on the other ground which was not mentioned in the original notice, rather he is required to issue fresh notice U/s 148.

(49) D.C.M. Financial Services Ltd. (2011) (Del): Where assessment order passed under section 143(3) read with section 147 has been set aside, consequential order u/s. 154 has also to be set aside.

(50) Kanubhai M.Patel (HUF) (2011) (Guj.): The court observed that any notice may be considered to be issued if made out and placed in the hands of a person authorised to serve it, and with a bona fide intent to have it served. The expression 'shall be issued' in section 149 would, therefore, have to be read in the above mentioned context. Hence, Time limit u/s 149 for issue of notice for reassessment proceedings (i.e, 4 years or 6 years) shall be calculated from the end of the relevant assessment year to the date when it is handed over to the proper person for service of notice (i.e, post office or courier) and not to the date when such notice is signed by the Assessing Officer.

For example- Notice u/s. 148 issued for A.Y 2005-06 (date mentioned in the notice 31.3.2012)
The said notice has been handed over to postal Depart for serve to assessee on 7.4.2012.
Assessee received the notice on 8.4.2012.

In the given case time limit of notice shall be calculated from 31.3.2006 to 7.4.2012 i.e., more than 6 years. Hence the notice is barred by limitation and therefore the reassessment proceedings cannot be invoked.

ASSESSMENT OF SEARCH CASES

(51) Rajhans Aromatics (2011) (Del):- Time limit for assessment u/s. 153A in a search case starts from the date of completion of the search, which is understood as the date of which the last panchnama was prepared. But where after this date, a carton found during the search was opened and an inventory was prepared, the date of preparation of such inventory cannot be understood as extending the search, so as to entail longer time limit for completion of the assessment

APPEALS AND REVISIONS

(52) Jind Co-operative Sugar Mills (2011) (P&H): Where the assessee produced additional evidence before CIT (Appeal), it was held that it is not necessary that when additional evidence is furnished, the matter must be remanded to the AO. It depends on nature of issue and nature of evidence and in an appropriate case, without any prejudice to either of the parties, the evidence can be looked into by the appellate authority itself.

(53) Lachman Dass Bhatia Hingwala (P) Ltd. v. (2011) (Delhi): -It is a well established principle that the Tribunal does not have inherent power to review its own judgment or order on merits or re-appreciate the correctness of its earlier decision on merits. However, the power to recall is different from power to review. Although, 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 had earlier held in the case of Honda Siel Power Products Ltd., the reason for giving the power of rectification to the Tribunal is to see that no prejudice is caused to the parties to the appeal by its decision based on a mistake apparent from the record. The Tribunal, in this case, had not considered the material which was already on record. The Apex Court directed the Tribunal to rectify its mistake.

In view of the above judgement, 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 because of Tribunal's apparent mistake, error or omission.

(54) Metalman Auto P. Ltd. (2011) (P&H): Mere omission of the assessee to claim exemption under section 10(35) in the return of income could not be debar the assessee from the making claim before the first Appellate Authority during the appellate proceedings.

(55) Subhash Kumar Jain [2011] 335 ITR 364 (P & H): Where a matter is settled by the AO on a condition that assessee surrenders his unexplained income and no penal proceedings u/s. 271(1)(c) has been initiated because the Department has no documentary evidence against the assessee, then the commissioner u/s. 263 cannot invoke his revisionary power on the ground that the order is erroneous and prejudicial to the interest of the Revenue, since the AO does not initiate penal proceedings.
In the given case it was held that the assessee had made surrender of income with a clear condition that no penal action under section 271(1)(c) would be initiated and the offer of the assessee was accepted by the Department. Once that was so, the Commissioner cannot take a different view and levy penalty because order based on an agreement cannot give rise to grievances and the same cannot be agitated.

(56) **WBIDFCL (2011) SC:** The High Court should not dispose of the appeals filled by the department on the ground of delay in a case where huge stakes are involved. The High Court can consider imposing costs on the department for the delay and decide the appeals on merits

PENAL PROCEEDINGS

(57) R. Gopalkrishnan (Dr.)(2011) (Mad.): No penalty if the return was revised before detection. Where the revised return was filed by the assessee within the time limit prescribed under section 139(5) of the Act and there was nothing to suggest that the assessee had filed revised return with the knowledge that the department had detected such additional income. Penalty under section 271(1)(c) of the Act was not leviable as there was no willful and deliberate suppression of income.

(58) Indersons Leather P. Ltd. (2010) (P&H): 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.

(59) I.F.C.I.Ltd. (2011) (Del.): Where the assessee had furnished all particulars in its return of income, merely because a claim put forth by assessee as regards loss was accepted, that would not *per se* amount to furnishing of any kind of inaccurate particulars and, therefore, penalty levied upon assessee could not be sustained.

(60) Cadbury India Ltd. (2011) (Del): Assessee having deducted tax from the payment made to clearing and forwarding agents wrongly under section 194C, instead of section 194-I and 194J, on the basis of misconceived professional advice given by chartered accountants there was reasonable cause for failure to comply with the provisions of section 194-I and 194J and, therefore, penalty under section 271C was not leviable.

(61) H.P. State Forest Corporation Ltd.(2011) (HP): Merely because assessee, a Government corporation, claimed depreciation in the valuation of closing stock on account of deterioration of old stock and the same has not been accepted by the Revenue, penalty under section 271(1)(c) is not leviable in the absence of any finding that the claim of the assessee was false or that it fudged the books of account.

MISCELLANEOUS

(62) Where the company amended its memorandum and articles of association so as to enable it to make money lending as its main business, the loss on account of sale and purchase of shares was allowed to be adjusted against other business income.

(63) where it is not clear that whether amendment in Income Tax are applicable from F.Y or from A.Y, then generally it is deemed that it is applicable from the relevant A.Y.

(64) **Section 69B** cannot be invoked merely on the basis of District Valuation Officer's (D.V.O.) report when the books of accounts of the assessee are not rejected nor any incriminating material was found during the search to suggest that assessee had made any payment over and above the consideration mentioned in the return

(65) Sale of scrap rubber which is generated in course of extraction of rubber latex from trees cannot be taxed as partly agricultural and partly business income by applying rule 7A because such scrap is generated in course of purely an agricultural operation. However, if scrap is generated in course of Industrial operation for processing rubber latex to manufacture rubber

(66) Provisions of section 40(a)(ia) can be invoked only in case of non-deduction of tax at source but not for lesser deduction of tax.
