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Latest Circulars, Notifications and Press Releases

SECTION 197A OF THE INCOME-TAX ACT, 1961 - DEDUCTION OF TAX AT SOURCE - NO DEDUCTION IN CERTAIN CASES - SPECIFIED PAYMENT UNDER SECTION 197A(1F)

NOTIFICATION NO. 56/2012 [F. NO. 275/53/2012-IT(B)]/SO 3069(E), DATED 31-12-2012

In exercise of the powers conferred by sub-section (1F) of section 197A of the Income-tax Act, the Central Government hereby notifies that no deduction of tax under Chapter XVII of the said Act shall be made on the payments of the nature specified below, in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act **excluding a foreign bank**, namely:-

(*i*) bank guarantee commission;
(*ii*) cash management service charges;
(*iii*) depository charges on maintenance of DEMAT accounts;
(*iv*) charges for warehousing services for commodities;
(*v*) underwriting service charges;
(*vi*) clearing charges (MICR charges);
(*vii*) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

2. This notification shall come into force from the 1st day of January, 2013.

SECTION 10AA OF THE INCOME-TAX ACT, 1961 - CLARIFICATION ON ISSUES RELATING TO EXPORT OF COMPUTER SOFTWARE

CIRCULAR NO. 1/2013 [F. NO. 178/84/2012-ITA.I], DATED 17-1-2013

Question 1: Whether "on-Site" development of Computer Software Qualifies as an export activity for tax benefits under section 10AA of the Income-tax Act, 1961?

Answer: It is clarified that the software developed abroad at a client's place would be eligible for benefits under the respective provisions, because these would amount to 'deemed export' and tax benefits would not be denied merely on this ground. However, since the benefits under these provisions can be availed of only by the unit in SEZ, it is necessary that there must exist a direct and intimate nexus or connection of development of software done abroad with the eligible units set up in SEZ and such development of software should be pursuant to a contract between the client and the eligible unit in SEZ.

Question 2: Whether receipts from deputation or Technical Manpower for such "On-Site" Software development abroad at the Client's place are eligible for deduction under section 10AA?

Answer: It is clarified that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between the client and the eligible unit should not be denied benefits under section 10AA provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled.

Question 3: Whether tax Benefits under section 10AA, would continue to remain available in case of a slump-Sale of a Unit/Undertaking?

Answer: It is clarified that on the sole ground of change in ownership of an undertaking, the claim of exemption cannot be denied to an otherwise eligible undertaking and the tax holiday can be availed of for the unexpired period at the rates as applicable for the remaining years, subject to fulfilment of prescribed conditions.

Question 4: Whether tax benefits under section10AA can be enjoyed by an eligible SEZ unit consequent to its transfer to another SEZ?

Answer: The matter has been examined and it is clarified that the tax holiday should not be denied merely on the ground of physical relocation of an eligible SEZ unit from one SEZ to another if all the prescribed conditions are satisfied under the Income-tax Act, 1961. It is further clarified that the unit so relocated will be eligible to avail of the tax benefit for the unexpired period at the rates applicable to such years.

FINANCE MINISTRY'S CLARIFICATION ON TAX RESIDENCY CERTIFICATE (TRC)

PRESS RELEASE, DATED 1-3-2013

Concern has been expressed regarding the clause in the Finance Bill that amends Section 90 of the Income-tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of section 90 was introduced last year by Finance Act, 2012. That subsection requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.

In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA.

However, it has been pointed out that the above language could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India. The government wishes to make it clear that that is not the intention. **The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his residential status.**

SECTION 203 OF THE INCOME-TAX ACT, 1961, READ WITH RULE 31 OF THE INCOME-TAX RULES, 1962 - DEDUCTION AT SOURCE - CERTIFICATE FOR TAX DEDUCTED - ISSUANCE OF CERTIFICATE FOR TAX DEDUCTED AT SOURCE IN FORM NO.16

CIRCULAR NO. 4/2013 [F.NO.275/34/2011-IT(B)], DATED 17-4-2013

1. **ISSUE OF PART A OF FORM NO. 16 FOR DEDUCTION OF TAX AT SOURCE MADE ON OR AFTER 1-4-2012:**
   All deductors (including Government deductors who deposit TDS in the Central Government Account through book entry) shall issue the Part A of Form No. 16, by generating and subsequently downloading through TRACES Portal, in respect of all sums deducted on or after the 1st day of April, 2012 under the provisions of **section 192**. Part A of Form No 16 shall have a unique TDS certificate number.

2. **AUTHENTICATION OF TDS CERTIFICATE IN FORM NO. 16:**
   The deductor, issuing the Part A of Form No. 16 by downloading it from the TRACES Portal, shall, before issuing to the deductee authenticate the correctness of contents mentioned therein and verify the same either by using manual signature or by using digital signature.

SECTION 92C OF THE INCOME-TAX ACT, 1961 - TRANSFER PRICING - COMPUTATION OF ARM'S LENGTH PRICE - NOTIFIED TOLERABLE LIMIT FOR DETERMINATION OF ALP

NOTIFICATION NO. 30/2013/[F.NO.500/185/2011-FTD-I]/SO 962(E), DATED 15-4-2013

In exercise of the powers conferred by the second proviso to sub-section (2) of section 92C of the Income-tax Act, 1961, the Central Government hereby notifies that where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed 1% of the latter for wholesale traders and 3% of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for assessment year 2013-14.

SECTION 199 OF THE INCOME-TAX ACT, 1961 - CREDIT FOR TAX DEDUCTED – CREDIT OF TDS UNDER SECTION 199 TO AN ASSESSEE WHEN THE TAX DEDUCTED HAS BEEN DEPOSITED WITH REVENUE BY DEDUCTOR

INSTRUCTION NO. 5/2013 [F.NO.275/03/2013-IT(B)], DATED 8-7-2013

It has been decided by the Board that when an assessee approaches the Assessing Officer with requisite details and particulars in the form of TDS certificate as an evidence against any mismatched amount, the said Assessing Officer will verify whether or not the deductor has made payment of the TDS in the Government Account and if the payment has been made, credit of the same should be given to the assessee. However, the Assessing Officer is at liberty to ascertain and verify the true and correct position about the TDS with the relevant AO (TDS). The Assessing Officer may also, if deemed necessary, issue a notice to the deductor to compel him to file correction statement as per the procedure laid down.

E-FILING OF RETURN MADE COMPULSORY WHERE TOTAL INCOME EXCEEDS ₹5 LAKHS

NOTIFICATION NO. 34/2013 DATED 1-05-2013

The CBDT has, vide notification dated 1-05-2013, made E-filing of Return compulsory for Assessment Year 2013-14 for persons having total assessable income exceeding ₹ 5,00,000.

The CBDT vide its earlier notifications had exempted salaried employees having total income upto ₹ 5 lakhs including income from other sources upto ₹ 10,000 from the requirement of filing return of income for assessment year 2011-12 and 2012-13 respectively. The exemption was available only for the assessment year 2011-12 and 2012-13. The exemption was giving considering 'paper filing of returns' and their 'processing through manual entry' on system. This exemption is not available from Assessment Year 2013-14

AMENDMENT IN RULE 11UA FOR VALUATION OF UNQUOTED EQUITY SHARES

Rule 11UA provides that the method of determination of FMV of unquoted equity shares for the purpose of section 56(2)(vii), 56(2)(viia) and 56(2)(viib). The method of valuation is:

$$\frac{\text{Assets – Liabilities}}{\text{Paid up equity share capital}} \times \text{Paid up value of unquoted equity shares}$$

Certain assets and liabilities are excluded in above-mentioned calculation.

The following changes have been made in Rule 11UA:

1. Earlier advance tax, TDS, TCS was not treated as asset. Correct provision for taxation minus Advance tax, TDS & TCS was treated as liability. Now as per the amendment in Rule 11UA, the income tax refund will be treated as asset. For example,

Advance Tax, TDS & TCS	=	₹ 50 lakhs
Provision for taxation	=	₹ 42 lakhs

   Prior to amendment, ₹ 50 lakh being advance tax, TDS & TCS was not asset. Income tax liability shall be taken to be NIL.

   After the amendment, ₹ 50 lakh being advance tax, TDS & TCS are not asset but Income tax refund of ₹ 8 lakhs will be treated as an asset. Income tax liability shall be taken to be NIL.

2. For section 56(2)(viib), the FMV of shares shall be at the option of the assessee be either of the following:
   (a) $\frac{\text{Assets – Liabilities}}{\text{Paid up equity share capital}} \times \text{Paid up value of unquoted equity shares}$

   (b) The fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method.

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Latest in Judiciary 2012-13

1. **Can amount collected by an NBFC from its customers on adhoc basis towards possible sales tax liability which is disputed by it, be treated as its income, if such sum is not kept in a separate interest-bearing account and has been included in sales turnover?**

   Sundaram Finance Ltd. v. Assistant Commissioner of Income-tax (2012) 349 ITR 0356 (Supreme Court)

   The assessee is a non-banking financial company (NBFC) engaged in the business of hire purchase financing, equipment leasing and allied activities. During the relevant previous year, it collected certain sums on an adhoc basis as "contingent deposit" from its leasing and hire purchase customers to protect itself from sales tax liability, which is under dispute. The assessee did not offer such sum to tax as income on the ground that such sums collected as "contingent deposits", in anticipation of sales tax liability under dispute, were "refundable", if the assessee were to succeed in its challenge to the levy of the said tax. Therefore, the assessee contended that the sum of ₹ 36.47 lakhs collected by it, is an imprest with a liability to refund. The amount is in the nature of "deposits", and hence, the same would not be taxable in the year of receipt but only in the year in which the liability to refund the sales tax ceases.

   The Supreme Court, observed that in determining whether a receipt is liable to be taxed, the taxing authorities cannot ignore the legal character of the transaction which is the source of the receipt. The taxing authorities are bound to determine the true legal character of the transaction. The Apex Court noted the assessee's own statement that the sum of ₹ 36.47 lakhs was not kept in a separate interest-bearing bank account *(inspite of the assessee's contention that it represented a contingent deposit)* but formed part of its business turnover *means that it is a trading receipt.*

   Therefore, the Supreme Court, applying the "substance over form" test, held that the sum of ₹ 36.47 lakhs constituted the income of the assessee, since it -
   (i) formed part of the assessee's turnover.
   (ii) was collected from customers; and
   (iii) was collected towards sales tax liability.

2. **What would be the nature of corporate membership fee paid to the golf club, considering that the membership was for a limited period of six years – Revenue or Capital expenditure?**

   CIT v. Groz Beckert Asia Ltd. (2013) 351 ITR 196 (P&H)(FB)

   The Court observed that though payment of membership fee results in obtaining of club membership for a period beyond the year of payment but the benefit remains in the revenue nature and not in the capital nature. By such membership, privileges to use facilities of a club alone are conferred on the assessee and that too for a limited period. Such expenses are incurred for running the business with a view to provide benefits to the assessee. Also, such membership does not bring into existence an asset or an advantage for the enduring benefit of the business.

The High Court, therefore, held that by subscribing to the membership of a club for a limited period, no capital asset is created or comes into existence and consequently, the corporate membership fees cannot be treated as capital in nature. It is allowable as revenue expenditure under section 37(1).

3. Can power subsidy received by the assessee from the State Government, year after year, on the basis of actual power consumption be treated as a capital receipt?

CIT v. Rassi Cement Ltd. (2013) 351 ITR 169 (A.P.)

In this case, the assessee received power subsidy from the State Government and treated it as a capital receipt. The Assessing Officer, however, denied the assessee's claim, contending that the power rebate given by the Electricity Department cannot be capitalized as the same is given as a rebate which is in the nature of revenue receipt.

The High Court held that the power subsidy was given as a part of an incentive scheme after commencement of production, which is linked to production and therefore, has to be treated as a revenue receipt, since such assistance is given for the purpose of carrying on of the business of the assessee.

Accordingly, the High Court held that the power subsidy received by the assessee from the State Government on the basis of actual power consumption has to be treated as a trading receipt and not as a capital receipt.

4. Can notional interest on security deposit given to the landlord in respect of residential premises taken on rent by the employer and provided to the employee, be included in the perquisite value of rent-free accommodation given to the employee?

CIT v. Shankar Krishnan (2012) 349 ITR 0685 (Bom.)

The assessee, a salaried employee, was provided with rent-free accommodation, being a flat in Mumbai, by his employer company. The monthly rent paid by the employer in respect of the said flat was ₹ 10,000 per month. The employer had given an interest-free refundable security deposit of ₹ 30 lacs to the landlord for renting out the said premises. The assessee-employee computed the perquisite value on the basis of rent of ₹10,000 paid by his employer to the landlord, since the same was lower than 15% of salary.

The Assessing Officer, however, contended that since the employer had given interest-free deposit of ₹ 30,00,000 to the landlord, interest@12% on the said deposit is required to be taken into consideration for estimating the fair rental value of the flat given to the assessee and accordingly, he enhanced the perquisite value of the residential accommodation provided to the employee by such notional interest.

The Bombay High Court held that the Assessing Officer is not right in adding the notional interest on the security deposit given by the employer to the landlord in valuing the perquisite of rent-free accommodation, since the perquisite value has to be computed as per Rule 3 and Rule 3 does not require addition of such notional interest. Thus, the perquisite value of the residential accommodation provided by the employer would be the actual

amount of lease rental paid or payable by the employer, since the same was lower than 15% of salary.

5. **Can service charges received along with rent in respect of a property, be brought to tax under the head 'Income from house property', if the service agreement is dependent upon the rental agreement?**

CIT v. J.K. Investors (Bom.) Ltd. (2012) 211 Taxman 383 (Bom.)

On this issue, the Assessing Officer claimed that since the service charges were in respect of ancillary services, the same has to be assessed under the head 'Income from other sources' and not as 'Income from house property'.

The Bombay High Court observed that the first step is to determine whether the service agreement could stand independently from the rental agreement. In the present case, the service agreement is dependent upon the rental agreement and in the absence of the rental agreement there could be no service agreement. The services being provided under the service agreement are in the nature of lift, common entrance, main road leading to the building through the compound, drainage facilities, air conditioning facility, open space in/around the building etc. which are not separately provided but go along with the occupation of the property.

Therefore, the amount received as service charges have to be considered as a part of the rent received and subjected to tax under the head "Income from house property".

6. **Can depreciation on leased vehicles be denied to the lessor on the grounds that the vehicles are registered in the name of the lessee and that the lessor is not the actual user of the vehicles?**

I.C.D.S. Ltd. v. CIT (2013) 350 ITR 527 (Supreme Court)

The assessee is a non-banking finance company engaged in the business of leasing and hire purchase. The assessee purchased vehicles directly from the manufacturers and as a part of its business, leased out these vehicles to its customers, after which the physical possession of the vehicles was with the lessee. Further, the lessees were registered as the owners of the vehicles in the certificate of registration issued under the Motor Vehicles Act, 1988. The assessee-lessor claimed depreciation on such vehicles.

The Assessing Officer disallowed the depreciation claim on the ground that the assessee's use of these vehicles was only by way of leasing out the vehicles to others and not as actual user of the vehicles in the business of running them on hire and secondly, the vehicles were registered in the name of the lessee and not the assessee-lessor. Therefore, according to the Assessing Officer, the assessee had merely financed the purchase of these assets and was neither the owner nor the user of these assets.

The Supreme Court observed that section 32 imposes a twin requirement of "ownership" and "usage for business" as conditions for claim of depreciation thereunder. The Supreme Court further observed that as far as usage of the asset is concerned, the section requires that the asset must be used in the course of business. It does not mandate actual usage by the assessee itself. In this case, the assessee did use the vehicles in the course of its leasing business. Hence, this requirement of section 32 has been fulfilled, notwithstanding the fact that the assessee was not the actual user of the vehicles.

The Supreme Court further noted that section 2(30) of the Motor Vehicle Act, 1988, is a deeming provision which creates a legal fiction of ownership in favour of the lessee only for that Act, not for the purpose of law in general. No inference could be drawn from the registration certificate as to ownership of the legal title of the vehicles, since registration in the name of the lessee during the period of lease is mandatory as per the Motor Vehicles Act, 1988. If the lessee was in fact the legal owner, he would have claimed depreciation on the vehicles which was not the case.

The Apex Court observed that as long as the assessee-lessor has a right to retain the legal title against the rest of the world, he would be the owner of the asset in the eyes of law. In this regard, the following provisions of the lease agreement are noteworthy –

- The assessee is the exclusive owner of the vehicle at all points of time;
- The assessee is empowered to repossess the vehicle, in case the lessee committed a default;
- At the end of the lease period, the lessee was obliged to return the vehicle to the assessee;
- The assessee had a right of inspection of the vehicle at all times.

It can be seen that the proof of ownership lies in the lease agreement itself, which clearly points in favour of the assessee.

The Supreme Court, therefore, held that assessee was entitled to claim depreciation in respect of vehicles leased out since it has satisfied both the requirements of section 32, namely, ownership of the vehicles and its usage in the course of business.

7. Can waiver of loan given to the assessee by the Government of India from Steel Development Fund (SDF) to meet the capital cost of asset be reduced to arrive at the actual cost as per section 43(1) for computing depreciation under section 32?

Steel Authority of India Ltd. v. CIT (2012) 348 ITR 150 (Delhi)

The assessee is a public sector undertaking engaged in the manufacture and sale, including export of iron and steel of various grades. It has several steel plants in India. The Government of India sanctioned huge loans to the assessee from the SDF to meet its requirements. On account of glut in the international steel market due to heavy production of steel in South East Asia and the meltdown in the USA, the price of steel fell rapidly and the assessee started incurring heavy losses. The assessee, therefore, approached the Government of India for waiver of loans granted from SDF. The Government of India, as a measure of providing relief to the steel industry in general and the assessee in particular, waived repayment of loans granted to the assessee from the SDF.

The assessee reduced the cost of the assets by the amount of the loans waived by the Government of India in its books of account and accordingly calculated depreciation. However, in the returns filed for the years under consideration, the assessee took a contrary stand and claimed depreciation on the assets without reducing the loans waived by the Government. The assessee took a plea that *Explanation 10* to section 43(1) does not consider the waiver of a loan as a subsidy or a grant or reimbursement of the cost.

The Assessing Officer, however, contended that depreciation ought to be allowed to the assessee in respect of assets purchased on the reduced cost, after reducing the loans waived by the Government, as per the provisions of section 43(1).

The Delhi High Court observed that the case of the assessee may not fall under *Explanation 10* to section 43(1), since the *Explanation* covers only a case of subsidy, grant or reimbursement but not a case of waiver of loan. However, having regard to the facts of the case, the waiver of the loan would amount to the meeting of a portion of the cost of the assets under the main provision of section 43(1) which spells out the meaning of "actual cost". As per section 43(1), "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. The intention of the parties, as reflected in the accounts of the assessee, appears to be that the loans have been granted towards a portion of the cost of the assets.

The waiver of the loan, in this case, is not a mere quantification of a subsidy granted generally for industrial growth. It was granted specifically to the assessee, who had reduced the amount waived from the cost of the assets in its books of account. This accounting treatment reflects the analogous understanding by the assessee regarding the purpose of the grant of loan. The High Court, therefore, held that, by applying the main provision of section 43(1), the amount of loan waived by the Government is to be reduced from the cost of assets to arrive at the "actual cost" for computing depreciation.

8. Can the second proviso to section 32(1) be applied to restrict the additional depreciation under section 32(1)(iia) to 50%, if the new plant and machinery was put to use for less than 180 days during the previous year?

M.M. Forgings Ltd. v. ACIT (2012) 349 ITR 0673 (Mad.)

The Madras High Court held that if an asset is acquired during the previous year and put to use for fee less than 180 days in that previous year, it was mandatory that the claim of the assessee made under section 32(1)(iia) had to be necessarily assessed by applying the second proviso to section 32(1). Since there is a statutory stipulation restricting the allowability of depreciation to 50% of the amount computed under section 32(1)(iia), where the asset is put to use for less than 180 days, the amount of depreciation allowable has to be restricted to 50% of the amount computed under section 32(1)(iia).

9. Can encashment of bank guarantee by the Export Promotion Council on account of failure of the assessee to utilise its export entitlements be considered as compensatory in nature to be eligible for deduction under section 37(1), where the failure to honour export commitment was a business decision taken by the assessee in view of losses incurred by it?

CIT v. Regalia Apparels Pvt. Ltd. (2013) 352 ITR 71 (Bom.)

The assessee is engaged in the business of manufacturing of garments. The Apparel Export Promotion Council granted to the assessee entitlement for export of garments and knit wares. In consideration for export entitlements, the assessee furnished a bank guarantee in support of its commitment that it shall abide by the terms and conditions in respect of export entitlements. The failure to fulfill the obligation to export would render the bank guarantee liable to forfeiture.

The assessee started incurring losses and hence decided not to utilize the export entitlements, which consequently led to forfeiture of bank guarantee by the Export Promotion Council. The assessee recorded the payment as penalty in its books. It, however, claimed deduction under section 37(1) on the ground that such expenditure was compensatory and not penal in nature.

The Assessing Officer contended that though expenditure was incurred for business purpose, the forfeiture of bank guarantee was in the nature of penalty and therefore, the same cannot be allowed as deduction.

The High Court, however, observed that the assessee had taken a conscious business decision not to honour its commitment of fulfilling the export entitlements in view of losses being suffered by it. The High Court held that there is no contravention of any provision of law and the forfeiture of the bank guarantee was compensatory in nature and therefore, allowable as deduction under section 37(1).

10. Can remuneration paid to working partners as per the partnership deed be considered as unreasonable and excessive for attracting disallowance under section 40A(2) even though the same is within the statutory limit prescribed under section 40(b)(v)?

CIT v. Great City Manufacturing Co. (2013) 351 ITR 156 (All)

In this case, the Assessing Officer contended that the remuneration paid by the firm to its working partners was highly excessive and unreasonable, on the ground that the remuneration to partners (₹ 39.31 lakh) was many times more than the total payment of salary to all the employees (₹ 4.87 lakh). Therefore, he disallowed the excessive portion of the remuneration to partners by invoking the provisions of section 40A(2).

On this issue, the High Court observed that section 40(b)(v) prescribes the limit of remuneration to working partners, and deduction is allowable up to such limit while computing the business income. If the remuneration paid is within the ceiling limit provided under section 40(b)(v), then, recourse to provisions of section 40A(2) cannot be taken.

The Assessing Officer is only required to ensure that the remuneration is paid to the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and the remuneration is within the limits prescribed under section 40(b)(v). If these conditions are complied with, then the Assessing Officer cannot disallow any part of the remuneration on the ground that it is excessive.

The Allahabad High Court, therefore, held that the question of disallowance of remuneration under section 40A(2) does not arise in this case, since the all the three conditions mentioned above have been satisfied. Hence, the remuneration paid to working partners within the limits specified under section 40(b)(v) cannot be disallowed by invoking the provisions of section 40A(2).

11. Can unpaid electricity charges be treated as "fees" to attract disallowance under section 43B?

CIT v. Andhra Ferro Alloys P. Ltd. (2012) 349 ITR 255 (A.P)

On this issue, the Assessing Officer was of the view that electricity charges come within the ambit of section 43B and therefore, could be allowed as deduction only on payment basis. Therefore, he disallowed the unpaid electricity charges.

The Andhra Pradesh High Court observed that the provisions of section 43B do not incorporate electricity charges. Therefore, non-payment of electricity charges would not attract disallowance under section 43B since such charges cannot be termed as "fees". The Court, therefore, held that deduction is allowable in respect of such electricity charges.

12. Can exemption under section 54F be denied solely on the ground that the new residential house is purchased by the assessee exclusively in the name of his wife?

CIT v. Kamal Wahal (2013) 351 ITR 4 (Delhi)

The assessee sold a capital asset and invested the sale proceeds in purchase of a new house in the name of his wife. He claimed deduction under section 54F in respect of the new residential house purchased by him in the name of his wife. However, the same was denied by the Assessing Officer on the ground that, in order to avail the benefit under section 54F, the investment in the residential house should be made by the assessee in his own name.

The Delhi High Court held that, for the purpose of section 54F, a new residential house need not necessarily be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. A similar view was upheld by this Court in *CIT v. Ravinder Kumar Arora (2012) 342 ITR 38,* where the new residential house was acquired in the joint names of the assessee and his wife and the Court had held that the assessee was entitled for 100% exemption under section 54F. In that case, it was further observed that section 54F does not require purchase of new residential house property in the name of the assessee himself. It only requires the assessee to purchase or construct a residential house.

Further, in this case, the Delhi High Court observed that the assessee had not purchased the new house in the name of a stranger or somebody who is unconnected with him, but had purchased it in the name of his wife. The entire investment for purchase of new residential house had come out of the sale proceeds of the capital asset (of the assessee) and there was no contribution from his wife.

Hence, the Delhi High Court, held that the assessee is entitled to claim exemption under section 54F in respect of utilization of sale proceeds of capital asset for investment in residential house property in the name of his wife.

13. Would an assessee be entitled to exemption under section 54 in respect of purchase of two flats, adjacent to each other and having a common meeting point?

CIT v. Syed Ali Adil (2013) 352 ITR 0418 (A.P.)

The assessee-individual had inherited an ancestral house property, which he sold during the relevant previous year. Out of the sale consideration, he purchased two adjacent residential flats. The assessee claimed exemption under section 54 in respect of investment in both the residential flats.

The Assessing Officer, however, restricted the exemption under section 54 only in respect of investment in one residential flat (including stamp duty paid for registration of the flat), contending that –

(i) the two residential units were separated by a strong wall;

(ii) the two flats were purchased from two different vendors under two separate sale deeds.

The High Court held that–

(i) the expression "a residential house" in section 54(1) has to be understood in a sense that the building should be of residential nature and "a" should not be understood to indicate a singular number.

(ii) where the flats are situated side by side and the builder had effected the necessary modification to make it as one unit, the assessee would be entitled to exemption under section 54 in respect of investment in both the flats, despite the fact that they were purchased by separate sale deeds.

The Andhra Pradesh High Court, held that in this case, the assessee was entitled to exemption in both the flats purchased by him, since they were adjacent to each other and had a common meeting point.

14. Can unabsorbed depreciation of a business of an industrial undertaking eligible for deduction under section 80-IA be set off against income of another non-eligible business of the assessee?

CIT v. Swarnagiri Wire Insulations Pvt. Ltd. (2012) 349 ITR 245 (Kar.)

The assessee was in the business of manufacture of wires. It installed a windmill for power generation. The assessee claimed depreciation on windmill against income from power generation, which was eligible for deduction under section 80-IA. The balance depreciation was set off against the profits from manufacturing of wires, being a non-eligible business.
The Assessing Officer contended that depreciation relating to a business eligible for deduction under section 80-IA cannot be set off against non-eligible business income. Therefore, unabsorbed depreciation was to be carried forward to the subsequent year to be set off against the eligible business income of the assessee of that year.

The High Court held that for computing deduction under section 80-IA, the law provides that it should be presumed that the eligible business is the only business in the initial assessment year and in subsequent assessment years.

The High Court observed that it is a generally accepted principle that deeming provision of a particular section cannot be breathed into another section. Therefore, the deeming provision contained in section 80-IA(5) cannot override the provisions of section 70. The assessee had incurred loss in eligible business after claiming depreciation. Hence, section 80-IA becomes insignificant, since there is no profit from which this deduction can be claimed. It is thereafter that section 70 comes into play, whereby the assessee is entitled to set off the losses from one source against income from another source under the same head of income. The Court, therefore, held that the assessee was entitled to the benefit of set off of loss of eligible business against the profits of non-eligible business.

Note *– The crux of the above decision can be explained with a simple example. Let us consider a company, X Ltd., having two units, Unit A and Unit B. If Unit A engaged in eligible business (say, power generation) has a profit of ₹ 100 lacs in A.Y.2013-14, before claiming depreciation of ₹ 120 lacs and Unit B engaged in non-eligible business (say, manufacture of wires) has a profit of ₹ 70 lacs, then, as per the above decision, the loss of ₹ 20 lacs (representing balance depreciation not set-off) pertaining to Unit A can be set-off against profit of ₹ 70 lacs of Unit B carrying on non-eligible business. Therefore, the net profit of ₹ 50 lacs would be taxable in the A.Y.2013-14. If in the next year, i.e. A.Y.2014-15, the net profits of Unit A and Unit B are ₹ 200 lacs and ₹ 80 lacs, respectively, then the eligible deduction under section 80-IA for that year would be ₹ 180* *lacs (i.e., ₹200 lacs minus ₹20 lacs, being loss (representing balance depreciation) set-off in the A.Y.2013-14 against other income).*

15. Under which head of income is rental income from plinths inherited by individual co-owners from their ancestors taxable - "Income from house property" or "Income from other sources"? Further, would such income be assessable in the hands of the individual co-owners or in the hands of the Association of Persons?

Sudhir Nagpal v. Income-tax Officer (2012) 349 ITR 0636 (P & H)

As regards the head of income under which rental income from plinths is assessable, the High Court observed that it is the income from property consisting of any building or land appurtenant thereto which is assessed under section 22 and not the income from renting out of open land or some kutcha plinth only.

Therefore, the Court held that the income from letting out the plinths is assessable under section 56 as "Income from other sources" and not under the head "Income from house property".

On appeal, the High Court observed that in order to assess individuals as "association of persons", the individual co-owners should have joined their resources and thereafter, acquired property in the name of association of persons and the property should have been commonly managed. It is only in such a case that income could be assessed in the hands of "association of persons". Mere accruing of income jointly to more persons than one would not constitute them an association of persons in respect of such income.

In this case, the co-owners had inherited the property from their ancestors and there was nothing to show that they had acted as an association of persons. Thus, the High Court held that the rental income from the plinths has to be assessed in the status of individual and not association of persons.

16. Can an assessee file a revision petition under section 264, if the revised return to correct an inadvertent error apparent from record in the original return, is filed after the time limit specified under section 139(5) on account of the error coming to the notice of the assessee after the specified time limit?

Sanchit Software and Solutions Pvt. Ltd. v. CIT (2012) 349 ITR 404 (Bom.)

The assessee-company had electronically filed its return of income. It committed a mistake by including dividend income [exempt under section 10(34)] and long term capital gains on sale of shares [exempt under section 10(38)] in its return of income, though the same was correctly disclosed in the Schedule containing details of exempt income. The return was processed under section 143(1) denying the exemptions under section 10(38) and 10(34) and therefore, intimation under section 143(1) was served on the assessee raising a demand of tax. The assessee, on receiving the intimation, noticed the error committed and filed a revised return rectifying the error. However, the revised return was not sustainable as the same was filed beyond the period of limitation as provided under section 139(5). Later, the assessee filed an application for rectification under section 154 and also a revision petition under section 264.

The Commissioner of income-tax, while considering the revision petition, contended that the intimation under section 143(1) was based on the return of the assessee, in which the claims under section 10(34) and under section 10(38) were not made by the assessee. Hence, it cannot be said that the intimation under section 143(1) was erroneous, since the same was squarely based on the return filed by the assessee. The revision petition under section 264 was rejected by the Commissioner.

The High Court observed that the entire object of administration of tax is to secure the revenue for the development of the country and not to charge the assessee more tax than which is due and payable by the assessee.

The High Court observed that, in this case, the Commissioner of income-tax had committed a fundamental error in proceeding on the basis that no deduction on account of dividend income and long-term capital gains under section 10 was claimed from the total income, without considering that the assessee had specifically sought to exclude the same as is evident from the entries in the relevant Schedule. Therefore, this was an error on the face of the order and hence, the same was not sustainable. Accordingly, the High Court set aside the order of Commissioner and remanded the matter for fresh consideration.

The High Court further directed the Assessing Officer to consider the rectification application filed by the assessee under section 154 as a fresh application received on the date of service of this order and dispose of the rectification application on its own merits, without awaiting the result of the revision proceedings before the Commissioner of Income-tax on remand, at the earliest.

17. Can penalty under section 271(1)(c) be imposed if an assessee had wrongly claimed deduction of provision made for payment of gratuity in its return of income, though the same was shown as disallowed under section 40A(7) in the statement of particulars filed along with tax audit report under section 44AB?

Price Waterhouse Coopers Pvt. Ltd. v. CIT (2012) 348 ITR 306 (Supreme Court)

The assessee is engaged in multi-disciplinary management consultancy services. It had claimed deduction of provision made for payment of gratuity, though the annexure to the tax audit report in Form No. 3CD indicated that the provision towards payment of gratuity was not allowable under section 40A(7).

The Assessing Officer issued a notice to the assessee under section 148 for reopening the assessment. Thereafter, upon request, he furnished the reasons for reopening the assessment. It was then that the assessee realised its mistake and informed the Assessing Officer, by way of a letter, that there was no willful suppression of facts but a genuine mistake had been committed. Accordingly, the assessee filed a revised return on the same day and paid the tax due with interest.

The Assessing Officer, thereafter, initiated penalty proceedings under section 271(1)(c) and levied penalty at 300% of the tax sought to be evaded by the assessee, contending that the assessee has furnished inaccurate particulars of its income.

Considering the above facts, the Supreme Court observed that the tax audit report was filed along with the return and it unequivocally stated that the provision for gratuity was not allowable under section 40A(7). This fact indicates that the assessee made a computation error in its return of income. The error was also not noticed by the Assessing Officer who framed the assessment order and before whom, the tax audit report was also placed. The contents of the tax audit report showed that there was no question of the assessee concealing the income or furnishing any inaccurate particulars. Therefore, the Apex Court

held that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars. Therefore, the Apex Court held that imposition of penalty on the assessee was not justified.

18. Can reporting of income under a different head be considered as tantamount to furnishing of inaccurate particulars or suppression of facts to attract penalty under section 271(1)(c)?

CIT v. Amit Jain (2013) 351 ITR 74 (Delhi)

In this case, the assessee declared a particular income as short-term capital gains in his return. The Assessing Officer, on an interpretation of the relevant provisions and having regard to the nature of transactions, assessed such income as income from business. He further levied penalty under section 271(1)(c) on the ground that the assessee had furnished inaccurate particulars of his income.

The High Court, after considering decision of the Supreme Court in *CIT v. Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158*, held that mere reporting of income under a different head would not characterize the particulars reported as "inaccurate" to attract levy of penalty under section 271(1)(c).

19. Can penalty under section 271(1)(c) be imposed on the ground of disallowance of a certain deduction under Chapter VI-A owing to the subsequent decision of the Supreme Court?

CIT v. Celetronix Power India P. Ltd. (2013) 352 ITR 70 (Bom.)

In this case, the assessee had claimed deduction a particular section under Chapter VI-A relying on a judgment of the Bombay High Court. Subsequent to filing of its return, the above judgment was reversed by the Supreme Court and accordingly, the deduction was not allowed at the time of assessment. Consequent to additions made on account of such disallowance, penalty was also imposed.

The Court that for imposing penalty under section 271(1)(c), there should be concealment of income or furnishing of inaccurate particulars of income, which were missing in this case. The assessee had disclosed all material facts relevant for assessment and there was no concealment.

The Bombay High Court deleting the penalty under section 271(1)(c) on the ground that the additions made on account of disallowance were neither due to the failure on the part of the assessee to furnish accurate particulars nor on account of furnishing inaccurate particulars.

20. In the case of an assessee liable to pay minimum alternate tax under section 115JB, can penalty under section 271(1)(c) be imposed on account of additions made in respect of certain capital expenditure, treated by the assessee as revenue expenditure, if, even after such additions to total income, the assessee is still assessable under section 115JB?

CIT v. Amtek Auto Ltd. (2013) 352 ITR 394

The Assessing Officer levied penalty under section 271(1)(c), in respect of additions made on account of loss on sale of fixed asset, loss on sale of shares and expenses paid towards placement of preference shares. On appeal by the assessee, the Tribunal observed that the additions were based on a difference of opinion as to whether such expenses and losses were revenue or capital in nature, and not on account of any false claim made by the assessee. Further, even after such additions, the tax on total income was lower than the minimum alternate tax on book profit, consequent to which there was no change in the tax payable.

On appeal by the Revenue, the High Court observed that the assessee had disclosed the nature of transactions in its return. It was on the basis of the information disclosed and the interpretation of the provisions of the statute, the Assessing Officer found that such expenditure claimed by the assessee is not revenue expenditure but capital expenditure. The High Court, therefore, concurred with the observation of the Tribunal and held that merely for the reason that the assessee-company had claimed the expenditure to be revenue will not render it liable to penal proceedings, when there has been no concealment of income.

21. Can discount given to stamp vendors on purchase of stamp papers be treated as 'commission or brokerage' to attract the provisions for tax deduction under section 194H?

CIT v. Ahmedabad Stamp Vendors Association (2012) 348 ITR 378 (SC)

The principal issue in this case is whether stamp vendors are agents of the State Government who are being paid commission or brokerage or whether the sale of stamp papers by the Government to the licensed vendors is on "principal-to-principal" basis involving a "contract of sale".

On this issue, the Gujarat High Court had in, *Ahmedabad Stamp Vendors Association v. Union of India (2012) 348 ITR 378*, observed that the crucial question is whether the ownership in the stamp papers passes to the stamp vendor when the treasury officer delivers stamp papers on payment of price less discount. The Gujarat Stamp Supply and Sales Rules, 1987 contemplates that the licensed vendor, while taking delivery of the stamp papers from the Government offices, is purchasing the stamp papers. The Rules also indicate that the discount which the licensed vendor has obtained from the Government is on purchase of the stamp papers.

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

When the licensed stamp vendors take delivery of stamp papers on payment of full price less discount and they sell such stamp papers to the retail customers, neither of the two activities (namely, buying from the Government and selling to the customers) can be termed as service in the course of buying and selling of goods. The High Court, therefore, held that discount on purchase of stamp papers does not fall within the expression "commission or brokerage" to attract the provisions of tax deduction at source under section 194H.

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

22. Can an assessee carrying on commission agency business (i.e., business of arranging transportation of goods through lorries owned by other transporters) be made liable to deduct tax under section 194C, in respect of amount received from clients and passed on to the lorry owners/transporters (after retaining his booking commission)?

CIT v. Hardarshan Singh (2013) 350 ITR 0427 (Delhi)

The assessee has four trucks and is in the business of transporting goods (hereinafter referred to as "own business"). He also carries on the business of a commission agent by arranging for transportation of goods through other transporters (hereinafter referred to as "lorry booking business"). In respect of his own business, the payments received by the assessee were after deduction of tax.

The issue under consideration is whether the assessee can be treated as the "person responsible for making the payment" under section 194C in respect of amount collected from clients and paid to the lorry owners/transporters, and consequently, be made liable to deduct tax at source.

The assessee contended that, as far as the lorry booking business is concerned, he has no contract of carriage with any other person. The contract is between the clients and the lorry owners/transporters, in which the assessee only acts as a facilitator or as an intermediary. His income is only the booking commission, which he retains out of the amount collected from the clients. The remaining amount is passed on entirely to the lorry owners/transporters.

The Assessing Officer and the Commissioner, however, did not agree with this contention of the assessee and were of the view held that there was a privity of contract between the assessee and the clients for carriage of goods and that the assessee was not a mere intermediary or facilitator.

The Tribunal, noting that the assessee has not done the work of actual transportation of goods and earned only commission, held that the assessee has no privity of contract for carriage of goods with the clients and he merely acted as a facilitator or intermediary. Therefore, the assessee was not liable to deduct tax at source, and accordingly disallowance under section 40(a)(ia) was not attracted in this case.

The Revenue contended before the High Court that the assessee was the "person responsible for paying" as provided in section 194C read with section 204. The High Court observed that this contention was tenable only if there was privity of contract between the assessee and its clients. The High Court also noted that the facts of the case were similar to the case of *CIT v. Cargo Linkers (2009) 179 Taxman 151 (Delhi)*, where the principal contract was between the exporter and the airline. In that case, it was held that the assessee had merely functioned as an intermediary, and hence, it was not the "person responsible for deduction of tax" in terms of section 194C.

The High Court, applying the rationale of the above ruling to the case on hand, held that, in this case also, the assessee mainly acted as an intermediary or facilitator for which he received commission, and hence, he was not the "person responsible for making the payment" in terms of section 194C.

23. Where under release agreement, assessee –CA firm which was representing a foreign firm for 13 years was to no longer represent foreign CA firm in India and foreign firm would not refer any work to assessee-firm, compensation received by assessee – firm from said foreign CA firm for termination of its service would be capital receipt.

Khanna & Annadhanam (Delhi)

As per understanding between the assessee CA firm and a foreign accounting firm DHS, the assessee firm was getting referred work from the foreign firm for about 13 years. The foreign firm wanted another Indian CA firm to represent its work in India. Accordingly, an agreement was entered into which was called a release agreement, under which assessee- CA firm was to no longer represent foreign CA firm in India and foreign firm would not refer any work to assessee-firm. In consideration of the termination of the services of the assessee – firm, a compensation of certain amount was paid by DHS to the assessee-firm. The Assessing Officer took the view that the receipt was taxable as part of the professional income of the assessee-firm.

The Delhi High Court held as follows:

The Supreme Court in Oberoi Hotel Pvt. Ltd. V. CIT, (1999) 236 ITR 903 has held that ordinarily compensation for loss of office or agency is to be regarded as a capital receipt and the only exception where the payment received for termination of an agency agreement could be treated as revenue receipt was where the agency was one of many agencies which the assessee held and its termination did not impair the profit making structure of the assessee. In a firm of chartered accountants, there could be separate source of professional income such as tax work, audit work, certification work, and opinion work as also referred work. Under the arrangement with DHS there was a regular inflow of referred work from DHS in respect of clients based in Delhi and nearby areas. There is no evidence that the assessee-firm had entered into similar arrangements with other international firms of chartered accountants. The arrangement with DHS was in vogue for a long period 13 years and had acquired a kind of permanency as a source of income. When that source was unexpectedly terminated, it amounted to the impairment of the profit-making structure or apparatus of the assessee firm. It is for that loss of the source of income that the compensation was calculated and paid to the assessee. The compensation was thus a substitute for the source. Thus, the Assessing Officer was wrong in treating the receipt as being revenue in nature.

Thus, the amount received by the assessee – CA firm in terms of release agreement represents a capital receipts not assessable to income tax.

24. **Where assessee player disclosed the details of awards received from the government and other institutions but did not offer them to tax and subsequent to reopening of assessment voluntarily offered same to tax, penalty for concealment of income could not be levied.**

CIT vs. Sania Mirza (Andhra Pradesh)

The assessee is a tennis player. She filed her return declaring a total income of ₹ 94,605. Along with her return of income, she filed a statement of affairs wherein she disclosed that she had received ₹ 30,63,310 as awards from the Government and from other institutions. This amount was not offered to tax although it was disclosed in the statement of affairs along with the return. When the assessment was reopened, she voluntarily offered ₹ 30,63,310 for tax. It was stated that the amount was shown in the capital account and was not shown as a capital receipt.

The Assessing Officer accepted the amount as taxable income and levied the tax accordingly. The Assessing Officer decided to impose penalty of ₹ 10,14,582 on the ground that the assessee had furnished inaccurate particulars of her income.

The court held that there is nothing to suggest that the assessee acted in a manner such as to lead to the conclusion that she had concealed the particulars of her income or had furnished inaccurate particulars of income. The admitted position is that the amount of ₹ 30,63,310 was shown by her in the return. That being the position, it cannot be said that there was any concealment. There is no dispute about the fact that the amount was correctly mentioned and therefore, there is also nothing inaccurate in the particulars furnished by her. The only error that seems to have been committed was that it was not shown as income. But as soon as this was pointed out, the error was accepted and the amount was surrendered to tax. Hence, this is not a fit case for imposition of penalty.

25. Interest earned by a club on fixed deposits kept with bank, which were its corporate members, would not be exempted from payment of income-tax on basis of doctrine of mutuality.

Bangalore Club vs. CIT (Supreme Court)

The assessee-club earned interest income on fixed deposits kept with different banks. While it offered tax on income earned from other banks, it claimed exemption from tax on interest earned from those banks which were its corporate members on the basis of doctrine of mutuality.

The Supreme Court held that funds of club in form of FDRs are expended on non-members i.e. that clients of the bank. Banks generate income by paying a lower rate of interest to club-assessee that makes deposit with them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons, snap the link of mutuality and thus, breaches the concept of mutuality.

The amount of interest earned by the assessee from the bank will not fall within the ambit of the mutuality participle and will therefore, be taxable in the hands of the assessee-club.

26. Would the period of limitation for an order passed under section 263 be reckoned from the original order passed by the Assessing Officer under section 143(3) or from the order of reassessment passed under section 147, where the subject matter of revision is different from the subject matter of reassessment under section 147?

CIT v. ICICI Bank Ltd. (2012) 343 ITR 74 (Bom.)

In the present case, an order of assessment was passed under section 143(3) allowing the deduction under section 36(1)(vii), 36(1)(viia) and foreign exchange rate difference. Further, two notices of reassessment were issued under section 148 and an order of reassessment was passed under section 147 which did not deal with the above deductions.

Later, the Commissioner passed an order under section 263 for disallowing the deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate difference which have not been taken up in the reassessment proceedings under section 147 but which was decided in the original order of assessment passed under section 143(3).

Held, period of limitation in respect of the order of Commissioner under section 263 in respect of a matter which does not form the subject matter of reassessment shall be reckoned from the date of the original order under section 143(3) and not from the date of the reassessment order under section 147.

3

NEW PENALTY FOR CONCEALMENT IN CASE OF SEARCH & SEIZURE

NEW LAW OF PENALTY FOR CONCEALMENT OF INCOME IN CASE OF SEARCH & SEIZURE (AS INTRODUCED BY FINANCE ACT, 2012)

<u>SECTION 271AAB</u>

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income in the manner given in clause (a) above; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) No penalty under the provisions of section 271(1)(c) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under section 139(1) or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(c) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.

ANALYSIS OF SECTION 271AAB

Search is conducted on **2nd August, 2012.** Cash of ₹ 3 crores and jewellery of ₹ 4 crores is seized. The due date of filing of return is **30th September** of the Assessment year and the Assessing Officer issued notice under section 153A on 4th August, 2012 to file the returns of income under section 153A for Assessment Year 2007-08 to Assessment year 2012-13 on before **5th September, 2012.** Assessee has not filed the return of income for Assessment Year 2012-13 upto **1st August, 2012**.

1. Now **"Specified Previous year"** means:
   (i) **Previous year 31.03.2012** i.e. the previous year which has ended before the date of search but the due date of furnishing the return of Income under section 139(1) for such year has not expired before the date of search and the assessee has not furnished the return of income for the said previous year before the date of search.
   (ii) **Previous year 31.03.2013** i.e. the previous year in which search is conducted.

2. Now **"Specified Date"** means:
   (i) **For previous year 31.03.2012** i.e. Assessment Year 2012-13 ➔ **5th September, 2012**, i.e. the date on which the period specified in the notice issued under section 153A for furnishing the return of income expires.
   (ii) **For previous year 31.03.2013** i.e., Assessment Year 2013-14 ➔ **30th September, 2013** i.e. the due date of furnishing the Return of Income under section 139(1).

3. Let us say that out of cash of ₹ 3 crores & Jewellery of ₹ 4 crores seized, cash of ₹ 75 lakh and jewellery of ₹ 1.20 crores was recorded in regular books of account of previous year 31.03.2012 and/ or previous year 31.03.2013 on or before 02.08.2012 . Then cash of ₹ 75 lakhs and jewellery of ₹ 1.20 crores shall not be treated as undisclosed income of previous year 31.03.2012 and / or 31.03.2013 and no penalty of concealment under section 271AAB or under section 271(1)(c) shall be levied.

   Same answer will apply if assessee has disclosed cash of ₹ 75 lakh and jewellery of ₹ 1.20 crores before the CIT before 2.08.2012.

4. Regarding remaining cash of 2.25 crores and jewellery of ₹ 2.80 crores(which is not recorded in regular books of account before 2.8.2012 of Previous Year 31.3.2012 and/ or 31.3.2013), if the assessee proves that cash of ₹ 2.25 crores and jewellery of ₹ 2.80 crores is out of the income of previous year 31.3.2012 and/ or previous year 31.03.2013 in the following manners:
   - He makes statement under section 132(4) in the course of search and admits the undisclosed income of 2.25 crores and 2.80 crores and specifies the manner in which such income has been derived.
   - And proves the manner in which undisclosed income has been derived.
   - And pays tax and interest in respect of undisclosed income of previous year 31.03.2012 on or before 5.9.2012 and of previous year 31.3.2013 on or before 30.09.2013.

   then penalty of 10% on ₹ 5.05 crores i.e., ₹ 50,50,000 shall be levied under section 271AAB. This is in addition to income tax and interest on the said income. Penalty under section 271(1)(c) shall not be levied.

5. If assessee is not able to admit the concealed income and substantiate it in the statement given under section 132(4) but assessee declares such income in the return of previous year 31.03.2012 and / or previous year 31.03.2013 i.e. for previous year 31.03.2012 he files return on or before 5.9.2012 and for previous year 31.03.2013, he files return of income on or before 30.09.2013 and declares such income therein, then there shall be a penalty of 20% of 5.05 crores i.e. of 1.10 crores. This is in addition to income tax and interest on the said income. Penalty under section 271(1)(c) shall not be levied.

6. If assessee does not admit / disclose the income in manner given in para 4 and 5 above and A.O. assesses the above income in previous year 31.03.2012 / 31.03.2013, than assessee shall pay penalty of minimum 30% and maximum 90% of undisclosed income. Penalty under section 271(1)(c) shall not be levied.

7. If it is proved that the income does not belong to previous year 31.03.2012 / 31.03.2013 then Explanation 5A to section 27(1)(c) shall be applicable.

Memorandum Explaining Finance Bill, 2012

Penalty on undisclosed income found during the course of search

Under the existing provisions of section 271AAA of the Income-tax Act, no penalty is levied if the assessee admits the undisclosed income in a statement under sub-section (4) of section 132 recorded in the course of search and specifies the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income.

As a result, undisclosed income (for the current year in which search takes place or the previous year which has ended before the search and for which return is not yet due) found during the course of search attracts a tax at the rate of 30% and no penalty is leviable.

In order to strengthen the penal provisions, it is proposed to provide that the provisions of section 271AAA will not be applicable for searches conducted on or after 1st July, 2012. It is also proposed to insert a new provision in the Act (section 271AAB) for levy of penalty in a case where search has been initiated on or after 1st July, 2012. The new section provides that,-

(i) If undisclosed income is admitted during the course of search, the taxpayer will be liable for penalty at the rate of 10% of undisclosed income subject to the fulfillment of certain conditions.

(ii) If undisclosed income is not admitted during the course of search but disclosed in the return of income filed after the search, the taxpayer will be liable for penalty at the rate of 20% of undisclosed income subject to the fulfillment of certain conditions.

(iii) In a case not covered under (i) and (ii) above, the taxpayer will be liable for penalty at the rate ranging from 30% to 90% of undisclosed income.

These amendments will take effect from the 1st day of July, 2012 and will, accordingly, apply to any search and seizure action taken after this date.

EXPLANATION 5A TO SECTION 271(1)(c): DEEMED CONCEALMENT

Explanation 5A to section 271(1)(c) is applicable for previous years which have ended before the date of search and the due date for filing the return of income for such years has expired and the assessee has not filed the return of income.

"*Explanation 5A.*—Where in the course of a search initiated under section 132, the assessee is found to be the owner of,—

(*i*) any money, bullion, jewellery or other valuable article or thing (hereinafter in this *Explanation* referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or

(*ii*) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of the search and the due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under section 271(1)(c), be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."

RESTROSPECTIVE ADDITION IN EXPLANATION 5A TO SECTION 271(1)(c) BY FINANCE ACT, 2009

Where in the course of a search initiated under section 132, the assessee is found to be the owner of, —

(*i*) any money, bullion, jewellery or other valuable article or thing (hereinafter referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or

(*ii*) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and where the return of income for such previous year has been furnished before the date of search but such income has not been declared therein, then notwithstanding that such income is declared by him in any revised return of income furnished on or after the date of search, he shall for the purpose of imposition of penalty under section 271(1)(c) be deemed to have concealed the particulars of his income or furnished inaccurate particular of such income.

Search conducted on 2nd August, 2012. Assessee is issued with notice under section 153A and asked to file Return of Income on or before 5th September, 2012 for Assessment Year 2007-08 to Assessment Year 2012-13.

Undisclosed income pertains to Previous Year	Due Date of Filing of ROI	Date of filing of ROI	Consequences
PREVIOUS YEAR 31.3.2012	30.09.2012	Return not filed upto 1st August, 2012	1. No penalty if income recorded in regular books of account on or before 2.8.2012 or disclosed before CIT before 2.8.2012. (Section 271AAB) 2. Penalty of 10% of undisclosed income if assessee makes a statement in course of search and admits undisclosed income and prove the manner in which income was derived and pays tax & interest on or before 5.9.2012. (Section 271AAB) 3. Penalty of 20% of undisclosed income if assessee declares undisclosed income in the ROI he files on or before 5.9.2012. (Section 271AAB) 4. Penalty of 30% to 90% of undisclosed income if Assessing Officer assesses undisclosed income and assessee does not fall in point 1,2 & 3 above. (Section 271AAB)
PREVIOUS YEAR 31.3.2013	30.09.2013	30.09.2013 Undisclosed income declared	1. No penalty if income recorded in regular books of account on or before 2.8.2012 or disclosed before CIT before 2.8.2012. (Section 271AAB) 2. Penalty of 10% of undisclosed income if assessee makes a statement in course of search and admits undisclosed income and prove the manner in which income was derived and pays tax & interest on or before 30.9.2013. (Section 271AAB) 3. Penalty of 20% of undisclosed income if assessee declares undisclosed income in the ROI he files on or before 30.9.2013. (Section 271AAB) 4. Penalty of 30% to 90% of undisclosed income if Assessing Officer assesses undisclosed income and assessee does not fall in point 1,2 & 3 above. (Section 271AAB)

PREVIOUS YEAR 31.3.2012	30.09.2012	May, 2012 undisclosed income was not declared.	Section 271AAB not applicable since return has been filed before the date of search and undisclosed income not declared therein. Explanation 5A is applicable and there is a deemed concealment. Penalty shall be minimum 100% and maximum 300% of tax sought to be evaded. This shall apply even if assessee files a revised return on or after 2.8.2012 declaring the undisclosed income therein.
PREVIOUS YEAR 31.3.2011	30.09.2011	30.09.2011 Undisclosed income not shown. Revised return filed on 30.9.2012 declaring undisclosed income.	Deemed Concealment of income as per Explanation 5A to section 271(1)(c). Penalty shall be minimum 100% of tax sought to be evaded and maximum 300% of tax sought to be evaded.
PREVIOUS YEAR 31.3.2011	30.09.2011	30.09.2012 Undisclosed income disclosed	Explanation 5A to section 271(1)(c) shall apply. Penalty shall be minimum 100% of tax sought to be evaded and maximum 300% of tax sought to be evaded.