Black Money Act, 2015 10

This Module includes:

10.1 Introduction to Black Money Act

10.2 Highlights of Black Money Act

Black Money Act, 2015

SLOB Mapped against the Module:

To develop understanding about various provisions of direct taxation laws and rules including international taxation laws, and inherent issues that are subject to interpretation with reference to case laws, etc.

Module Learning Objectives:

After studying this module, the students will be able to -

- Identify the applicability of the provisions
- Understand the requirement of the provisions
- Analyse the impact of such provisions in computing income and tax liability
- Appreciate the various disclosures and procedure.

Introduction to Black Money Act

10.1

An Act to make provisions to deal with the problem of the Black money that is undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto.

Highlights of Black Money Act

10.2

Chargeability

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 had been introduced in the Parliament on 20-03-2015 which thereafter received President's assent on 26th May 2015 and notified in the month of July 2015.

The Act extends to the whole of India and provides that tax @ 30% shall be charged on every assessee for every assessment year in respect of total undisclosed foreign income and asset of the previous year – [Sec. 3]

Taxpoint

- Assessee means a person, being a resident other than not ordinarily resident in India within the meaning of sec. 6(6) of the Income-tax Act, by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under this Act and includes every person who is deemed to be an assessee in default under this Act – [Sec. 2(2)]
- **Previous year means:**
  a) the period beginning with the date of setting up of a business and ending with the date of the closure of the business or the 31st day of March following the date of setting up of such business, whichever is earlier;
  b) the period beginning with the date on which a new source of income comes into existence and ending with the date of closure of the business or the 31st day of March following the date on which such new source comes into existence, whichever is earlier;
  c) the period beginning with the 1st day of the financial year and ending with the date of discontinuance of the business other than business referred to in (b) or dissolution of an unincorporated body or liquidation of a company, as the case may be; or
  d) the period of 12 months commencing on the 1st day of April of the relevant year in any other case,
  - and which immediately precedes the assessment year [Sec. 2(9)]
- Undisclosed asset located outside India means an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory [Sec. 2(11)]
- Undisclosed foreign income and asset means the total amount of undisclosed income of an assessee from a source located outside India and the value of an undisclosed asset located outside India, referred to in section 4, and computed in the manner laid down in section 5 [Sec. 2(12)]
- An undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer.

- Value of an undisclosed asset means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed.

Scope of total undisclosed foreign income and asset [Sec. 4]

- The total undisclosed foreign income and asset of any previous year of an assessee shall be:

  a) the income from a source located outside India, which has not been disclosed in the return of income furnished u/s 139 of the Income-tax Act;

  b) the income, from a source located outside India, in respect of which a return is required to be furnished u/s 139 of the Income-tax Act but no return of income has been furnished u/s 139 of the Income-tax Act; and

  c) the value of an undisclosed asset located outside India.

- Any variation made in the income from a source outside India in the assessment or reassessment of the total income of any previous year, of the assessee under the Income-tax Act in accordance with the provisions of section 29 to section 43C (Profits and gains of business or profession) or section 57 to section 59 (Income from other sources) or section 92C (Transfer pricing) of the said Act, shall not be included in the total undisclosed foreign income.

- To avoid double taxation, the income included in the total undisclosed foreign income and asset under this Act shall not form part of the total income under the Income-tax Act.

Computation of total undisclosed foreign income and asset [Sec. 5]

- In computing the total undisclosed foreign income and asset of any previous year of an assessee:

  - No deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee, whether or not it is allowable in accordance with the provisions of the Income-tax Act.

  - Any income,—

    a) which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies; or

    b) which is assessable or has been assessed to tax for any assessment year under this Act,

shall be reduced from the value of the undisclosed asset located outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax.

- The amount of deduction in case of an immovable property shall be the amount which bears to the value of the asset as on the first day of the financial year in which it comes to the notice of the Assessing Officer, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset.

Illustration 1.

A house property located outside India was acquired by an assessee in the previous year 2009-10 for ₹ 50 lakh. Out of the investment of ₹ 50 lakh, ₹ 20 lakh was assessed to tax in the total income of the previous year 2009-10 and earlier years. Such undisclosed asset comes to the notice of the Assessing Officer in the year 2025-26. If the value of the asset in the year 2025-26 is ₹ 1 crore, the amount chargeable to tax shall be ₹ 60,00,000 i.e.:

₹ 1,00,00,000 – (₹ 20,00,000 / ₹ 50,00,000) = ₹ 60,00,000

Tax Management

Tax authorities [Sec. 6]

- The income-tax authorities shall be the tax authorities for the purposes of this Act.
- Every such authority shall exercise the powers and perform the functions of a tax authority under this Act in respect of any person within his jurisdiction.
- The jurisdiction of a tax authority under this Act shall be the same as he has under the Income-tax Act
- The tax authority having jurisdiction in relation to an assessee who has no income assessable to income-tax under the Income-tax Act shall be the tax authority having jurisdiction in respect of the area in which the assessee resides or carries on its business or has its principal place of business.

Change of incumbent [Sec. 7]

The tax authority who succeeds another authority as a result of change in jurisdiction or for any other reason, shall continue the proceedings from the stage at which it was left by his predecessor. The assessee in such a case may be given an opportunity of being heard, if he so requests in writing, before passing any order in his case.

Assessment [Sec. 10]

- The Assessing Officer may, on receipt of an information from an income-tax authority or any other authority under any law for the time being in force or on coming of any information to his notice, serve on any person, a notice requiring him, on the specified date, to produce such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act.
  - No separate return is required to be filed under this Act
  - There is no time limit for issuance of the aforesaid notice. The Assessing Officer may issue such notice any time on the basis of information.
- The Assessing Officer may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require.
- The Assessing Officer may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year or years.
- The Assessing Officer, after considering such accounts, documents or evidence, as he has obtained, and after taking into account any relevant material which he has gathered and any other evidence produced by the assessee, shall by an order in writing, assess the undisclosed foreign income and asset and determine the sum payable by the assessee.
- Such order shall be made within 2 years from the end of the financial year in which the notice was issued by the Assessing Officer [Sec. 11]
- Best Judgment Assessment: If any person fails to comply with all the terms of the notice, the Assessing Officer shall, after taking into account all the relevant material which he has gathered, make the assessment of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee. [Sec. 10(4)]
  - Before making such an assessment, an opportunity of being heard is required to be given to the assessee.
- Aggrieved with the order of the Assessing Officer, the assessee may file appeal or rectification petition or revision petition (which are in line with the Income-tax Act)

	Income-tax Act	Black Money Act
Rectification	Sec. 154	Sec. 12
Notice of Demand	Sec. 156	Sec. 13
Appeals to Commissioner (Appeals)	Sec. 246A to 250	Sec. 15 to 17
Appeals to Tribunal	Sec. 252 to 255	Sec. 18
Appeals to High Court	Sec. 260A	Sec. 19
Appeals to the Supreme Court	Sec. 261	Sec. 21
Revision	Sec. 263 / 264	Sec. 23 / 24
Recovery of Tax	Sec. 220	Sec. 30
Tax Recovery Officer	Sec. 222 to 232	Sec. 31 to 39
Interest	Sec. 234 to 234C	Sec. 40
Power regarding discovery, inspection, etc.	Sec. 131	Sec. 8

- **Liability of manager of a company [Sec. 35]**

  Every person being a manager at any time during the financial year shall be jointly and severally liable for the payment of any amount due under this Act in respect of the company for the financial year, if the amount cannot be recovered from the company.

  However, if the manager proves that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the company, then aforesaid provision shall not be applied.

- **Joint and several liability of participants [Sec. 36]**

  Every person, being a participant in an unincorporated body at any time during the financial year, or the representative assessee of the deceased participant, shall be jointly and severally liable, along with the unincorporated body, for payment of any amount payable by the unincorporated body under this Act and all the provisions of this Act shall apply accordingly.

  However, if the partner of LLP proves that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the partnership, then aforesaid provision shall not be applied.

  - Participant means—

    a. a partner in relation to a firm; or

    b. a member in relation to an association of persons or body of individuals [Sec. 2(7)]

Penalties & Prosecutions

Provision relating to penalties and prosecutions are enumerated here in below:

Nature of default	Sec.	Penalty	Sec.	Prosecution
Fails to disclose foreign income and asset	41	300% of tax u/s 10	51(1)	3 years to 10 years[1]
Fails to furnish return of income before expiry of the relevant assessment year[2]	42	₹ 10 lakh		
Fails to disclose foreign asset or income in the return of income[2]	43	₹ 10 lakh	50	6 months to 10 years[1]

Nature of default	Sec.	Penalty	Sec.	Prosecution
Attempt to evade payment of tax, interest and penalty	44	Tax in arrear	51(2)	3 years to 10 years
Failure to: a) answer any question put to him by a tax authority b) sign any statement made by him in the course of any proceedings which a tax authority may legally require him to sign; c) attend or produce books of account or documents at the place or time, at certain place and time in response to summons issued u/s 8	45	₹ 50,000 to ₹ 2,00,000		
Makes a statement or delivers an account or statement which is false			52	6 months to 10 years[1]
Abets or induces another person to make and deliver an account or a statement or declaration which is false			53	6 months to 10 years[1]
Second and subsequent offences			58	3 years to 10 years[3]

[1.] with fine

[2.] this section shall not apply in respect of an asset or assets (other than immovable property) where the aggregate value of such asset or assets does not exceed ₹ 20 lakh

[3.] Fine of ₹ 5 lakh to ₹ 1 crore

Taxpoint:

- No penalty order shall be passed after the expiry of 1 year from the end of the financial year in which the notice for imposition of penalty is issued u/s 46 [Sec. 47]
- A person shall not be prosecuted against for an offence except with the sanction of the Principal Commissioner or Commissioner or the Commissioner (Appeals), as the case may be.
- An order imposing a penalty shall be made with the approval of the Joint Commissioner, if:
  - the penalty exceeds ₹ 1,00,000 and the tax authority levying the penalty is in the rank of Income-tax Officer; or
  - the penalty exceeds ₹ 5,00,000 and the tax authority levying the penalty is in the rank of Assistant Commissioner or Deputy Commissioner.
- Congnizance of offence: No court inferior to that of a metropolitan magistrate or a magistrate of the First Class shall try any offence under this Act. – Sec. 80
- No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act. – Sec. 82(1)
- No prosecution, suit or other proceeding shall lie against the Government or any officer of the Government, for anything in good faith done or intended to be done, under this Act -Sec. 82(2)

Other Provisions

- **Rounding off**

  a. The amount of undisclosed foreign income and asset computed shall be rounded off to the nearest multiple of ₹ 100.

  b. Any amount payable or receivable by the assessee shall be rounded off to the nearest multiple of ₹ 10.

- **Agreement with foreign countries or specified territories [Sec. 73]**

  The Central Government may enter into an agreement with the Government of any other country:

  a. for exchange of information for the prevention of evasion or avoidance of tax on undisclosed foreign income chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance;

  b. for recovery of tax under this Act and under the corresponding law in force in that country.

Taxpoint:

- The Central Government may enter into an agreement with the Government of any specified territory outside India
- The Central Government may, by notification, make such provisions as may be necessary for implementing the agreements
- Any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may by notification make such provisions as may be necessary for adopting and implementing such agreement.

Exercise

Multiple Choice Questions

1. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 extends to
   A. Whole of India
   B. Whole of India excluding Jammu and Kashmir
   C. Whole of India excluding Jammu and Kashmir and Arunachal Pradesh
   D. None of the above
2. The rate of tax provided by the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is
   A. 30%
   B. 60%
   C. 50%
   D. None of the above

[Answer: 1 – A, 2 – A]

Short Essay Type Questions

1. How to compute total undisclosed foreign income and asset u/s 5 of the Black Money Act?
2. State the amount of penalty u/s 41 of the Black Money Act for failure to disclose foreign money and asset.

References

https://www.incometaxindia.gov.in/

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Case Study 11

This Module includes:

11.1 Discussion on Various Cases

Case Study

SLOB Mapped against the Module:

1. To develop understanding about various provisions of direct taxation laws and rules including international taxation laws, and inherent issues that are subject to interpretation with reference to case laws, etc.
2. To attain abilities to apply the acquired understanding for solving complex taxation problems and taking tax efficient business decision and execution thereof.

Module Learning Objectives:

After studying this module, the students will be able to -

- Identify the issue before the judiciary
- Understand, analyse, and interpret the decision of the judiciary
- Appreciate the applicability of such decision in the given scenario

Discussion on Various Cases

11.1

Commissioner of Income Tax (International Taxation) -vs.- Amazon Web Services Inc. [2025] 174 taxmann.com 1188 (Delhi) / 2025 DHC 4622-DB

Whether payments made by Indian customers for standardized cloud computing services (IaaS) constitute "Royalty" or "Fees for Technical Services" (FTS) under the India-US DTAA?

- **Brief Fact:** The Revenue treated payments to AWS for cloud services as "royalty" for the use of scientific equipment/process. AWS argued it provided standard automated services without transferring any rights, control, or technical know-how to the customers.
- **Decision:** Held in favour of Assessee. The Court held that cloud computing payments are not Royalty. Customers merely access the service; they do not acquire any proprietary right, control, or possession over the server hardware or software code. It is a service, not a lease of equipment or transfer of copyright.

Income Tax Bar Association -vs.- Union of India [2025] 179 taxmann.com 290 (Gujarat)

Can the CBDT extend the due date for filing Tax Audit Reports without simultaneously extending the due date for filing the Income Tax Return (ITR)?

- **Brief Fact:** The CBDT extended the deadline for filing Tax Audit Reports to 31st October but kept the ITR filing deadline as 31st October as well. The petitioners argued this violated the statutory scheme which envisages a one-month gap between the audit report and ITR filing.
- **Decision:** Held in favour of Assessee. The Court directed the CBDT to extend the ITR filing due date. It held that the "specified date" for audit and "due date" for ITR are inextricably linked. Extending one without the other defeats the legislative intent of allowing time to prepare the return after the audit is concluded.

KMG Wires Pvt. Ltd. -vs.- National Faceless Assessment Centre [2025] [WPL/24366/2025] (Bombay)

Is a tax notice valid if it relies on case laws generated by Artificial Intelligence (AI) that do not actually exist?

- **Brief Fact:** The Income Tax Department issued a notice relying on three specific judicial precedents. The assessee found these cases were hallucinations (non-existent) generated by an AI tool used by the officer to draft the notice.
- **Decision:** Held in favour of Assessee. The Court quashed the notice, calling the process unfair. It observed that while AI is useful, quasi-judicial authorities cannot blindly rely on it without cross-verification. Reliance on non-existent cases breaches the principles of natural justice.

T.K.S. Builders (P.) Ltd. -vs.- Income Tax Officer [2024] 167 taxmann.com 759 (Delhi)

Do Faceless Assessing Officers (FAO) and Jurisdictional Assessing Officers (JAO) have concurrent jurisdiction to issue reassessment notices under Section 148?

- **Brief Fact:** The assessee challenged a sec. 148 notice issued by the Faceless Assessing Officer, arguing that only the Jurisdictional AO had the power to issue such notices under the specific notifications.

- **Decision:** Held in favour of Revenue. The Court clarified that under the new regime (Section 144B and related notifications), both the JAO and FAO have concurrent jurisdiction. A notice issued by the Faceless officer is valid and cannot be quashed merely on the ground that the JAO should have issued it.

Siemens Public Communications Network Ltd -vs.- CIT (2016) (SC)

Voluntary subsidies paid by a holding company, to protect the capital investment, to its loss-making subsidiary is capital receipt in the hands of the recipient

The subvention received by the Assessee - Company from its parent company in Germany in a situation where the assessee–company was making losses has been treated to be a revenue receipt by the Assessing Officer. Though the first Appellate Authority and the ITAT has reversed the said finding. However, the High Court has restored the view taken by the Assessing Officer referring the decisions of Apex Court in Sahney Steel & Press Works Ltd., Hyderabad -vs.- CIT (1997) 7 SCC 764 and CIT -vs.- Ponni Sugars and Chemicals Limited (2008) 9 SCC 337.

In these cases, the Apex Court has held that unless the grant-in-aid received by an Assessee is utilized for acquisition of an asset, the same must be understood to be in the nature of a revenue receipt.

However, the aforesaid view tends to overlook the fact that in both Ponni Sugars and Sahney Steel the subsidies received were in the nature of grant-in-aid from public funds and not by way of voluntary contribution by the parent Company as in the present cases. Further, the voluntary payments made by the parent Company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment of the Assessee Company. Thus, it was held that the payments made to the Assessee Company by the parent Company for Assessment Years in question cannot be held to be revenue receipts.

Earlier, the same view has also been held in CIT -vs.- Handicrafts and Handlooms Export Corporation of India Ltd. (Delhi)

Pr. CIT -vs.- U. K. Paints India Pvt. Ltd (2016) (Delhi)

Provisions of sec. 14A cannot be invoked by the Assessing Officer by rejecting the suo-moto disallowances made by assessee, without assigning any reasons.

During the relevant Assessment Year, the assessee's return had reported tax exempt income of over ₹ 25 crores. The Assessing Officer framed the assessment after applying disallowance u/s 14A in respect of this exempt income and without accepting the proferred disallowance of ₹ 7.5 lakhs made by the assessee. The order was rectified u/s 154 wherein AO merely clarified that the amount of ₹ 7.5 lakh offered was not 'taken into consideration' at the time of passing the order u/s 143(3). The Assessing Officer, therefore, reduced that amount from the figure of the determined disallowance. Commissioner (Appeals) was of the opinion that the rejection of ₹ 7.5 lakh was valid and restored the matter for fresh computation to the Assessing Officer. The Tribunal held that the Assessing Officer can proceed to make an independent determination of the disallowance under Rule 8D read with sec. 14(2) after recording his satisfaction about the amount and the reasons thereof offered by the assessee voluntarily u/s 14A.

The High Court considered the reasons for disallowance, the method of computation adopted by the Assessing Officer and the various submissions made by Revenue. The High Court also went through the order of the ITAT in appellant's own case, where the ITAT had observed "there is no iota of doubt to the effect that intention behind using the expression "in relation to" in sec. 14A is to encompass not only the direct but also the indirect expenditure which has any relation to the exempt income."

The High Court observed that the principle of disallowance is stated in Section 14A(1) and Section 14A(2) prescribes the mode or methodology for the disallowance and the steps for its calculation. Unlike the other part of the statute which decree or enjoin the actual methodology and are substantive, Parliament deemed it appropriate to leave it to the rule making authority to prescribe the methodology, i.e. computation. For instance, what are taxable

and in what proportion and the principles applicable are embedded in the statute in certain provisions, such as Sections 28 to 43 and Sections 80A to 80HHC when it comes to deductions. Instead of adopting that mode, the Parliament thought it appropriate to leave the mode to the rule making authority.

The High Court held that the opinion of the Assessing Officer in the latter part [of Section 14A(2)] is to be based upon an appraisal of objective material relating to the assessee's voluntary disallowance of amounts and in addition if in the course of assessment, the assessing Officer enquires from the assessee about the amounts spent, which are to be disallowed, and the assessee in fact discloses a larger amount (than the one given in the return), it is still incumbent upon the Assessing Officer to enquire into such larger amounts and determine whether it has nexus with expenditure relatable to exempt income to attract sec. 14A(1).

It is to be noted that sec. 14A(2) states that "… if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act"

Raj Dadarkar & Associates -vs.- ACIT (2017) (SC)

Income from the sub-licensing of property is taxable as house property income and not business income

The Maharashtra Housing and Developing Authority (MHADA) had constructed buildings. However, there was a reservation for Municipal retail market on the plot on which MHADA had constructed. Therefore, MHADA handed over the ground floor [stilt portion] of the above said buildings to Market Department of Municipal Corporation Greater Bombay (MCGB). In 1993, the Markets Department of the MCGB auctioned the property on a monthly license [stallage charges] basis to run the municipal market. The assessee participated in the auction and was the successful bidder. Accordingly, MCGB handed over possession of the market portion to the assessee. The premises allotted to the assessee was a bare structure, on stilts, that is, a pillar/column, sans even four walls. In terms of the auction, it was the assessee who had to make the entire premises fit to be used a market, including the construction of walls, construction of entire common amenities such as toilet blocks, etc. Accordingly, after taking possession of the premises, the assessee spent a substantial amount on additions/alternations of the entire premises, including demolishing the existing platform and, thereafter, reconstructing the same according to the new plan sanctioned by the MCGB. The assessee constructed 95 shops and 30 stalls of different carpet areas on the premises under the market name 'S Shopping Centre'. The assessee also obtained, in terms of the conditions of the auction, the necessary registration certificate for running a business under the Shop and Establishment Act and other licenses/ permissions from MCGB and other Government and semi-Government bodies for carrying on trading activities on the said premises. The assessee was responsible for day-to-day maintenance, cleanliness and upkeep of the market premises. The appellant also had to incur/pay water charges, electricity charges, taxes and repair charges

The assessee collected the following types of receipts from the sub-licensees:

- Compensation from sub-licensees [same rate of stallage charges and on the same terms and condition as given to the assessee by the MCGB]
- Leave and license fees
- Service Charges for providing various services, including security charges, utilities, etc.

The assessee filed the returns of income offering the income from the aforesaid shops and stalls sub-licensed by it as business income. The Assessing Officer computed the income from the shops, and the stalls under head 'Income from House Property'. The Commissioner (Appeals) allowed the appeal of the appellant and reversed the action of the respondent. However, the Tribunal reversed the order of the Commissioner (Appeals) and confirmed the action of the Assessing Officer. Aggrieved by the Tribunal's order, the assessee filed an appeal before the High Court. The High Court dismissed the appeal filed by the assessee.

On appeal, the Apex Court has held that wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of sec. 22 are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto. 'Owner of the house property' is defined in sec. 27 which includes certain situations where a person not actually the owner shall be treated as the deemed owner of a building or part thereof.

The assessee is held to be 'deemed owner' of the property in question by virtue of sec. 27. Merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case. The Tribunal being the last forum insofar as factual determination is concerned, the findings have attained finality. The Tribunal held that the service charges received were inseparable from the basic charges of rent. Also, it was undisputed that the assessee did not undertake any systematic or organized activity of providing services to the occupiers, which can constitute receipt as business income for the assessee.

It was for the assessee to produce sufficient material on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of the assessee. Reliance placed by the assessee on the judgments in Chennai Properties & Investments Ltd. (2015) 14 SCC 793 (SC) and Rayala Corporation (P) Ltd. T (2016) 15 SCC 201 (SC) would be of no avail. In Chennai Properties & Investments Ltd., the entire income of the appellant was through letting out of the two properties it owned and there was no other income of the assessee except the income from letting out of the said properties, which was the business of the assessee.

Palam Gas Service -vs.- CIT (2017) (SC)

Provision of sec. 40(a)(ia) covers the cases where the amount is actually paid.

The assessee is engaged in the business of purchase and sale of LPG cylinders. During the relevant assessment year, assessee received freight payments of ₹ 32 lakhs from Indian Oil Corporation (IOC) with whom the assessee had entered into main contract for carriage of LPG. The transportation of LPG was done through three truck-owners, to whom a total freight payment of ₹ 20 lakhs was made. As per the Assessing Officer, since the assessee has sub-contracted the transportation to these three persons within the meaning of sec. 194C, he was liable to deduct tax on ₹20 lakhs. The Assessing Officer thus disallowed these expenses u/s 40(a)(ia). On appeal, the Commissioner (Appeals) & the ITAT upheld the order of the Assessing Officer. On further appeal, the High Court too ruled in favour of the Revenue.

The Apex Court rejects assessee's plea that since the word used in sec. 40(a)(ia) is 'payable', no disallowance can be made where the freight charges had been paid during the year. The Apex Court acknowledges that grammatically, it may be accepted that the two words, i.e. 'payable' and 'paid', denote different meanings, but held that "when the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in sec. 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid." The Apex Court remarks that if the provision is interpreted in the manner suggested by appellant-assessee, "then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVIIB .., he would still go scot free."

Maneklal Agarwal -vs.- DCIT (2017)(SC)

Higher rentals received from third party sub-lessees taxable in the hands of the first lessor where the lease is shown to be sham

The assessee had leased out his property to his own family members for a nominal rent, who in turn had sub-leased it to third parties on much higher rental values. The tax authorities, at both assessment and first appellate levels, held that such sub-letting income was subject to tax in the hands of the assessee only. Upon further appeal, the

order of the Commissioner (Appeals) was upheld by the Tribunal with a directive to consider municipal valuation as basis of income so charged to tax. The tax department challenged the order passed by the Tribunal before the Andhra Pradesh & Telangana High Court. The High Court allowed the revenue's appeal and dismissed the assessee appeals on the ground that the nature of lease executed by the assessee was proved to be bogus as a fact by the Tribunal, leading to a conclusion that the net rental value would be chargeable to tax in the hands of the assessee.

Aggrieved by the High Court's order, the assessee filed an appeal with the Supreme Court. The Supreme Court observed that the assessee had devised a structure to show lesser income in his hands by entering into a lease agreement with his wife, son, and daughter-in-law at very nominal rates and allowing such family members to sub-let the property at a much higher rental value. The Supreme Court relied on its own decision in ITO -vs.- Ch. Atchaiah (1996) AIR 993, where it had held that the Assessing Authority has the right to tax the 'right person'. In the instant case, given the finding of fact that the first lease transaction was bogus, the assessee was found to be the 'right person', making it permissible for the revenue to tax the said rental income in the hands of the assessee. To avoid double taxation of the same income, the Supreme Court further held that the assessee's relatives could seek redressal of the taxation of income at their hands in appropriate proceedings.

CIT -vs.- Smt. Sarika Jain (2017)(All)

ITAT wasn't competent to make addition under different section if it wasn't subject matter of appeal

The assessee was a partner in a firm, wherein he introduced certain amount of capital. Notice u/s 148 was issued to the assessee to explain the source of such capital. In reply to the said notice, the assessee submitted that she had received gift of certain amounts from 2 persons. The gifts were received through banking channel. In order to prove the aforesaid gift transactions, gift deeds were also produced before the authorities. The statement of the two donors were also recorded u/s 131 and they proved the factum of the gift. The Assessing Officer has held that gifts were not genuine as these were held to be unnatural and aforesaid amounts were added as undisclosed income of assessee u/s 68. On appeal, the Commissioner (Appeals) affirmed the said order. On further appeal, the Tribunal, held that the addition made by the Assessing Officer u/s 68 and sustained by the Commissioner (Appeals) could not be sustained. However, the Tribunal proceeded to add the aforesaid amount as the income of the assessee u/s 69-A.

Sec. 254(1) provides that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

The High Court has held that the use of the word 'thereon' is important and it reflects that the Tribunal has confined itself to the questions, which are arising or are subject matter in the appeal and it cannot be travelled beyond the same. The power to pass such orders as the Tribunal thinks fit can be exercised only in relation to the matter that arises in the appeal and it is not open to the Tribunal to adjudicate any other question or an issue, which is not in dispute and which is not the subject matter of the dispute in appeal. When said income could not be added u/s 68 and Tribunal was not competent to make said addition u/s 69A entire order of the Tribunal stand vitiated in law. Accordingly, the Tribunal was not competent to make any addition u/s 69A and as the same was not subject matter of the appeal before it.

Purnima Advertising Agency Pvt Ltd -vs.- DCIT (2017)(Guj)

Higher tax demand u/s 206AA cannot be raised on account of an incorrect PAN mentioned in the TDS return

The taxpayer is a company registered under the Companies Act and is engaged in the business of advertisement. During the year under consideration, the taxpayer has made payments to various recipients, on which the taxpayer has deducted tax at 2%. While filing TDS returns for the second and third quarters there was an inadvertent error since the PAN of one deductee was wrongly mentioned. There was a typographical error while putting details in TDS statement. The taxpayer had not immediately noticed this error. During the course of processing TDS returns,

the Assessing Officer (AO) found that the PAN indicated by the taxpayer in the declaration did not match with the actual PAN of the deductee. The PAN provided in the TDS return did not belong to that deductee and, therefore, in terms of sec. 206AA(6)2, it would have the effect as if the deductee has not furnished the PAN to the deductor and the effect of provisions of sec. 206AA(1)3 is applicable. The AO held that the taxpayer who was required to deduct tax at the rate of 20% had deducted the same at the rate of 2%. Therefore, the AO raised a demand for the remaining tax after adjusting such tax deducted.

Section 200(3) of the Act refers to the requirement of filing a TDS statement. This provision though does not refer to any mechanism for correction of such a statement, sec. 200A(1) specifically refers to a TDS statement or a correction statement. Thus, clearly leaving the possibility of correcting a declaration once made by the taxpayer. Sec. 200A(1)(a)(iii) permits the tax authority to make an adjustment of an incorrect claim, apparent from any information in the statement.

Neither the statute nor the department completely rules out the possibility of a genuine and bona fide typographical or even mechanical error. Looking to a large number of TDS statements and entries in such statements, it would be impossible to process individual claims of corrections, whether they are based on bona fide mistakes or otherwise. The taxpayer relied on the notification wherein tax department has formulated the scheme. This notification contains detailed provisions for the processing of TDS statements. It also refers to a correction of the TDS statement. The scheme authorises the director general to specify the procedures and processes for the effective functioning of the cell where such declarations would be processed which includes the receipt of the corrected TDS statement.

Even as per the tax department, the online system permits corrections limited to two alphabetical and two numerical errors in the PAN number. Such limited permission to correct is sought to be justified on two grounds. One is that if the error is genuine and bona fide in feeding the PAN number, it is unlikely that a typographical error would travel beyond such characters and the second is that looking to the millions of statements and entries being filed by the taxpayers across the country, it would open the flood gates, if corrections are permitted without any limit.

Once the tax department recognises the possibility of errors and also makes provisions for making corrections, it would be wholly illogical to limit such corrections on arithmetical working out of only two alphabets or two numeric being found incorrect requiring change. An error in feeding an entry or a number may have multiple origins from the typographical error of data entry operation to mechanical failures or through pure oversight referring to one column of PAN instead of another while filling up and uploading the statement. It is not necessary nor possible to envisage different situations under which such errors could crop-up and need not necessarily be confined to limited figures on the letters of the PAN being incorrect.

It is entirely one thing to suggest that the tax department would not accept any change once certain entries are uploaded, or at any rate no change would be permissible beyond a certain date. However, it is entirely another thing to suggest that the corrections may be permitted but should be limited to a number of characters where correction is needed.

In the present case, Section 200A of the Act itself refers to correction TDS statement. The intimation sent to the taxpayer of the shortfall in TDS also referred to the possibility of correction but limited it to certain characters. In the instant case, the deductee has already discharged its full tax liability. If the full effect of the tax department's decision is allowed, the deductee would not get the benefit of 2% of tax deducted by the deductor and already deposited with the government. Since the PAN does not match, the deductor would pay additional 18% which although styled in the name of TDS, would be additional to what deductee would have paid by way of tax to the department.

In the present case, with the payee having already discharged its tax liability independently, such an amount would remain in government coffers not accounted for by anyone's tax liability. Further, the tax department's contention was that the incorrect PAN could be corrected as long as a mismatch is up to two alphabets and two numeric

characters are incorrect.

The decision to limit the correction to limited characters is a policy decision which should be based on logical parameters. Nevertheless, putting the limitation of permitting corrections of only four characters has no rationale relation.

Accordingly, it has been held that the decision of the tax department in not permitting the taxpayer to correct the PAN of the deductee in the TDS statement was not acceptable. The tax department shall verify the taxpayer's claim of actual deduction of tax at the prescribed rate in the case of deductee, verify that the PAN sought to be corrected by the taxpayer belongs to the said deductee and that the tax was actually deposited in the case of such a deduction.

CIT -vs.- Equinox Solution Pvt. Ltd (2017)(SC)

If an undertaking is sold as a running business with all assets and liabilities for a slump price, no part of the consideration can be attributed to depreciable assets and assessed as a short-term capital gain u/s 50(2)

Assessee company was engaged in the business of manufacturing sheet metal components at Ahmedabad, sold his entire business in one go with all its assets and liabilities to another company and claimed the sale to be of 'slump sale' in the nature of long term capital gains as the undertaking was owned by assessee for almost 6 years. The Assessing Officer rejecting assessee's contention held that it was covered u/s 50(2) and framed assessment accordingly. On appeal, the Commissioner (Appeals) allowed assessee's claim of deduction. On further appeals before ITAT and High Court, assessee succeeded.

The Apex Court observed that sec. 50(2) would apply to any block of assets transferred which assessee was using in running of his business. The Apex Court, however, opined that where the entire running business with assets and liabilities stood transferred in one go, such sale could not be treated as short-term capital assets and is in the nature of LTCG.

The Apex Court upheld assessee's claim relying upon coordinate bench ruling in Artex Manufacturing Co. and Bombay High Court ruling in Premier Automobiles Ltd. wherein similar view was taken

Mcdowell & Company ltd -vs.- CIT (2017)(SC)

Deemed income u/s 41(1) of the amalgamating company should be reduced from the loss to be set off u/s 72A by the amalgamated company

Assessee company took over the sick company - HPL ('amalgamating company') through the scheme of amalgamation. HPL owed a lot of money to banks and financial institutions. In its books of accounts, the interest which had accrued on the loans given by such financial companies were shown as the money payable on account of interest to the said banking companies and was reflected as expenditure on that count. As the interest payable was treated as expenditure, benefit thereof was taken in the assessment orders made. Under certain circumstances and on fulfillment of conditions laid down u/s 72A, the company which takes over the sick company is allowed to set off losses of the amalgamated company as its own losses. After amalgamation, the assessee has taken such benefit.

The banks which had advanced loans to HPL agreed to waive off the interest which had accrued prior to certain date. Since, interest was claimed as expenditure by HPL in its returns. On the waiver of this interest, it became income in terms of sec. 41(1) of the Act. In the return filed by the assessee, the assessee claimed set off of the accumulated loses which it had taken over from HPL by virtue of the provisions contained in sec. 72A of the Act. The Assessing Officer treated the aforesaid income at the hands of the assessee herein and adjusted the same from the accumulated loses. The assessment order was drawn accordingly. The assessment was upheld by the Commissioner(Appeals). However, in further appeal, the ITAT held that the aforesaid income u/s 41(1) of the Act was not at the hands of the assessee herein but it may be treated as income of the HPL and since HPL was a different assessee and a different entity, the assessee herein was not liable to pay any taxes on the said income. Later on, the High Court reverse the order of the Tribunal

The Apex Court held that waiver of liability due by amalgamating company after amalgamation is taxable in the hands of the amalgamated company u/s 41(1) as when the assessee is allowed the benefit of the accumulated losses while computing those loses, the income which accrued to it had to be adjusted and only thereafter net losses could have been allowed to be set off by the assessee company.

Shankar Dalal & others -vs.- CIT (2017)(Bom.)

Provisions of local land laws should be considered while determining the land as agricultural land.

In the return of income, the assessee has declared that gain on sale of agricultural land is exempt since the land does not constitute "Capital Assets" as defined u/s 2(14). The Assessing Officer passed an order denying exemption giving reasons that land did not constitute agricultural land since no agricultural operations were carried out regularly and same was sold to a company engaged in the business of development of infrastructure activity. The Assessing Officer also ruled that though the land was located beyond the specified limits from the municipal limits i.e. beyond 8 kms, yet it was to be treated as capital asset. On appeal, Commissioner (Appeals) held the land as agricultural land and exempts capital gain. The Tribunal upon re-inspection held that "To the extent the land is actually used for dry crop, the land has to be regarded to be an agricultural land the balance 4/5th of the land could not be regarded to be the agricultural land".

Bombay High Court reverses ITAT order, and held that "merely because the assessees could not produce and utilize the land fully by employing labour, and/or unable to give the crop statements should not have been the criteria" The Court held that the Revenue fell in error in not considering the provisions of local land laws, as activities performed by assessee on the land were recognised as 'agricultural' activities under the Local land law.

Mother Hospital (P) Ltd -vs.- CIT (2017)(SC)

A lessee cannot be said to be the "owner" for purposes of claiming depreciation and the lessee is entitled to depreciation on the cost of construction incurred by him but not on the cost incurred by the owner and reimbursed by the lessee

A partnership firm had been constituted by 'M' and his family members. The said firm owned a land. The purpose of the partnership firm was to run a super speciality hospital and, accordingly, the firm started construction of the hospital building. Thereafter, an agreement was entered into between the firm and the company by which it was agreed that the firm would complete the construction of the building and hand over possession of the same on completion, on the condition that the entire cost of construction of the building would be borne by the assessee company. The assessee-company filed its return in which it claimed depreciation on the building part of the said property. The Assessing Officer rejected the claim of depreciation and added back the same.

Building which was constructed by the firm belonged to the firm. The title in case of immovable property cannot pass when its value is more than ₹ 100/- unless it is executed on a proper stamp paper and is also duly registered with the sub-Registrar. Nothing of the sort took place. In the absence thereof, it could not be said that the assessee had become the owner of the property.

Further, the Court held that it is only when assessee holds a lease right or other right of occupancy and any capital expenditure is incurred by it on construction or renovation or improvement of building, assessee would be entitled to depreciation to extent of such expenditure incurred. However, where construction is carried out by owner-lessor and expenditure is only reimbursed by assessee-lessee, Explanation 1 to section 32(1) would not come to aid of assessee.

Rajesh Kumar Aggarwal -vs.- CIT (2017)(Delhi)

Exemption u/s 54F can be granted in revision u/s 264

The assessee for assessment year 2009-10 had claimed a set off of capital gains from sale towards house property as

against capital losses and the loss in respect of shares. The set off was not permitted. In the meanwhile, the assessee had purchased new property, apparently with the intention of seeking the benefit u/s 54F. The original property was sold on 20.06.2008; the new property was purchased in July, 2008. However, the benefit of sec. 54F was not claimed when the return was filed on 30.09.2009. The assessment order disallowed the set off. This resulted in a capital gain. By then, the time to file the revised return had elapsed and the assessment was completed. The assessee filed the revision petition u/s 264 of the Act. The Commissioner rejected the assessee's revision petition stating that no documentary evidences whatsoever were filed by the assessee during the course of assessment proceedings with regard to cost of improvement made by him in the Property. Further, the assessee has also failed to bring on record reasons that prevented him from filing the copies of so called valuation report before the AO. Thus, the valuation report now filed by the assessee is a self serving document without any corroboratory evidences. As regards the claim of deduction u/s 54F, the assessee has not claimed the same in his return. Further, it has also never been raised by him during the course of assessment proceedings.

Section 264 in its operative part states that the (Principal Commissioner or) Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

The phraseology adopted by the provision is of the widest amplitude. The term "any such order as he thinks fit" is only qualified by subject to provisions of this Act. Therefore, unless there is a direct impediment to the power u/s 264 (exercisable by the Commissioner) which inhibits the grant of relief, it is per se admissible. The impediment may be in the form of a substantive provision which might place a time limit, to the grant of such relief or it may be otherwise. In the present case, the concerned provision sec. 54F, does not per se contain any such impediment. Therefore, as far as the text of the provision goes, this Court is of the opinion that there is no bar in the grant of the relief despite the assessee apparently having missed the bus and having committed the mistake.

Pr. CIT -vs.- Ramgopal Minerals (2017)(Kar)

No cessation of liability even if creditors were untraceable but evidences of payments to them were produced

In course of assessment, the Assessing Officer made addition to assessee's income u/s 41(1) in respect of cessation/ remission of trading liability of various transporters who transported the minerals for the assessee stating that the assessee had failed to produce these transporters/trade creditors before the authority, despite the summons issued to them. On further appeal, the Tribunal completely set aside the additions made by the revenue. On further appeal, High Court held that in legal parlance, merely because the creditor could not be traced on the date when the verification was made, same is not a ground to conclude that there was cessation of the liability.

Cessation of the liability has to be cessation in law, of the debt to be paid by the assessee to the creditor. The debt is recoverable even if the creditor has expired, by the legal heirs of the deceased creditor. Under the circumstances, in the present case, it can hardly be said that the liability had ceased. If the liability had not ceased or the benefit was not taken by the assessee in respect of such trade liability, the conditions precedent were not satisfied for invoking sec. 41(1).

Tribunal has clearly recorded the evidence and findings of facts in favour of the respondent-assessee that the assessee has produced the documentary evidence in the form of ledger accounts and proof of payments made through bank channel and PAN numbers also.

Burden of the Revenue to summon such creditors or transporters for establishing that the liability has ceased could not be shifted upon the respondent-assessee.

There is no perversity in the same so as to give rise to any substantial question of law arising in the present case, requiring consideration u/s 260A

CIT -vs.- Vinzas Solutions India (P.) Ltd (2017) (Mad)

Payment made by the dealer for outright purchase of software is not tantamount to "royalty"

The respondent-assessee was a dealer in computer software, having purchased the same from various companies. During the course of assessment proceedings, a disallowance was effected in terms of sec. 40(a)(ia) by the Assessing Officer on the ground that consideration for purchase was of the nature of 'royalty' under Explanation 4 and 5 of section 9(1)(vi) and tax ought to have been deducted at source in accordance with the provisions of section 194J. On appeal, CIT(A) affirmed the order of the Assessing Officer. On appeal, Tribunal reversed the order of CIT(A).

The term "'royalty' normally connotes the payment made by a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is a tailor-made to meet the requirement of a buryer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as 'royalty. There is a difference between a transaction of sale of a 'copyrighted article' and one of 'copyright' itself.

The provisions of sec. 9(1)(vi) as a whole, would stand attracted in the case of the latter and not the former. Explanations 4 and 7 relied by the authorities would thus have to be read and understood only in that context and cannot be expanded to bring within its fold transaction beyond the realm of the provision.

CIT -vs.- Subhash Vinayak Supnekar (2016) (Bom.)

Investment can be made out of advance received under sale agreement for sec. 54EC relief

The assessee entered into an agreement to sell for the subject property on 21-2-2006 and the sale deed was executed on 5-4-2007. The assessee had invested an amount of ₹50 lakhs from the advance received under the agreement to sale in the Rural Electrification Corporation Ltd. bonds on 2-2-2007. Assessing Officer as well as CIT(A) held that the assessee was not entitled to the benefit of section 54EC as the amount was invested in the bonds prior to the sale of the subject property on 5-4-2007. The Tribunal, however, held that even when an assessee made investment in bonds as required under section 54EC on receipt of advance as per the agreement to sell, still it was entitled to claim the benefit of section 54EC. Hight Court affirmed the order of the tribunal

Ian Peter Morris -vs.- ACIT (2016) (SC)

Interest u/s 234B & 234C does not apply on salary income

The appellant–assessee along with three others had promoted a Company. The said Company was acquired by one Synergy Credit Corporation Limited (the Acquirer Company). The appellant was offered the position of Executive Director in the Acquirer Company. Further, a Non-Compete Agreement was signed between the appellant–Assessee and the Acquirer Company imposing a restriction on the appellant from carrying on any business of Computer Software development and marketing for a period of five years for which the appellant–Assessee was paid a sum of ₹ 21,00,000/-. The question that arose in the proceedings commencing with the Assessment Order is whether the aforesaid amount of ₹ 21 lakhs is on account of 'salary' or the same is a 'capital receipt'. The High Court in the order under appeal took the view that the said amount is 'salary amount' on which interest would be chargeable/leviable u/s 234B and 234C.

However, the High Court's ruling to levy interest u/s 234B & 234C on this income was challenged in appeal. The Supreme Court held that on perusal of the relevant provisions of Chapter VII of the Act, against salary, a deduction, at the requisite rate at which income tax is to be paid by the person entitled to receive the salary, is required to be made by the employer failing which the employer is liable to pay simple interest thereon. In cases where receipt is by way of salary, deductions u/s 192 of the Act are required to be made. No question of payment of advance

tax under Part 'C' of Chapter VII of the Act can arise in cases of receipt by way of 'salary'. Therefore, interest obligations u/s 234B and 234C would have no application to the present situation since the High Court has already decided that the non-Compete Agreement was by way of salary. The Apex Court thereby modified the order, deleting interest u/s 234B & 234C.

Pr. CIT -vs.- Bharat Heavy Elect. Ltd. (2016) (P&H)

Usual clauses in contract involving payments for construction, erection & commissioning etc of plants involving inputs from technical personnel do not constitute "payments for technical services" attracting TDS obligations u/s 194J

Post TDS inspection u/s 133A of the Act, the AO found that the company had made payments to five contractors in respect of various contracts and deducted tax in respect thereof u/s 194C of the Act, whereas, all the contracts involved the provision of professional and technical services which fell within the ambit of the provisions of sec. 194J of the Act and not u/s 194C.

The question, therefore, was whether the amounts paid under the contracts constitute fees for professional or technical services attracting sec. 194J or whether they constitute payments to contractors attracting the provisions of sec. 194C?

The High Court held that testing, pre-commissioning, commissioning and post commissioning are required to be carried out by a contractor to satisfy the customer that the work has been executed in a proper manner; that the equipment has been installed as required and that its performance meets the parameters specified in the contract. The personnel that are required to test and commission the plant and equipment perform their functions not under a contract for the supply of technical services to the customer, but to satisfy the customer on behalf of the contractor that the plant and equipment has been duly supplied as per the contractual specifications.

Indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. The contract entered did not involve the supply of professional or technical services within the meaning of sec. 194J

CIT vs. Greenfield Hotels & Estates Pvt. Ltd (2016)(Bom.)

Where Revenue accepts decision of a Court/Tribunal on an issue of law, not challenging it in appeal, then a subsequent decision following the earlier cannot be challenged

The revenue was in appeal against the tribunal's order of having made provisions of section 50C inapplicable to transfer of land & building, being a leasehold property. It was brought to the notice of the court that the Revenue had not preferred any appeal against the decision of the Tribunal in a like case where facts were similar and it could be inferred that it had been accepted.

The High Court followed decisions of the court in DIT -vs.- Credit Agricole Indosuez 377 ITR 102 and the Apex Court in UOI -vs.- Satish P. Shah 249 ITR 221, which laid down the salutary principle that where the Revenue has accepted the decision of the Court/Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged.

Further, it was not the Revenue's case before the court that there were any distinguishing features either in facts or in law in the present appeal from that arising in the earlier case. In the above view, the question as framed by the Revenue did not give rise to any substantial question of law and accordingly, was not entertained

ADIT -vs.- E-Funds IT Solution Inc (2017) (SC)

Outsourcing services provided by E-Funds Corporation, USA to its Indian affiliate does not constitute Permanent Establishment under the India-USA Tax Treaty

E-Funds Corporation ("E-Funds US") is a company incorporated in the USA and part of a group which is engaged in the business of electronic payments, ATM management service, decision support & risk management and similar professional services.

E-Funds US and its group company, E-Funds IT Solutions Group Inc ("E-Funds IT US") entered into contracts with their clients in the US, for the provision of Information Technology Enabled Services ("ITES"). These contracts were assigned or sub-contracted to e-Funds International India Private Limited ("E-Funds India"), an indirect subsidiary of E-Funds US in India, for execution. Under the terms of the agreements between E-Funds India and the two US entities, E-Funds India provided support services to E-Funds US and E-Funds IT US, which in turn enabled them to render services to their clients. The Assessing Officer ("AO"), relying upon the Functions, Assets and Risks Analysis ("FAR Analysis") performed in relation to E-Funds US and E-Funds India, observed that:

- E-Funds US allowed E-Funds India to use its technology and infrastructure for provision of IT enabled services for free;
- E-Funds US even undertook marketing activities for E-Funds India and the latter did not bear any significant risks in the overall services;

In light of this, the AO concluded that:

- E-Funds India was a fixed place PE of E-Funds US and E-Funds IT US in India since the US entities had a fixed place in India through which they were carrying on their own business.
- Thus, the income attributable to E-Funds US and E-Funds IT US, which was not included in the income earned by E-Funds India, was to be taxed in India.

This view was upheld by the Commissioner (Appeals) ("CIT(A)") who concluded that in addition to a fixed place PE, there also existed a service PE and an agency PE. On appeal, the findings of CIT(A) in relation to the existence of fixed place PE and a service PE were affirmed by the Income Tax Appellate Tribunal ("Tribunal"). The Tribunal did not rule on the existence of an agency PE as arguments on that ground had not been furthered by the Income Tax Department ("Revenue"). The findings of all the above authorities were set aside by the Delhi High Court ("High Court"), which ruled that E-Funds India did not constitute a PE of E-Funds US or E-Funds IT US in India. Aggrieved by the ruling of the High Court, the Revenue preferred an appeal before the Supreme Court.

The Supreme Court, after hearing all contentions put forth by the parties, arrived at the following conclusions:

1. **Determination of Fixed Place PE**

   The Supreme Court relied on its previous decision in Formula One World Championship Ltd vs. CIT to hold that a fixed place would constitute a PE of a non-resident only when such fixed place was "at the disposal" of that non-resident. A fixed place would be treated as being "at the disposal" of a non-resident enterprise when that enterprise has right to use the said place and has control thereupon. Merely having access to such a place, for the purposes of business, would not suffice. Control should be of a considerable amount and usually control would be present where the foreign entity can employ the place of business at its discretion.

   In the present case, the Supreme Court noted that neither E-Funds US nor E-Funds IT US had a physical premise in India at its disposal nor did they have control over use of E-Funds India's premises for their business.

   It further observed that the finding of the lower authorities regarding the existence of a PE, was based mainly

on the fact that the business of the US entities was being outsourced to a 100% subsidiary in India and this resulted in a PE. On this aspect, the Supreme Court affirmed the observations of the High Court to the effect that a subsidiary of a foreign parent carrying on business in the source State does not by itself create a PE in the source State. The High Court had observed that close association between the entities or interactions or transactions between them were not appropriate tests to determine the existence of a PE. It had further held that neither the assigning of a contract nor sub-contracting, nor provision of intangible software free of cost would be relevant in determining a PE. Moreover, even if the foreign entities had reduced their expenditure by transferring the business to the Indian subsidiary, it would not by itself create a fixed place PE.

All of these observations were affirmed by the Supreme Court, which noted that it was "fundamentally erroneous" to say that merely by contracting with a 100% subsidiary, a PE would be created. In any event, E-Funds India had only rendered back office support services to both US entities, and as such, it could not be said that the business of either US entity had been carried on through E-Funds India.

On that basis, the Supreme Court held that the outsourcing of work by E-Funds US and E-Funds IT US to India would not result in the creation of a fixed place PE of E-Funds US or E-Funds IT US in India.

2. Determination of Service PE

Article 5(2)(l) of the India – US Tax Treaty provides that a service PE would be constituted in India where a US enterprise furnished services within India through employees or other personnel. The Revenue had argued that personnel engaged by E-Funds India for the provision of support services to E-Funds US and E-Funds IT US were de facto working under the control of the US entities, and as such, constituted a service PE of the US entities in India.

On facts, the Court observed that none of the customers of E-Funds US or E-Funds IT US were located in India, or receiving services in India. As such, the primary requirement that services be furnished "within India" had not been satisfied. On that basis, the Court did not go into the question of control over the personnel engaged by E-Funds India. In any event, E-Funds India merely undertook auxiliary operations that facilitated the provisioning of the main service (i.e. ITES) by E-Funds US and E-Funds IT US abroad. As such it could not be stated that a service PE had been created in India in terms of the India – US Tax Treaty.

3. Determination of Agency PE

On the question of whether a E-Funds India could be said to constitute the agency PE of E-Funds US and E-Funds IT US, the Supreme Court agreed with the view of the High Court that since the Revenue had not raised the argument of agency PE before the Tribunal or the High Court, it could not be raised at the level of the Supreme Court. In any event, it was observed that an agency PE could only be constituted in terms of Article 5(4) of the India – US Tax Treaty. Since the tests under Article 5(4) had not been satisfied with respect to E-Funds India, no agency PE could be said to have been constituted.

4. Mutual Agreement Procedure

In the present case, the competent authorities of India and the US had initiated proceedings under the Mutual Agreement Procedure ("MAP") article of the India – US Tax Treaty and had entered into an agreement as to attribution of profits between the US entities and E-Funds India. The Revenue contended that the PE issue stood determined owing to certain statements made in the MAP Settlement Agreement to the effect that the US entities had PEs in India. It was argued that these statements should continue to remain applicable to the E-Funds Group as there had been no subsequent change in the factual position of the Group.

On this point, the Court had concluded that MAP proceedings had been initiated on a without prejudice basis and that the existence of a PE was a question of law that needed to be determined purely on merits. Referring to Paragraph 3.6 of the OECD Manual on MAP Procedure, the Supreme Court observed that it was "very

clear" that a MAP Settlement Agreement was time and case specific and could not be considered precedent for subsequent years. Thus, statements made in a MAP Settlement Agreement for a previous year could not be used in determining PE status for a subsequent year.

Merely holding a subsidiary in India which provides services to the parent, would not constitute a fixed place PE. A subsidiary would have to conform to the principles required to be considered a PE, and only if they are satisfied, would it be considered as a PE

R.B Shreeram Durgaprasad -vs.- CIT (2016) (Bom.)

Penalty order is illegal and without jurisdiction if it was passed during pendency of assessment proceeding

Certain addition was made to assessee income in reassessment proceedings. The assessee filed appeal before the Tribunal against such addition. The Assessing Officer levied penalty u/s 271(1)(c) upon assessee, while the appeal was pending before the tribunal. On reference, the assessee contended that in terms of section 275(1) (a), penalty proceedings could not have been initiated pending appeal before the Tribunal.

The High Court ruled in favor of the assessee by contending that the language of section 275(1)(a) clearly shows that the order imposing penalty cannot be passed if the appeal against basic order of assessment is pending before the competent superior authority. Here, though 1st appellate authority had disposed of the appeal, further appeal of assessee before the Tribunal was very much pending. The order imposing penalty, therefore, appears to be premature and, therefore, illegal and without jurisdiction. The notices for initiation of those proceedings are during the pendency of appeal before the Tribunal. Essential ingredients of section 275(1) are clearly not in contemplation of notice issuing authority on these dates. The form or language of these notices shows clear nonapplication of mind in this respect. It is obvious that such notices initiating the penalty proceedings could not have been issued before order of the Tribunal.

Hightension Switchgears Pvt Ltd -vs.- CIT (2016) (Kolkata)

No TDS on transportation charges reimbursed by buyer if seller is liable to pay such charges to GTA

During the year 2006-07, a seller had sold certain goods to the assessee(buyer). Under the contract of sale, the seller was bound to send the goods to the buyer and to pay the transportation charges to the GTA (Goods Transport Agency). It was, however, entitled to recover the transportation charges from the buyer. The assessee reimbursed the freight component to the seller and claimed deduction of the same. The Tribunal held that the assessee was liable to deduct tax at source as per section 194C in respect of freight component. Since the assessee had failed to deduct tax at source in respect thereof, the lower authorities were justified in disallowing the freight component as per section 40(a)(ia). Assessee on further appeal to High Court.

The High Court ruled in favour of the assessee by contending that even assuming that the supplier in transporting the goods to the assessee acted as an agent of the assessee and the assessee has reimbursed the freight charges to the supplier, who in turn has paid to the concerned transporter as held by the Tribunal is conceptually correct, no other conclusion is possible. The agent being the supplier in the instant case has admittedly paid to the transporter and has also deducted tax at source. When the agent has complied with the provision, the principal cannot be visited with penal consequences. For one payment there could not have been two deductions. Moreover, when a person acts through another, in law, he acts himself

CIT -vs.- Anil Kumar & Co. (2016) (Kar.)

No addition could be made on estimated basis without rejecting books of account of assessee

The assessee was a partnership firm carrying on the business as cotton merchants and commission agents. The assessee filed its return of income for the AY 2006-2007, declaring total income of INR NIL. On such return being selected for scrutiny assessment order came to be framed under section 143(3) after issuing notice and hearing

the assessee. The AO noticed that the gross profit declared by the assessee for the earlier assessment years and the present assessment year were at variance and as such the gross profit was adopted at 4 per cent of the total turnover. On appeal, the Commissioner(Appeals) concluded that differential gross profit of ₹5.99 lakhs was to be sustained as against gross profit of ₹ 32.44 lakhs made by the Assessing Officer. On further appeal, the Tribunal allowed the appeal of the assessee and deleted the addition made by the Commissioner (Appeals) on gross profit. On further, appeal to High Court.

The tribunal has rightly held that when the books of account of the assessee had not been rejected and assessment having not been framed u/s 144, the A.O and the Commissioner(Appeals) were in error in resorting to an estimation of income and such exercise undertaken by them was not sustainable. Section 145(3) lays down that the Assessing Officer can proceed to make assessment to the best of his judgment under section 144 only in the event of not being satisfied with the correctness of the accounts produced by the assessee. In the instant case the Assessing Officer has not rejected the books of account of the assessee. To put it differently the Assessing Officer has not made out a case that conditions laid down in section 145(3) are satisfied for rejection of the books of account. Thus, when the books of account are maintained by the assessee in accordance with the system of accounting, in the regular course of his business, same would form the basis for computation of income. In the instant case it is noticed that neither the Assessing Officer nor the Commissioner (Appeals) have rejected the books of account maintained by the assessee in the course of the business. As such tribunal has rightly rejected or set aside the partial addition made by Assessing Officer for arriving at gross profit and sustained by the Commissioner (Appeals) and rightly held that entire addition made by the Assessing Officer was liable to be deleted. The said finding is based on sound appreciation of facts and it does not give rise for framing substantial question of law.

CIT -vs-. Kotak Securities Ltd (2016) (SC)

Transaction charge paid to BSE isn't 'FTS' as BSE isn't providing customized services to members

By the impugned order dated 21st October, 2011 passed in the aforesaid appeal, the High Court of Bombay has held that the transaction charges paid by a member of the Bombay Stock Exchange to transact business of sale and purchase of shares amounts to payment of a fee for 'technical services' rendered by the Bombay Stock Exchange. Therefore, under the provisions of Section 194J of the Income Tax Act, 1961 (for short "the Act"), on such payments TDS was deductible at source. The said deductions not having been made by the appellant - assessee, the entire amount paid to the Bombay Stock Exchange on account of transaction charges was not deducted in computing the income chargeable under the head "profits and gains of business or profession" of the appellant - assessee for the Assessment Year in question i.e. 2005-2006. This is on account of the provisions of Section 40(a)(ia) of the Act. Notwithstanding the above, the Bombay High Court held that in view of the apparent understanding of both the assessee and the Revenue with regard to the liability to deduct TDS on transaction charges paid to the Bombay Stock Exchange right from the year 1995 i.e. coming into effect of Section 194J till the Assessment Year in question, benefit, in the facts of the case, should be granted to the appellant - assessee and the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act must be held to be not correct

The Apex Court ruled in favor of the assessee by contending that "we hold that the view taken by the Bombay High court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act ".

IVRCL-KBL (JV) -va.- ACIT (2016) (Andhra Pradesh)

Credit of TDS won't be denied to a contractor even if entire work has been sub-contracted to others

The assessee was a joint-venture executing civil contract works. It was awarded contracts by the Irrigation Department of the State Government. The assessee gave said contracts subsequently on sub-contract basis to one of its constituents without any margin. The assessee filed its return claiming refund of tax deducted at source from

bills paid by the State Government. The assessing authority contended that as no real work was carried on by the assessee, no income had accrued to it and therefore , credit for TDS was not allowable in the hands of the assessee in terms of Rule 37BA (2)(i) of the income tax rules,1962.

The High Court ruled in favour of the assessee by contending that there are two distinct and independent contracts. There is no privity of contract between the government and the constituent of the assessee i.e. sub-contractor. The rights and obligations under the first contract are only that of the Government and the assessee; and those, in the second contract, are only that of the assessee and the sub-contractor. The contractual obligation, to execute the work for the Government, is that of the assessee joint venture alone, and not that of the constituent member of the JV i.e. the sub-contractor. It is evident, therefore, that the contractual receipts under the first contract is only that of the assessee; and the income, arising out of the said contract, is assessable only in their hands, and not in the hands of the sub-contractor. The High Court set aside the order passed by the AO and directed to determine the quantum of credit for TDS which the assessee is entitled to and refund the amount so computed to assessee in accordance with law

CIT -vs.- Priya Blue Industries (P) Ltd (2016) (Guj)

Finished products obtained from ship breaking activity are usable as such and hence, are not 'waste and scrap' though commercially known as scrap, thus provision of TCS is not applicable.

The assessee-company, engaged in ship breaking activity, sold old and used plates, wood etc. It did not produce any document or papers to show collection of tax at source on sale of such items and payment thereof to the credit of the Central Government nor was certificate in Form No.27C produced. The Assessing Officer observed that such items were in the nature of scrap and therefore, the assessee is liable to collect tax at source from the buyers of scrap. Accordingly, demand u/s 201(1) alongwith interest u/s 201(1A) was raised. The assessee claimed that such items are usable as such, and are hence not 'scrap', thus, provisions relating to collection of tax at source is not applicable.

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

On further appeal, the High Court concurred with the view of the Tribunal.

CIT -vs.- M/s Thyssen Krupp Industries Private Ltd (2015)(Bom)

An Adjustment with respect to transfer pricing has to be confined to transactions with Associated Enterprises and cannot be made with respect to transactions with unrelated third parties

The assessee is in the business of execution of turnkey contracts involving design, manufacture, supply, erection and commissioning of sugar plants, cement plants, etc. During the subject Assessment Year, the assessee entered into international transactions with its Associated Enterprises (AE), as well as transactions with independent parties. The TPO proposed an addition on account of enhancement of profit margin on all transactions of the assessee. Aggrieved by the order, assessee filed an appeal with ITAT. The tribunal held that only transactions

entered into by an assessee with its AE are subject to transfer pricing adjustment and not otherwise. Thus, allowing the assessee's appeal before it. Aggrieved by the order, the revenue filed an appeal with High Court.

The High Court dismisses revenue appeal by contending that as per Chapter X of the Act, redetermination of the consideration is to be done only with regard to income arising from International Transactions on determination of ALP. The adjustment which is mandated is only in respect of International Transaction and not transactions entered into by assessee with independent unrelated third parties, therefore this adjustment is beyond the scope and ambit of Chapter X of the Act.

Berger Paints India Ltd. -vs.- CIT (2017) (SC)

Securities premium shall not be considered as a part of the capital employed for the purpose of sec. 35D.

The appellant is a Limited Company engaged in the business of manufacture and sale of various kinds of paints. A notice was issued by the A.O. to the appellant (assessee) under Section 143(2) of the Act which called upon the appellant to explain as to on what basis the appellant had claimed in the return a deduction under the head "preliminary expenses" amounting to ₹7,03,306/- being 2.5% of the "capital employed in the business of the company" under Section 35D of the Act. The appellant (assessee) replied to the notice. The appellant (assessee) contended therein that it had issued shares on a premium which, according to them, was a part of the capital employed in their business. The appellant, therefore, contended that it was on this basis, it claimed the said deduction and was, therefore, entitled to claim the same under Section 35D of the Act. The A.O. did not agree with the explanation given by the appellant. He was of the view that the expression "capital employed in the business of the company" did not include the "premium amount" received by the appellant on share capital. The Commissioner (Appeals) has deleted the addition. However, the Tribunal reversed the view taken by the Commissioner (Appeals). The High Court concurred with the Tribunal.

The Apex Court observed that if the intention of the Legislature were to treat the amount of "premium" collected by the Company from its shareholders while issuing the shares to be the part of "capital employed in the business of the company", then it would have been specifically said so in the Explanation (b) of sub-section (3) of Section 35D of the Act. It was, however, not said. Non-mentioning of the words does indicate the legislative intent that the Legislature did not intend to extend the benefit of Section 35D to such sum.

The company's accounts do not show the reserve and surplus as a part of its issued, subscribed and paid up capital. It is taken as part of share holders fund but the same was not a part of the issued, subscribed and paid up capital of the Company

Similarly, Companies Act which deals with the "issue of shares at premium and discount" requires a company to transfer the amount so collected as premium from the shareholders and keep the same in a separate account called "securities premium account". It does not anywhere says that such amount be treated as part of capital of the company employed in the business for one or other purpose.

Thus, securities premium shall not be considered as a part of the capital employed for the purpose of sec. 35D.

National Travel Services -vs.- CIT (2018) (SC)

Section 2(22)(e) gets attracted inasmuch as a loan has been made to a shareholder, who is the beneficial owner of shares holding not less than 10% of the voting power in the Company.

A reading of the amended definition would indicate that, after 31.05.1987, a "shareholder" is now a person who is the beneficial owner of shares holding not less than 10% of the voting power of the Company. After amendment of year 1988 carried out in section 2(22)(e), in order to invoke provisions of said section, 'shareholder' has only to be a person who is beneficial owner of shares.

One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the

same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect.

Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way.

PCIT -vs.- Tejua Rohitkumar Kapadia (2018) (SC)

Purchases cannot be treated as bogus u/s 69 if

a. they are duly supported by bills;

b. all payments are made by account payee cheques;

c. the supplier has confirmed the transactions;

d. there is no evidence to show that the purchase consideration has come back to the assessee in cash;

e. the sales out of purchases have been accepted; and

f. the supplier has accounted for the purchases made by the assessee and paid taxes thereon

CIT -vs.- Vasisth Chay Vyapar Limited (2018) (SC)

In case of NBFCs, income from NPAs would be taxable on receipt basis

The assessee, an NBFC, had advanced certain Inter-Corporate Deposits (ICD) to another company. As no interest could be received on such deposits for more than six months, in terms of directions given by the Reserve Bank of India (RBI), the taxpayer treated the said ICDs as NPA and did not offer interest income on ICDs.

However, the tax officer imputed interest on said ICDs to income of the assessee by applying mercantile system of accounting. The tax officer contended that RBI directives could not override the provisions of the Act.

The CIT(A) affirmed the order of the tax officer. On further appeal, the Income Tax Appellate Tribunal (ITAT) held in favour of the taxpayer and deleted the addition made by the AO.

The Delhi HC held in favour of the assessee that income in the hands of NBFCs is to be recognised as per the RBI prudential norms regardless of the fact even if they deviate from the mercantile system of accounting. The Hon'ble SC confirmed the order of Delhi HC and accordingly, rejected Revenue's appeal against the order of the Delhi HC.

Honda Siel Cars India Ltd. -vs.- CIT (2017) (SC)

Technical fee paid under a technical collaboration agreement for setting up a joint venture company in India is to be treated as capital expenditure, if upon termination of the agreement, the joint venture would come to an end

The assessee, Honda Siel Cars India Ltd., is a joint venture company between Honda Motors, a Japanese company and Siel Ltd., an Indian company. The assessee and Honda Motors entered into a technical collaboration agreement (TCA) on May 21, 1996 under which a technical fee of 30.5 million USD was payable by the assessee in five equal instalments on a yearly basis. Under the TCA, Honda Motors had to provide manufacturing facilities, know-how, technical information, information regarding intellectual property rights to the assessee which the assessee was entitled to exploit only as a licensee, without any proprietary rights. The assessee treated the technical fees as revenue while the Revenue authorities contended that it is capital in nature.

The Apex Court held that, in this case, technical fee is capital in nature since upon termination of TCA, the joint

venture itself would come to an end. It is further held that if limited rights to use technical know-how is obtained for a limited period for improvising the existing business, the expenditure is revenue in nature. However, if technical know-how is obtained for setting up a new business, the know-how is a capital expenditure.

Director, Prasar Bharati -vs.- CIT (2018) (SC)

Payment made by the Prasar Bharati Doordarshan Kendra to various accredited advertising agencies to secure more business was in the nature of commission liable to TDS u/s 194H

The appellant, 'Prasar Bharati Doordarshan Kendra', was functioning under the Ministry of Information and Broadcasting of Government of India. In the course of business activities which included running of TV channels, the appellant had been regularly telecasting advertisements of several advertising agencies.

With a view to have better regulation of the practice of advertising, the appellant entered into an agreement with various advertising agencies. As per the agreement, in order to receive the status of 'accredited' agencies, the said agencies had to make an application to the appellant and in return they were allowed to telecast advertisement of several consumer products manufactured by several companies on the appellant's TV channel. One of the stipulations in the said agreement was that the appellant would pay commission of 15% to the agency which the agency was allowed to retain from the revenue generated from the telecasting of advertisements.

The AO held that since the payments made by the appellant to the agencies were in the nature of commission, the provisions of sec. 194H were attracted and the appellant defaulted in not deducting the TDS on such payments.

On further appeal before the Apex Court, it was argued by the appellant that the relationship between appellant and the accredited agencies was not that of principal and agent and it was rather in the nature of principal-to-principal. It was further argued that in terms of agreement, the agencies purchased the air time from the appellant and sold it in the market to their customers after retaining 15% commission given to them by the appellant and therefore, the transaction cannot be regarded as being in between principal and agent.

The Apex Court considered the agreements entered into by the appellant with the accredited agencies and discussed the provisions of sec. 194H of the Act and held that the provisions of sec. 194H are applicable to the appellant because the payments made by the appellant pursuant to the agreement in question were in the nature of payment made by way of "commission" and, therefore, the appellant was under statutory obligation to deduct the income tax at the time of credit or/and payment to the payee.

The conclusion of the High Court is clear from the undisputed facts emerging from the record of the case because the agreement itself has used the expression "commission" in all relevant clauses; Second, there is no ambiguity in any clause and no complaint was made to this effect by the appellant; Third, the terms of the agreement indicate that both the parties intended that the amount paid by the appellant to the agencies should be paid by way of "commission" and it was for this reason, the parties used the expression "commission" in the agreement; Fourth, keeping in view the tenure and the nature of transaction, it is clear that the appellant was paying 15% to the agencies by way of "commission" but not under any other head; Fifth, the transaction in question did not show that the relationship between the appellant and the accredited agencies was principal to principal rather it was principal and Agent; Sixth, it was also clear that payment of 15% was being made by the appellant to the agencies after collecting money from them and it was for securing more advertisements for them and to earn more business from the advertisement agencies; Seventh, there was a clause in the agreement that the tax shall be deducted at source on payment of trade discount; and lastly, the definition of expression "commission" in the Explanation appended to Sec. 194H being an inclusive definition giving wide meaning to the expression "commission", the transaction in question did fall under the definition of expression "commission" for the purpose of attracting rigor of Sec. 194H of the Act.

Once it is held that the provisions of Sec. 194H apply to the transactions, it is obligatory upon the appellant to have

deducted the income tax while making payment to the advertisement agencies. The non-compliance of sec. 194H by the assessee attracts the rigor of sec. 201 which provides for consequences of failure to deduct or pay the tax as provided u/s 194H of the Act.

The appellant had relied on the decision of the Allahabad High Court in the case of Jagran Prakashan Ltd. -vs.- DCIT (TDS) (2012) 345 ITR 288, which was distinguished by the Apex Court on the fact that in the case of Jagran Prakasan Ltd. the parties did not have any agreement like the one in the present case. Accordingly, the appellant's case was dismissed.

Tooltech Global Engineering P. Ltd. vs. ACIT (2015) (Bom)

Chapter X of the Act, is an anti-avoidance measure and not an anti-evasion measure. The object of the Transfer Pricing Officer is to put a stop to capital erosion and transfer of profits from one taxable territory to another taxable territory.

The assessee had granted certain loans to its associated enterprises (AE) on which no interest was charged. The AO was of the opinion that the granting of loans to AE is an international transaction. After so holding the AO worked out interest income thereon to determine the Arm's Length Price. The said order was affirmed by the Tribunal. The assessee challenged the said order in appeal before the Hon'ble High Court.

The primary contention of the assessee before the Hon'ble High Court was that by virtue of reworking interest on loans granted to AE the AO / Department has sought to tax notional or hypothetical income and not real income and as per the provisions of the Income-tax Act, 1961 only real income could have been taxed and therefore the addition as regards notional interest income was not sustainable.

The Hon'ble High Court dismissed the appeal holding that, Chapter X of the Act, is an anti-avoidance measure and not an anti-evasion measure. It is not premised on the basis that the transactions entered into between the parties suffers from under/over invoicing. The value of the transactions is brought in line with the consideration which would pass between two independent parties i.e. non-related / non-associated enterprises, by legislative mandate. It was further held that the Legislature has introduced special provisions in respect of International Transactions to bring the income to tax having regard to Arm's Length Price (ALP). In such case, the parties are obliged to establish the ALP of the International Transactions entered into between the two AE to bring to tax the real income i.e. the correct price of the transactions, shorn of, the price arrived at on account of relationship. It means the real income on application of a new measure. The object of the Transfer Pricing Officer is to put a stop to capital erosion and transfer of profits from one taxable territory to another taxable territory.

Renault Nissan Automotive India Private Ltd. -vs.- DRP & Others (2018) (Madras)

Cryptic order passed/ directions issued by the DRP without application of mind, simply accepting the TPO's order, without independent reasoning and findings, is liable to be set aside.

The TPO rejected the overseas tested party approach adopted by the assessee and the economic adjustments claimed by the assessee and proposed TP adjustment. The assessee-filed objection before the DRP against the draft assessment order incorporating the adjustment made by the TPO. The DRP issued directions to the AO, which in effect, accepted the conclusion arrived by the TPO in toto.

The assessee filed the writ petition before the High Court against the said directions of the DRP primarily contending that the DRP had passed the order in total non-application of mind to the objections raised by the assessee. It contended that the DRP was not justified in rejecting the objections and confirming the TPO's order simply by stating that it was in agreement with the findings rendered by the TPO without any detailed discussions and independent findings on each issue.

The Court held that perusal of the DRP's order clearly indicated that apart from extracting objections raised by

the Petitioner and the relevant portion of the TPO's order dealing with such objection, the DRP had not further discussed anything on the said objection in detail as to how the objections raised by the assessee could not be sustained or as to how the findings rendered by the TPO on such issue had to be accepted.

Noting that sec. 144C(5) r.w.s. 144C(6) contemplates that DRP shall issue directions only after inter alia considering objections raised by the assessee, evidences filed by assessee etc., the Court held that issuance of such directions could not be made mechanically or as an empty formality. It held that, on the other hand, the DRP had to issue directions only after considering the above stated materials and such consideration must be apparent on the face of the order.

It thus held that, in absence of independent reasoning and finding, the DRP had passed a cryptic order without application of mind.

Accordingly, it set aside the DRP's order and directed it to pass a fresh order after considering the objections raised by the assessee in detail and giving independent reasons and findings.

PCIT -vs.- IVen Interactive Limited (SC) (2019)

Mere mentioning of the new address in the return of income without specifically intimating the A.O. with respect to change of address and without getting the PAN database changed, is not enough and sufficient.

Notices u/s 143(2) are issued on selection of case generated under automated system of the Department which picks up the address of the assessee from the database of the PAN. Therefore, the change of address in the database of PAN is must. Following are the implications of the verdict:

a) It is important to get the address in PAN database updated.

b) If this is not done, the A.O. would be right in sending notice u/s 143(2) on the old address and you cannot escape by claiming you didn't receive the notice on your new address.

c) Without PAN updation, you cannot claim that the notices u/s 143(2) & 142(1) were not served upon you as you never received those notices and the subsequent notices served and received by you were beyond the period of limitation prescribed under proviso to sec. 143 of the 1961 Act.

d) In the absence of any intimation to the A.O. with respect to change in address, the A.O. was justified in issuing the notice at the address available as per the PAN database.

The Peerless General Finance And Investment Company Ltd. -vs.- CIT (SC) (2019)

Receipts of subscriptions pursuant to collective investment schemes is to be treated as capital receipts even if it is shown as income in books of accounts

Assessee-company has floated various schemes which require subscribers to deposit certain amounts by way of subscriptions in its hands, and, depending upon the scheme in question, these subscribed amounts at the end of the scheme are ultimately repaid with interest. The scheme at hand also contains forfeiture clauses as a result of which if, mid-way, a certain amount is forfeited, then the said amount would immediately become income in the hands of the assessee. Assessing Officer treated these amounts as income inasmuch as under the accounting system followed by the assessee, these amounts were credited to the profit and loss account for the years in question as income. It was held what was clear, even on general principle, was that subscriptions were received in the years in question from the public at large under a collective investment scheme, and these subscriptions were never at any point of time forfeited. This being the case, and surrendered certificates not being the subject-matter of the appeal, it was clear that even on general principles, deposits by way of amounts pursuant to these investment schemes made by subscribers which had never been forfeited could only be stated to be capital receipts. The "theoretical" aspect of the present transaction was that assessee treated subscription receipts as income. The reality of the situation,

however, was that the business aspect of the matter, when viewed as a whole, lead inevitably to the conclusion that the receipts in question were capital receipts and not income.

P. P. Mahatme, POA Lorna Margaret Pinto -vs.- ACIT (Bombay) (2019)

No transfer on Family settlement amongst family members in context of 'preexisting right'

A family settlement which is a settlement amongst family members in the context of their 'preexisting right' is not a "transfer". Such a settlement only defines a preexisting joint interest as a separate interest. However, if there is no preexisting right, the family arrangement constitutes a "transfer". Merely because dispute involved some family members and such dispute is ultimately settled by filing consent terms, the same cannot be styled as a family arrangement or family settlement so as to hold that the consideration received as a result of such settlement, does not constitute capital gain.

PCIT -vs.- State Bank of India (Bombay)(2019)

Genuine contributions to unapproved and unrecognized funds allowable as deduction

Assessee claimed deduction of expenditure of ₹ 50 lakhs towards contribution to a fund created for the health care of the retired employees. Revenue argued that such fund not being one recognized under Section 36(1)(iv) or (v), claim of expenditure was hit by the provisions of sec. 40A(9). It was held the very purpose of insertion of sec. 40A(9) was to restrict the claim of expenditure by the employers towards contribution to funds, trust, association of persons etc. which was wholly discretionary and did not impose any restriction or condition for expanding such funds which had possibility of misdirecting or misuse of such funds after the employer claimed benefit of deduction thereof. In plain terms, this provision was not meant to hit genuine expenditure by an employer for the welfare and the benefit of the employees. Thus, assessee was entitled for deduction.

CIT -vs.- NCR Corporation Pvt. Ltd (Kar) (2020)

Whether ATM can be considered as computer and charged higher rate of depreciation?

The Karnataka High Court held that so long as functions of computers are performed with other functions and other functions are dependent on the functions of the computer, ATMs are to be treated as computers and are entitled to higher rate of depreciation

UOI -vs.- UAE Exchange Centre (SC) (2020)

Activities carried out by Liaison Office (LO) are preparatory and auxiliary and hence the LO doesn't constitute a permanent establishment under India

Facts

- The Assessee was a limited company incorporated in the United Arab Emirates (UAE). It was engaged in offering, among others, remittance services for transferring amounts from UAE to various places in India.
- The Assessee had set up its first liaison office in Cochin, India in January, 1997 and thereafter, in Chennai, New Delhi, Mumbai and Jalandhar in India. The activities carried on by the Assessee from the said liaison offices were stated to be in conformity with the terms and conditions prescribed by the Reserve Bank of India.
- The entire expenses of the liaison offices in India were met exclusively out of funds received from UAE through normal banking channels. The liaison offices undertake no activity of trading, commercial or industrial. The Assessee had no immovable property in India otherwise than by way of lease for operating the liaison offices. No fee/ commission was charged or received in India by any of the liaison offices for services rendered in India. The remittance services were offered by the Assessee to Non-Resident Indians in UAE. The contract pursuant to which the funds were handed over by the Non-Resident Indian to the Assessee in UAE was entered between the Assessee and the Non-Resident Indian remitter in UAE.

- However, the revenue was of the view that income shall be deemed to accrue in India from the activity carried out by the liaison offices of the Assessee in India under Article 5 and Article 7 of the tax treaty.

Held

- Article 5, deals with and defines the "Permanent Establishment" as 'A fixed place of business through which the business of an enterprise is wholly or partly carried on is regarded as a Permanent Establishment. The term "Permanent Establishment" would include the specified places referred to in clause 2 of Article 5'.
- In the present facts of the case, it was not in dispute that the place from where the activities were carried on by the assessee in India was a liaison office and would, therefore, be covered by the term Permanent Establishment in Article 5(2).
- However, Article 5(3) of the tax treaty opens with a non- obstante clause and also contains a deeming provision. It predicates that notwithstanding the preceding provisions of the concerned Article, which would mean clauses 1 and 2 of Article 5, it would still not be a Permanent Establishment, if any of the clauses in Article 5(3) are applicable.
- In present facts of the case, the crucial activities were of downloading particulars of remittances through electronic media and then printing cheques/ drafts drawn on the banks in India, which, in turn, were couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the Non-Resident Indian remitter.
- While doing so, the liaison office of the Assessee in India remained connected with its main server in UAE and the information residing thereat was accessed by the liaison office in India for the purpose of remittance of funds to the beneficiaries in India by the Non-Resident Indian remitters. These were combination of virtual and physical activities unlike the virtual activity of funds being remitted by telegraphic transfer through banking channels.
- Further, the Reserve Bank of India had agreed for establishing a liaison office of the respondent at Cochin, initially for a period of three years to enable the Assessee to (i) respond quickly and economically to inquiries from correspondent banks with regard to suspected fraudulent drafts; (ii) undertake reconciliation of bank accounts held in India; (iii) act as a communication centre receiving computer (via modem) advices of mail transfer T.T. stop payments messages, payment details etc., originating from respondent's several branches in UAE and transmitting to its Indian correspondent banks; (iv) printing Indian Rupee drafts with facsimile signature from the Head Office and counter signature by the authorised signatory of the Office at Cochin; and (v) following up with the Indian correspondent banks. These were the limited activities which the Assessee was permitted to carry on within India.
- Thus, the office in India was not permitted to undertake any other activity of trading, commercial or industrial, or to enter into any business contracts in its own name without prior permission of the Reserve Bank of India. The liaison office of the Assessee in India could not even charge commission/ fee or receive any remuneration or income in respect of the activities undertaken by the liaison office in India.
- Therefore, from the onerous stipulations specified by the Reserve Bank of India, it could be safely concluded, as opined by the Hon'ble High Court, that the activities of the liaison office(s) of the Assessee in India were in the nature of preparatory or auxiliary character.
- Hence, the same being "of preparatory or auxiliary character" by virtue of Article 5(3)(e) of the tax treaty, the fixed place of business (liaison office) of the Assessee in India otherwise a Permanent Establishment, was deemed to be expressly excluded from being so. And since by a legal fiction it was deemed not to be a Permanent Establishment of the Assessee in India, it was not amenable to tax liability in terms of Article 7 of the tax treaty.

Yum! Restaurants (Marketing) Private Limited -vs.- CIT (SC) (2020)

Doctrine of mutuality is not applicable in case of a commercial concern and arrangement

Yum! Restaurants (Marketing) Private Limited which is the appellant company is a fully owned subsidiary of YRIPL. Purpose of the organisation is that of cost advertisement and promotion to the franchised (economies). The Secretariat for Industrial Assistance approved this purpose. However, few conditions were laid down with regard to the functioning of the Appellant company. The Appellant was obligated to operate as a non-profit entity. And this non- profit entity was based on the principle of Mutuality.

Thereafter, the Yum! Restaurants (Marketing) Private Limited got into a Tripartite Operating Agreement in furtherance of the approval. The agreement was between the Appellant company, YRIPL and the franchises. As per the agreement the Appellant company received 5% of Gross sales as a fixed contribution for the purpose of Advertising and Other Promotional activities as a mutual benefit to the franchises & the parent company as well.

After the Assessment Year, the assessee(the Appellant) filled the returns as NIL for income stating its mutual character of this non-profit entity. This was not accepted by the Assessing Officer. The Commissioner of the Income Tax department upheld this decision explaining that the rejection was on the basis of the undesirable Commercialityin the activities undertaken by the Appellant company. Thus, making the surplus liable to tax.

The Income Tax Appellate Tribunal held that the essentials of a Doctrine of Mutuality are not fulfilled thus there is no basis to the arguments made by the assessee. The Delhi High Court also upheld this view.

The Apex Court has held that if the realization of money by the taxpayer from both members as well as non-members was in the course of the same activity and is tainted with commerciality, then the test of mutuality is not met. Where the participants did not have the right to participate in surplus or were not entitled to get back the unspent portion of their respective contributions, then this was also held to be against the concept of mutuality. In such cases, the income earned inter-se was held to be chargeable to income tax. The doctrine of mutuality bestows a special status to qualify for exemption from tax liability. It is a settled proposition of law that exemptions are to be put to strict interpretation. The Assessee having failed to fulfil the stipulations and to prove the existence of mutuality, the question of extending exemption from tax liability to the Assessee, that too at the cost of public exchequer, does not arise.

Navin Jolly -vs.- ITO (Kar) (2020)

Multiple independent residential units in same building can be treated as one residential unit for section 54F Exemption and usage of the property has to be considered in determining whether it is a residential property or a commercial property

The assessing officer vide order held that the assessee owns nine residential flats in his name and that he is deriving the income from the residential flats and declared the same under the head income from house property and is not eligible to claim exemption by invoking proviso (a)(i) and (b) to sec. 54F(1). The ITAT while dismissing the appeal by the assessee said, “it is immaterial as to how the assessee utilized the residential units and whether these residential units are used for commercial purposes or residential purposes, so long as these units were recognized as residential units. Therefore, it was held that the assessee cannot claim the benefit of exemption u/s 54F of the Act.”

The Hon’ble High Court has held that assessee is entitled to the benefit of exemption u/s 54F though the assessee owns more than one apartment of 500 square feet in the same building and it has to be treated as one residential unit.

PCIT -vs.- Open Solutions Software Services (Del) (2020)

Whether Transactional Net Margin Method does not require functional similarity between tested party and comparables?

The grievance of the Appellant is against the exclusion of four comparables introduced by the Transfer Pricing Officer ('TPO') for benchmarking the international transaction of rendition of software services by the Respondent.

From the exposition of law in Rampgreen Solutions Pvt. Ltd. -vs.- CIT and the other judgments, it is clear that even while applying the TNM method, comparables cannot be picked on the basis of broad classification under various heads, and that the actual functional profile of the comparable must be similar, if not same, to that of the taxpayer-assessee. In comparability analysis, the business environment; demand and supply of the services; assets employed, and, competence to provide different services are factors which would have a material bearing on the profitability of the entities and, therefore, regard must be had to such factors.

In the application of the TNM method, broad similarity in the domain of services is not enough and the overall FAR analysis of the comparable sought to be used must be similar with the taxpayer-assessee. On a perusal of the impugned order passed by the ITAT, present Court finds that none of the comparables have been excluded solely on the ground of high turnover. The primary reason for excluding the four comparables in question is on account of the dissimilarity in the overall profile of the said comparables with the Respondent-assessee.

In view of the above, it emerges that none of the comparables have been excluded on the ground of high turnover alone. The test of functional similarity applied by the Tribunal is in consonance with the legal position. Therefore, there is no merit in the contentions urged by the Revenue. Equally meritless is the contention of the Revenue regarding the bar to challenge the comparables after the acceptance of the filters. The filters are applied to narrow down the search to find the comparables that are closest to the assessee. The use of filters has to be necessarily validated from the annual reports. Since the TPO would have to do this exercise on the basis of the actual data in the report of the comparables, he would surely have the freedom to adopt or reject the comparables. It cannot held that merely because a comparable clears the filters, its inclusion in the list of comparables is immune to challenge by the assessee. The appeal is dismissed.

DIT -vs.- Samsung Heavy Industries Co Ltd (SC) (2020)

Project Office undertaking non-core activities in India does not constitute Permanent Establishment

Taxpayer, a non-resident company incorporated in South Korea, was awarded a turnkey contract by Oil and Natural Gas Corporation (ONGC) for carrying out the work involving surveys, design, engineering, procurement, fabrication, installation and modification of existing facilities; and start-up and commissioning of entire facilities of an oil and gas rig (Project) at north-west of Mumbai. The taxpayer, after seeking approval from Reserve Bank of India (RBI), setup a PO in Mumbai which would act as 'communication channel' between the taxpayer and ONGC in respect of the Project. The taxpayer undertook entire activities (as required under the Project) from outside India and later the rig platforms were brought to Mumbai for installation at the Project site. In its Indian tax return, the taxpayer disclosed a loss of INR 2.35mn which had been incurred on account of the activities carried out in India.

However, the tax officer, after examining the terms of agreement of Project, concluded that the project was a single indivisible turnkey project whose work was wholly executed by the PO which constitute a PE in India and thus consequently profits (attributed at the rate of 25% of the revenue) arising from such project would be taxable in India. The Dispute Resolution Panel (DRP) as well as Mumbai Tax Tribunal affirmed the findings of the tax officer. Further, the Tribunal observed that the onus lies on the taxpayer to prove that the activities of PE are of preparatory and auxiliary in nature. Upon further appeal, the Hon'ble Uttarakhand High Court (HC) held that the question relating to whether the PO opened at Mumbai cannot be said to be a "Permanent Establishment" within the meaning of Article 5 of the Tax Treaty would be of no consequence. The HC then held that there was no finding or justification on record that 25% of the gross revenue of the taxpayer outside India was attributable to the business carried out by the PO.

Revenue Authorities filed an appeal before the Apex Court (SC) against the HC order. The Apex court observed that when it comes to 'fixed place' PE under the Tax Treaty, the condition precedent for applicability of Article

5(1) of the Tax Treaty and there by constituting PE is that there should be a place 'through which the business of an enterprise' is wholly or partly carried on. Further, the profits of the foreign enterprise are taxable in India only if the said enterprise carries on its core business (through a PE) in India. Further, SC perused the documents that were relied upon by Tribunal and made the following observations:

- Board Resolution shows that the PO was established to coordinate and execute 'delivery documents in connection with construction of offshore platform modification of existing facilities for ONGC'. Tribunal's finding that PO was involved in core activity of execution of the Project is perverse.
- Tribunal ignored facts submitted by the taxpayer which established that no expenditure was incurred by PO in India and that only 2 employees (having no technical qualification) were engaged to perform non-core activities.
- Tribunal's finding that the onus to establish that PO does not constitute a PE is on taxpayer, is against the SC decision in case of E-Funds IT Solution Inc.

Basis the above observations, SC held that taxpayer's PO in Mumbai did not constitute a Fixed Place PE in India. SC also affirmed the stand taken by the taxpayer that on the facts of the case, PO in Mumbai would fall within exclusionary Article 5(4)(e) of Tax Treaty as PO is only an auxiliary office meant to act as a liaison office between taxpayer and ONGC.

DCIT -vs.- Pepsi Foods Ltd (2021) 433 ITR 295 (SC)

Would automatic vacation of stay order upon expiry of extended period of stay of 365 days be valid, where the delay in disposing of the appeal is not attributable to the assessee?

The third proviso to sec. 254(2A) provides that where the appeal filed before the Appellate Tribunal is not disposed of within the period of stay or extended period of stay granted by the Tribunal, the order of stay shall stand vacated after the expiry of 365 days, even if the delay in disposing of the appeal is not attributable to the assessee.

The Apex Court observed that the Appellate Tribunal, wherever possible, has to hear and decide appeals within a period of four years from the end of the financial year in which such appeal is filed. It is only when a stay is granted by the Appellate Tribunal, the appeal is required to be disposed of within 365 days. So far as the disposal of an appeal by the Appellate Tribunal is concerned, this is a directory provision. However, the condition of automatic vacation of stay on expiry of the period becomes mandatory so far as the assessee is concerned.

The Apex Court also pointed out that the said proviso would result in the automatic vacation of a stay upon the expiry of 365 days, even if the Appellate Tribunal could not take up the appeal in time for no fault of the assessee. Further, vacation of stay in favour of the Department would ensue even if the Department is itself responsible for the delay in hearing the appeal. In this sense, the proviso is manifestly arbitrary being a provision which is capricious, irrational and disproportionate so far as the assessee is concerned.

Accordingly, the Apex Court held that the third proviso to sec. 254(2A) has to be read without the word "even" and the word "not" after the words "delay in disposing of the appeal". Thus, any order of stay shall stand vacated after the expiry of the period or periods mentioned in the section, only if the delay in disposing of the appeal is attributable to the assessee.

Engineering Analysis Centre of Excellence P. Ltd -vs.- CIT and Another (2021) (SC)

Would the amounts paid by resident Indian end-users / distributors to non-resident computer software manufacturers / suppliers, as consideration for the use/resale of the computer software through End-User Licence Agreement (EULAs) / distribution agreements, be considered as payment of royalty for the use of copyright in the computer software? If yes, is it liable for deduction of tax at source u/s 195?

The Apex Court observed that as per the definition given in Explanation 2(v) to sec. 9(1)(vi), "royalty" means consideration for, inter alia, the transfer of all or any rights (including the granting of a licence), in respect of any copyright, literary, artistic or scientific work. As per Explanation 4 thereto, such transfer of all or any rights includes transfer of all or any right for use or right to use a computer software (including the granting of a licence). As per the meaning assigned in the DTAA with Singapore, for example, "royalty" means payment of any kind received as consideration for "the use of, or the right to use, any copyright" of a literary, artistic or scientific work. The meaning of royalty in India's DTAA with other countries like Australia, Canada, France, Italy, USA, Netherlands, Sweden, Taiwan, Japan, China etc. is similar if not identical.

The Apex Court observed the following four categories of cases, in which the distribution agreements and end-user licence agreements did not create any interest or right to such distributors or end-users, which would amount to the use of or right to use any copyright:

a. where computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

b. where resident Indian companies acting as distributors or resellers, purchase computer software from foreign, non-resident suppliers or manufacturers and then, resell the same to resident Indian end-users.

c. where the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.

d. where computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.

In all the above cases, the Apex Court has held that the amount paid by resident Indian end-users or distributors to non-resident computer software manufacturers or suppliers, as consideration for the resale or use of the computer software through end-user licence agreements or distribution agreements, is not royalty for the use of copyright in the computer software.

The provisions contained in the Income-tax Act, 1961 [namely, section 9(1)(vi) read along with Explanations 2 and 4 thereof], which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases. Consequently, the consideration paid to the non-resident computer software manufacturers or suppliers would not be chargeable to tax India. Hence, no tax is required to be deducted at source u/s 195.

As per section 90(2), the provisions of the Income-tax Act, 1961 will apply only to the extent they are more beneficial to the assessee, in a case where India has entered into a DTAA with the other country. In this case, since the provisions under the DTAA are more beneficial, the taxability of the payment would be determined as per the meaning of royalty assigned under the DTAAs.

PCIT -vs.- Dr. Ranjan Pai (2021) 431 ITR 250 (Kar)[1]

Can bonus shares received by shareholders be taxable under the head 'Income from other sources' as per the provisions of sec. 56(2)(x), as they are received without consideration?

The issue of bonus shares by capitalization of reserves is merely a reallocation of the company's funds. There is no inflow of fresh funds or increase in the capital employed, which remains the same. Thus, there is no addition or alteration to the profit-making apparatus and the total funds available with the company remain the same. On the other hand, when a shareholder gets bonus shares, the value of the original shares held by him goes down and the market value as well as intrinsic value of the two shares put together will be the same or nearly the same as the value of original share before the issue of bonus shares. Thus, any profit derived by the assessee shareholder on account of receipt of bonus shares is adjusted by depreciation in the value of equity shares originally held by him.

Accordingly, the High Court held that the bonus shares were not issued in order to evade any tax so to attract

the provisions of sec. 56(2)(x). Hence, the provisions of sec. 56(2)(x) would not be attracted in the hands of the recipient shareholders on receipt of bonus shares.

CIT and another -vs.- Corporation Bank [2021] 431 ITR 554 (Kar)

Are the provisions of TDS u/s 194H attracted on payment made by the assessee-bank for services rendered by M/s. NFS, a network of shared ATMs in India?

National Financial Switch (NFS) is an ATM network which facilitates convenience banking. It links together the country's ATMs in a single network. The High Court observed that the relationship between the assessee-bank and National Financial Switch (NFS) is not of an agency but that of two independent parties on principal to principal basis. Therefore, the High Court held that the provisions of sec. 194H are not attracted on payment made by Corporation Bank, which issued the credit card, for payment gateway services provided by NFS.

CIT -vs.- Reliance Telecom Ltd (SC) (2021)

ITAT has no power to recall its order even if submissions were filed on merits

The Supreme Court held that the order passed by the ITAT recalling its earlier order is beyond the scope and ambit of the powers u/s 254(2). In exercise of powers u/s 254(2), the ITAT may amend any order passed by it to rectify any mistake apparent from the record only. The Tribunal cannot revisit its earlier order and go into detail on merits.

The powers u/s 254(2) are only to correct and/or rectify the mistake apparent from the record. Merely because the assessee might have filed detailed submissions, it does not confer jurisdiction upon the ITAT to pass the order de hors sec. 254(2).

In the instant case, a detailed order was already passed by the ITAT, which was held in favour of the revenue. Therefore, the said order could not have been recalled by ITAT in the exercise of powers u/s 254(2). If the assessee believed that the order passed by the ITAT was erroneous, either on facts or in law, the only remedy available was to prefer the appeal before the High Court.

Board of Control for Cricket in India -vs.- PCIT (2021)(Mum-Trib)

BCCI isn't engaged in commercial activities as funds generated from IPL are used for promoting cricket

The Mumbai Tribunal has allowed relief to BCCI and directed CIT to grant registration u/s 12A citing that BCCI is still promoting the game of cricket. The Court has ruled that the prime character of popularising cricket is not lost just because a sports tournament is structured to make it more popular, resulting in more paying sponsorship and greater mobilisation of resources.

The Court rules that the basic character of popularising cricket is not lost just because a sports tournament is structured in such a manner to make it more popular, resulting in more paying sponsorship and greater mobilisation of resources.

It is indeed possible that the predominant object remains the promotion of cricket but that activity is done in a more effective and financially optimal manner. There is no conflict in the cricket becoming more popular and the cricket becoming more entertaining after the introduction of the IPL tournament.

As long as the object of promoting cricket remains intact, the assessee cannot be said to be not following the object of promoting cricket. It will not impact the eligibility of the assessee just because the operational model of a cricket tournament, whether IPL or any other tournament, is more entertaining, more economically viable, and provides economic opportunities to all those associated with that tournament.

1. This decision was rendered in the context of sec. 56(2)(vii); however, the underlying principle emanating therefrom applies with equal force in the context of the present provisions contained in sec. 56(2(x). Accordingly, the issue and decision has been presented with reference to sec. 56(2)(x).

All the funds available at the disposal of BCCI, including the additional funds generated by holding IPL tournaments, are employed for promoting cricket, and that matters. Improvising the game's rules, adding entertainment value, and making it economically attractive may be a purist's nightmare. Still, the same factors can also be viewed as radical and innovative ideas to popularise a game.

Therefore, the assessee is entitled to the continuance of its registration u/s 12A, and the order passed by the CIT stands quashed.

Kohinoor Indian (P.) Ltd. -vs.- ACIT (2021)(Amritsar-Trib)

'iPad' may have some computing functions, but it isn't a computer for higher depreciation

The Amritsar Tribunal has ruled that the predominant purpose of the iPad is communication, and it is not a computing device. Its main features are email, WhatsApp, Facetime calls, music, films, etc. Though the iPad may discharge some of the functions of computers, it is not a substitution for computers or laptops. In common parlance, the iPad is considered as communicating device with some additional features of a computer.

Further, apple stores do not sell the iPad as a computer device, but rather, it is selling it as communicating/ entertainment device. Another reason the iPad can be held as a communication device is it has an IMEI number. Though the assessee had denied having an IMEI number, no concrete records have been produced on record in this regard. Accordingly, ITAT held that the iPad is not a computer. Hence, depreciation is applicable at a lower rate.

PCIT -vs.- Tally Solutions (P.) Ltd. (2021) (Kar.)

Non-deduction of tax on the purchase of assets cannot take away the right to claim depreciation

The Karnataka High Court held that sec. 40(a)(i) and 40(a)(ia) provide for disallowance only in respect of expenditure, which is revenue in nature. Therefore, the provision does not apply to the assessee claiming depreciation, which is not an expenditure but an allowance.

The depreciation is not an outgoing expenditure, and therefore, provisions of sec. 40(a)(i) and 40(a)(ia) are not applicable. In the absence of any requirement of law for making a deduction of tax out of expenditure, which has been capitalised and no amount was claimed as revenue expenditure, no disallowance would be made.

It is also pertinent to note that depreciation is a statutory deduction available to the assessee on an asset, which is wholly or partly owned by it and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability.

Noida Cyber Park (P.) Ltd. -vs.- ITO (2021) (Delhi-Trib)

Section 50C is not applicable on the transfer of leasehold rights in land and building

The Delhi ITAT held that the expression 'land or building' in its coverage is quite distinct from the expression 'any right in land or building'. The legislature, in its wisdom, has used the expression 'land or building or both' in Section 50C, and not the expression 'any right in land or building'. Therefore, the express use of one expression would exclude the other.

The Hon'ble Supreme Court has supported these legal premises in the case of GVK Industries Ltd. -vs.- ITO [2011] (SC). Thus, transfer of leasehold rights does not warrant invoking sec. 50C as the said property is not of the nature covered by sec. 50C.

Aditya Balkrishna Shroff -vs.- ITO (2021) (Mum-Trib)

Gain received on personal loan due to forex fluctuation is a capital receipt not liable to tax

The Mumbai ITAT held that even before deciding whether the gain was of income nature, AO had proceeded to put the cart before the horse by deciding the head under which the income is to be taxed. He mixed up the concept

of income with the concept of gains. In the case of Shaw Wallace & Co Ltd v. DCIT [2001] (Cal), the ITAT held that a capital receipt, in principle, is outside the scope of income chargeable to tax. A receipt cannot be taxed as income unless it is in the nature of a revenue receipt or is specifically brought within the ambit of income by way of specific provisions of the Income-tax Act.

AO had accepted that the transaction was in the capital field and proceeded to hold that income arising out of the loan transaction was required to be treated as interest or income from other sources. If the transaction is in the capital field, the question of its taxability does not arise unless there is a specific provision of bringing such a receipt to tax. In any case, where the loan was foreign currency-denominated and the amount advanced as loan, as also received back as repayment, was precisely the same, there was no question of interest component at all.

The benefit or gain received by the assessee was on account of foreign exchange fluctuation. Since the foreign exchange fluctuation was with respect to a transaction in the capital field, the foreign exchange fluctuation receipt itself turned out to be a capital receipt.

CIT (International Taxation) -vs.- Gracemac Corporation (Delhi)

Licensing of software products by Microsoft is not taxable in India as royalty

High court held that licensing of software products of Microsoft in the Territory of India by the Respondent was not taxable in India as Royalty under Section 9(1)(vi) of the Act read with Article 12 of the Indo US DTAA

The department approached the High Court contending that the Tribunal has failed to appreciate that the distribution model in the case of the respondent-assessee involved making of multiple copies of the software clearly indicating transfer of copyright.

The Court has relied on the decisions in EY Global Services Limited -vs.- ACIT and EYGBS (India) Private Limited -vs.- JCIT wherein the Apex Court has held that the payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to 'royalty' liable to be taxed in India under the provisions of the Income Tax Act, 1961 and the India-UK DTAA.

SAP Labs India Pvt. Ltd. -vs.- ITO [2023] 454 ITR 121 (SC)

Determination of ALP by the High Court

The Apex Court laid down the following with respect to the powers of High Court to consider the substantial question of law involving determination of ALP:

- While determining the ALP, the Tribunal has to follow the guidelines stipulated under Chapter X of the Income-tax Act, 1961, namely, sec. 92 to 92F and Rules 10A to 10E. Any determination of the ALP under Chapter X not in accordance with the relevant provisions of the Income-tax Act and Rules can be considered as perverse and it may be considered as a substantial question of law as perversity itself can be said to be a substantial question of law. Therefore, there cannot be any absolute proposition of law that in all cases where the Tribunal has determined the ALP, the same is final and cannot be the subject matter of scrutiny by the High Court in an appeal.
- When the determination of the ALP is challenged before the High Court, it is always open for the High Court to consider and examine whether the ALP has been determined while taking into consideration the relevant guidelines under the Act and the Rules.
- The High Court can also examine the question of comparability of two companies or selection of filters and examine whether the same is done judiciously and on the basis of the relevant material/evidence on record. The High Court can also examine whether the comparable transactions have been taken into consideration properly

or not, i.e., to the extent as to whether non-comparable transactions are considered as comparable transactions or not.

Therefore, the view taken by the Karnataka High Court in the case of Softbrands India (P.) Ltd. that in the transfer pricing matters, the determination of the ALP by the Tribunal is final and cannot be subject matter of appeal under section 260A cannot be accepted. In an appeal challenging the determination of the arm's length price, it is always open for the High Court to examine in each case, within the parameters of section 260A, whether while determining the ALP, the guidelines laid down under the Income-tax Act and the Rules are followed or not and whether the determination of the ALP and the findings recorded by the Tribunal while determining the ALP are perverse or not.

Secunderabad Club -vs.- CIT [2023] 457 ITR 263 (SC)

Does the principle of mutuality apply to interest income derived from fixed deposits made with the banks by the clubs if such banks are members of the club?

The assessee-club deposited surplus funds as term deposits with various banks (who were the club members). It claimed interest earned on said deposits as exempt from income-tax applying the principle of mutuality.

The principle of mutuality works on the triple test, namely:

a. Complete identity between the contributors and participators

b. Action of the participators and contributors must be in furtherance of the mandate of the associations or the Clubs. The mandate of the Club is a question of fact that has to be determined from the Memorandum or Articles of Association, Rules of Membership, Rules of the Organization, etc., and must be construed broadly.

c. There must be no scope for profiteering by the contributors from a fund made by them, which could only be expended or returned to themselves.

Applying the above principles to the facts of the case, it was observed that in relation to transactions, namely, the deposit of surplus funds earned by the club, in banks which are members of the club, the principle of mutuality applies till the stage of deposit of funds and would lose its application, once the funds are deposited as fixed deposit in the banks. This is because the funds would be exposed to commercial banking operations, which means that the deposits could be used for lending to third parties and earning a higher interest thereon by paying a lower interest rate on the fixed deposits to the club. The bank utilising the funds of the club deposited in fixed deposit receipts for their banking business would completely rupture the "privity of mutuality", and as a result, the element of complete identity between the contributors and participators would be lost. Consequently, the first condition for the claim of mutuality is not satisfied.

If the surplus fund is not applied for the common purpose of the club or towards the benefit of the members of the club directly but is invested with a third party who has the right to utilise the said funds, subject to payment of interest on it and repayment of the principal when desired by the club, then, in such an event, the club loses its control over the said funds. Furthermore, as the bank utilises the fixed deposit amounts for its banking business, the club's identity with the funds is compromised. The bank's ability to derive profits by lending the amount at a higher interest rate, while paying a lower rate of interest on the fixed deposit made by the club, further disrupts the essential identicality between contributors and participators in the mutual relationship.

Conversely, when a club provides its facilities to members who contribute to its income, the principle of mutuality applies due to the identity between contributors and participants. However, where the same facilities are offered to non-members or the public to generate additional income, it transforms into a commercial transaction, and the principle of mutuality no longer applies.

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* From 01-10-2024: 2%

For the triple test to apply to the different and varied transactions of the club, it is necessary to lift the veil and discern the nature of each transaction: whether there is third-party intervention, which is the reason for earning the income, or it is an income generated between the members and the club, as such, i.e., only between the members of the club. When the transactions of the club are viewed in the aforesaid prism, then, in each of the transactions, whether the principle of mutuality would apply has to be discerned.

Accordingly, the Supreme Court held that the interest income earned on fixed deposits made with the banks by the appellant club has to be treated like any other income from other sources within the meaning of section 2(24). Conversely, if any income is earned by the club through its assets and resources from persons who are not members of the club, such income would also not be covered under the principle of mutuality. It would be liable to be taxed under the provisions of the Income-tax Act.

CIT -vs.- Cognizant Technology Solutions of India Pvt. Ltd. (2023) 454 ITR 1 (SC)

Is deduction under section 10AA available in respect of foreign exchange gain solely relating to the export business of the assessee?

In order to allow deduction u/s 10AA, it has to be seen whether such benefit earned by the assessee was derived by virtue of export made by the assessee. The exchange value based on upward or downward of the rupee value is not in the hands of the assessee. The assessee does not determine the exchange value of the Indian rupee. But for the fact that, the assessee is an export house, there was no question of earning any foreign exchange. Therefore, when the fluctuation in foreign exchange rate was solely relatable to the export business of the assessee and the higher rupee value was earned by virtue of such exports carried out by the assessee, the deduction u/s 10AA would be available in respect of such foreign exchange gains.

CIT -vs.- Reliance Energy Ltd. (2022) 441 ITR 346 (SC)

Whether deduction u/s 80-IA has to be limited to the extent of the Income from Business or profession as per sec. 80AB or it has to be allowed to the extent of the profit of the eligible undertaking?

A plain reading of sec. 80AB shows that the provision pertains to determination of the quantum of deductible income in the "gross total income". Sec. 80AB cannot be read to be curtailing the width of sec. 80-IA. It is relevant to take note of sec. 80A(1) which stipulates that in computation of the "total income" of an assessee, deductions specified in sec. 80C to sec. 80U shall be allowed from his "gross total income". Sec. 80A(2) provides that the aggregate amount of the deductions under Chapter VI-A shall not exceed the "gross total income" of the assessee. Thus, sec. 80AB which deals with determination of deductions under Part C of Chapter VI-A is with respect only to computation of deduction on the basis of "net income".

The import of sec. 80-IA is that the "total income" of an assessee is computed by taking into account the allowable deduction in respect of the profits and gains derived from the "eligible business". The scope of sec. 80-IA(5) is limited to determination of quantum of deduction u/s 80-IA(1) by treating "eligible business" as the "only source of income". Sub-section (5) cannot be pressed into service for reading a limitation of the deduction under sub-section (1) only to income under the head "Profits and gains of business and profession".

For the purpose of calculating profit-linked deduction under any section of Chapter VI-A, loss sustained in other divisions or units cannot be taken into account, as only profits from the eligible business have to be taken into account as if it was the only source of income. Profits and gains from eligible business cannot be reduced by the loss suffered in any other business owned by the assessee.

CIT -vs.- KBD Sugars and Distilleries Ltd. [2023] 454 ITR 800 (SC)

Can a resulting entity set off and carry forward the losses of the dysfunctional unit of demerged entity?

The Assessing Officer contented that the assessee was ineligible to the benefit of brought forward loss u/s 72A(4)

for the reason that the demerged company was dysfunctional since 1999 and, therefore, does not qualify to be a 'going concern'. Since the undertaking not being a 'going concern', the condition laid down in sec. 2(19AA) for demerger stands violated.

The Tribunal opined that the words used 'on a going concern basis' in sec. 2(19AA) only means that the transfer should be based on a 'going concern', and it does not mean that the undertaking being transferred should be a 'going concern' as on the date of transfer.

The 'scheme of demerger', which stands approved by the High Courts and the jurisdictional Court, clearly establishes the fact that the transfer of the undertaking is indeed on a 'going concern basis'. The assets, liabilities, employees, debts, obligations, rights, etc., of the undertaking, immediately prior to the demerger, stand entirely vested with the assessee upon 'demerger'. This amounts to 'transfer of the undertaking on a going concern basis'.

A simple reading of the same makes it very clear that the assessee is eligible for the benefits u/s 72A(4). The Act does not state that the undertaking being demerged ought to be a going concern at the time of demerger. It only states that the undertaking being demerged should stand transferred in a manner similar to the manner in which a 'going concern' is transferred.

Accordingly, the High Court held that if a unit were running and profitable, the same would not be available for demerger. It would be incongruous to construe sec. 2(19AA) to mean a running unit. The scheme of demerger had been approved by the High Courts. Therefore, the assessee was entitled to set off the brought forward losses u/s 72A(4). The Apex Court affirmed the decision of the High Court.

Bharti Cellular Ltd. -vs.- ACIT [2024] 462 ITR 247 (SC)

Are cellular mobile telephone service providers required to deduct tax at source under section 194H on the difference between the discounted price at which it sold start-up kits and recharge vouchers to franchisees or distributors and the sale price at which these products were subsequently sold by the franchisees or distributors?

As per sec. 194H, any person, who is responsible for paying to a resident, any income by way of Commission (not being insurance Commission referred to in sec. 194-D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate of 5%*.

As per Explanation (i) to sec. 194H "Commission or Brokerage" include any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.

The obligation to deduct tax at source in terms of sec. 194H arises when the legal relationship of principal and agent is established. Agency is a triangular relationship between the principal, agent and the third party.

To decide whether a contracting party acts for himself as an independent contractor (and not as an agent), it needs to be examined whether in the course of work, he intends to make profits for himself, or is entitled to receive pre-arranged remuneration. If the party is concerned about acting for himself and making the maximum profits possible, he is usually regarded as a buyer, or an independent contractor and not as an agent of the principal.

The legal position of a distributor is generally regarded as different from that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party.

Based on perusal of agreement between assessee and distributors / franchisee, the franchisee/distributor paid the discounted price regardless of, and even before, the pre-paid products being sold and transferred to the retailers or the actual consumer. The franchisee/distributor was free to sell the prepaid products at any price below the price printed on the pack. The franchisee/distributor determined his profits/income.

Section 194H fixes the liability to deduct tax at source on the 'person responsible to pay' and the liability to deduct tax at source arises when the income is credited or paid by the person responsible for paying. The expression "direct or indirect" used in Explanation (i) to section 194H is meant to ensure that "the person responsible for paying" does not dodge the obligation to deduct tax at source, even when the payment is indirectly made by the principal-payer to the agent-payee. However, deduction of tax at source in terms of sec. 194H is not to be extended and widened in ambit to apply to true/genuine business transactions, where the assessee is not the person responsible for paying or crediting income. In the present case, the assessee neither pays nor credit any income to the person with whom he has contracted. The assessee is not privy to the transactions between distributors/franchisees and third parties. It is, therefore, impossible for the assessee to deduct tax at source and comply with sec. 194H, on the difference between the total/sum consideration received by the distributors/franchisees from third parties and the amount paid by the distributors/ franchisees to them.

Accordingly, the Apex Court held that the contractual obligations of the franchises or distributors did not reflect a fiduciary character of the relationship, or the business being done on the Principal's account. Hence, sec. 194H is not applicable to the facts and circumstances of this case and the assessee would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/ franchisees from the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors.

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