Income Tax Case Laws

(Source :www.itatonline.org)

CA SOUMYA RANJAN PANDA

The document contains abstract of 142 recent Judgments of various Judicial Authorities on matters of Income Tax. Most Importantly, section wise arrangement of the cases would give the readers a comfort to search and refer any cases. Hope this would serve the purpose of the reader and make my effort fruitful.

Contents

1. *S.2(14): Capital asset – Paintings – Personal effects. [S. 45]*

Capital gains tax on sale of paintings is liable only with effect from 1-4-2008 in respect of the assessment year 2008-09 onwards and not in respect of earlier assessment years. (A.Y. 2005-06) **CIT v. Kuruvilla Abraham (2013) 215 Taxman 644 (Mad) (HC)**

2. *S.2(14): Capital asset–Agricultural land–No substantial question of law-Finding of fact. [S.260A]*

The assessee sold different plots of land, which were claimed to be agricultural land, situated at distance of more than 8 kms. from municipal limits. In support the assessee furnished certificate of Tehsildar and letter of District Town Planning stating that the land was situated beyond 8 kms. from outer limits of the municipal corporation. Assessing Officer disallowed the claim. On appeal Commissioner (Appeals) decided in issue in favour of assessee. Appeal of the department was dismissed by Tribunal. On appeal by revenue the court held that a question of law can be raised only if it arises from facts as found by Income-tax authorities. Therefore, where the Tribunal did not consider a question raised by revenue that land in question was not agricultural land as the Assessing Officer had not doubted such fact, order of Tribunal did not call for any interference. (A.Ys. 2008-09, 2009-10) **CIT v. Nirmal Bansal (2013) 215 Taxman 639 (Delhi)(HC)**

3. *S.2(15): Charitable purpose–Education–For publishing of magazines exemption cannot be denied. [S. 11, 13]*

The assessee-trust was running educational institutions. To aid spreading of education and update syllabus and other related educational aspects, two magazines were started its sister concern in which it made an investment. The denied exemption u/s.11 to the assessee on the ground that by publishing magazines, the assessee infringed s. 13(1)(c). Held the assessee was entitled to benefit u/s 11. (A.Ys. 1986-87, 1987-88) **CIT v. Vijaya Vani Educational Trust (2013) 215 Taxman 137(Mag.) (AP)(HC)**

4. *S.2(15): Charitable purpose-Objects of general public utility–Entitled for registration [S. 12A]*

The assessee trust was established with a predominant purpose of development of urban areas, on application for registration under section 12A, CIT rejected on grounds

that there was a profit motive in carrying the objectives. On appeal the Tribunal held the objects of the assessee are in the nature of general public utility and hence it was entitled for registration under section 12A. (A.Ys. 2003-04 to 2007-08). **Urban Improvement Trust v. CIT (2013) 142 ITD 313 (Jodh.)(Trib.)**

5. *S.2(15): Charitable purpose-Society formed by State Government-Providing single window assistance, especially to foreign entrepreneurs not exempt. [S. 11]*

The assessee society provided single window clearance to entrepreneurs for a fee. Assessing Officer thereby denied exemption under section 11 as he held that the activity carried out is not charitable purpose as defined under section 2(15). On appeal CIT(A) upheld the order of the Assessing Officer on appeal to the Tribunal held, dismissing assessee appeal: The assessee is providing single window clearance to foreign entrepreneurs for a fee in lieu of services rendered, which cannot be termed as a charitable activity and the assessee is held to be a service provider. (A.Y. 2009-10) **Tamil Nadu Industrial Guidance & Export Promotion Bureau v. ADIT (2013) 142 ITD 192 / 23 ITR 385 (Chennai)(Trib.)**

6. *S.2(15): Charitable Purpose–Proviso attracted if activities carried are similar to trade, commerce or business. Use, application or retention of consideration received is irrelevant. Proviso will also apply to a regulatory body or a body incorporated by Government. [S.12A]*

The main objects of the trust/society registered under section 12A was *inter alia* holding international film festival of India, advising the Indian Government on various policies and issues relating to entertainment industry in Goa, to build multiplexes, cinema halls, auditoriums, etc. The CIT cancelled the registration under section 12A as he was of the opinion that the assessee could no longer be said to be carrying on charitable activities in view of the amended definition to section 2(15) of the Act. The Tribunal held that the receipts received were from the carrying on activity in the nature of trade, commerce or business or from the activity of rendering any service in relation to commerce or business. The Tribunal also held that the proviso to section 2(15) will also apply to a regulatory body or a body incorporated by Government as the section does not provide any exception under the proviso and accordingly the CIT had rightly cancelled the

registration granted under section 12A of the Act. (A.Y.2009-10) **Entertainment Society of Goa v. CIT (2013) 23 ITR 549 (Mum.)(Trib.)**

7. *S.2(15): Charitable purpose–Imparting of educational activities are charitable in nature–Entitled to registration. [S. 12A]*

The assessee-society was formed with the main object of imparting education. It had made an application for registration under section 12A of the Act. The CIT rejected the application of the assessee-society for registration under section 12AA of the Act. On appeal by the assessee to the Hon'ble Income Tax Appellate Tribunal, Delhi held allowing the appeal: Proviso to section 2(15) does not apply in the case of educational activities and where the purpose of a trust or institution is to impart education, it constitutes 'charitable purpose' even if it incidentally involves carrying on of commercial activities; assessee-society having been formed with the main object to impart education, it is entitled to registration under section 12A of the Act. **Shri Gian Ganga Vocational & Educational Society v. CIT (2013) 154 TTJ 74 / 85 DTR 66 / 143 ITD 297 (Delhi)(Trib.)**

8. *S.2(22)(e): Dividend–Deemed dividend- Loans or advances–Goods sold to sister concern provision of section 2(22)(e) cannot be made applicable.*

During the assessment proceedings, the Assessing Officer found that assessee had given certain amount as advance to its sister concern. The assessee's explanation was that said amount was not a loan or advance rather it represented value of goods sold to sister concern which the Assessing Officer rejected and made addition u/s.2(22)(e).The Commissioner (Appeals) as well as Tribunal finding that assessee had infact sold goods to its sister concern, set aside addition made by the Assessing Officer. Court held that since the amount in question involved business transaction and it could not be categorised as loan or advance, question of application of s. 2(22)(e) did not arise.(AY 2006-07) **CIT v. Shripad Concrete (P.) Ltd. (2013) 215 Taxman 143 (Mag.) (Guj.)(HC)**

9. *S.2(24): Income-Tax reimbursement.*

The assessee company was engaged in the generation and distribution of power. It supplied power to GEB & ESC, under an agreement that tax payable by assessee company was to be reimbursed by both companies. The Assessing Officer held that such

reimbursement would be added to assessee total income. The CIT(A) upheld Assessing Officer's order. The Tribunal held that such guise of payment of tax was actually the part of tariff charges receivable to the assessee and hence without any deduction, the same is liable for taxation. **Essar Power Ltd. v. Addl. CIT (2013) 142 ITD 251 (Mum.)(Trib.)**

10. S.2(24): Income–Carbon credit-Capital or revenue-Income earned on sale of carbon credits is capital receipt and not revenue receipt liable to tax. [S.28(i), 45, 56]

The assessee company was generating power through biomass power generation unit. During the year, it had received CERs (Carbon Emission Reduction certificates) and sold CERs to a foreign company. The Assessing Officer held that the sale of CERs was a revenue receipt since they are a tradable and even quoted in stock exchange. The CIT(A) upheld the addition. The Tribunal deleted the addition by holding that carbon credit was in the nature of "an entitlement" received *inter alia* to improve world atmosphere heat and gas emissions. The entitlement is to be regarded as a capital receipt and cannot be taxed as a revenue receipt as it is not generated or created due to carrying on business but it is accrued due to "world concern" and "environment". The amount received for carbon credits does not have any element of profit and hence not liable for tax in terms of sections 2(24), 28, 45 and 56. (A.Y. 2007-08) **My Home Power Ltd. v. Dy. CIT (2013) 21 ITR 186/81 DTR 173 (Hyd.)(Trib.)**

11. S.2(24)(ix): Income–Lottery–Car won as a prize in incentive scheme under NSS.

The car won by the assessee on draw of lots under the incentive scheme of the National Savings Scheme was not a lottery and was not liable to tax. **CIT v. S. P. Suguna Seelan (Dr.) (2013) 353 ITR 391 (Mad.)(HC)**

12. S.2(47): Transfer-Capital gains-General power of attorney-Circular of Registrar not to register conveyance of immoveable property based on General Power of attorney was set aside. [S.45]

The petitioner company entered in to a collaboration agreement with owner of immoveable property ,who executed a General Power of Attorney (GPA) in favour of assessee. The GPA was duly registered and stamped .The Divisional Commissioner ,Government of NCT of Delhi issued a circular directing all Regsitrars and sub-Registrar

not to register any conveyance vis-a-vis an immoveable property which is based on GPA. The petitioner challenged the said circular which is contrary to the observation of Supreme Court Judgment in Suraj Lamp & Industries (P) Ltd v. State of Haryana (2012) 340 ITR 1(SC).Allowing the petition the Court held that, circular directing Registrars not to register conveyance of immovable property based on a General Power of Attorney was contrary to the observation of the Supreme Court and was liable to be set aside. Such conveyance of immovable property by a GPA constituted transfer of capital asset as per s. 2(47). **Pace Developers & Promoters (P.) Ltd. v. Government of NCT (2013) 215 Taxman 554 (Delhi)(HC)**

13. S.2(47): Transfer–Capital gains-Accrual [S. 45, 292B]

Assessee having entered into development agreement with developer in respect of his vacant land on 14th April, 2002 with stipulation that developer after obtaining necessary approvals shall commence construction within 30 days and also executed a registered general power of attorney in favour of developer on the same date, 'transfer' took place on 14th April, 2002, hence capital gains became chargeable in Assessment Year 2003-04 notwithstanding the fact that there was a clause in the agreement that possession of vacant land will be handed over on the date the developer will hand over possession of assessee's portion of constructed area to the assessee which event happened after 21st April, 2004. (A.Y. 2003-04) **G. Sreenivasan v. Dy. CIT (2013) 86 DTR 34 (Cochin)(Trib.)**

14. S.2(47): Transfer–Capital gains is assessable in the year of handing over of possession and not on the date of registration. [S. 45, 50C]

Assessee having handed over the possession of the land to the purchaser on the date of execution of sale deed itself i.e., 09th July, 2001, the Capital Gains was assessable in A.Y. 2002-03 and not in A.Y. 2004-05 notwithstanding the fact that the said deed was registered on 30th July, 2003. **Sandhyaben A. Purohit (Smt.) vs. ITO (2013) 87 DTR 42 (Ahd.)(Trib.)**

15. S.4: Charge of income-tax-Accrual of Interest–Mere characterisation of an account as NPA would not by itself be sufficient to say that there was uncertainty as regards realizability of interest income thereon

Assessee was a Non-Banking Financial Company. The Assessing Officer added accrued interest on NPA to assessee's taxable income. Tribunal allowed assessee's appeal holding that accrued interest on NPA was not assessable to income tax. On appeal High Court held that, mere characterisation of an account as NPA would not by itself be sufficient to say that there was uncertainty as regards realizability of interest income thereon. Accordingly, the High Court set aside the matter to the Tribunal as there was nothing on record by Tribunal to indicate that 'interest income' was non-recoverable. (A.Ys. 1999-2000 & 2000-01) **CIT v. Sakthi Finance Ltd. (2013) 258 CTR 433 (Mad.)(HC)**

16. S.4: Charge of income-tax- Subsidy – Where object of entertainment duty subsidy was to promote construction of multiplex theatre complexes, receipt of subsidy would be on capital account.

Purposes for which subsidy is given is relevant factor and if object of subsidy is to enable assessee to set up a new unit then receipt of subsidy will be on capital account. Thus, where object of entertainment duty subsidy was to promote construction of multiplex theatre complexes, receipt of subsidy would be on capital account. **CIT v. Chaphalkar Brothers (2013) 351 ITR 309/215 Taxman 145(Mag.) (Bom.)(HC)**

17. S.4: Charge of income-tax – Compensation on land acquisition – Hindu Undivided Family-Amount belong to family members cannot be taxed in the hands of individual.

A land belonging to the assessee was acquired by the State Electricity Board for which compensation was paid. The acquisition notification was issued in the name of the assessee. The consideration was invested in fixed deposits in name of assessee, his wife and children on various dates. The Assessing Officer taxed the amount of consideration in the individual capacity. The Commissioner (Appeals) and the Tribunal, however, held that said amount belonged to joint family and its members. Held that the question as to whether compensation amount exclusively belonged to assessee or it belonged to joint family and its members, was purely a question of fact and no substantial question of law

arose there from. **ACIT v. Sureschandra Mahagoankar (2013) 215 Taxman 143 (Mag.) (Karn.)(HC)**

18. S.4: Charge of income-tax–Hindu Undivided Family–Joint property-Consideration received was held to be taxable as joint property and not in individual capacity.

'L' got a property on taking his share in joint family properties. The assessee, L's adopted son, distributed the property in favour of his wife and children. The consideration received from developer in respect of said property was treated as joint family property income by assessee. However, the Assessing Officer treated it as the individual income of assessee and his wife. Held since the property was not self acquired by assessee, it belonged to the HUF and since it was given without a registered document, which is permissible only if it was HUF property, the consideration received from developer was taxable as joint family property income. (A.Ys. 1995-96 to 1998-99) **CIT v. D.L. Nandagopala Reddy (Indl) (2013) 215 Taxman 636 (Karn.) (HC)**

19. S.4: Charge of income-tax–AIR information–Income offered to and taxed in the hands of the HUF cannot be once again taxed in the hands of the individual.

On the basis of the AIR information, the Assessing Officer noted that the assessee has made investment in FDR, mutual fund and has entered into an agreement for sale of a *property for which he had received an advance, which was invested in mutual* funds. It was submitted before the Assessing Officer that the assessee has disclosed the income in the hands of the HUF as the same belongs to HUF. The Assessing Officer did not accept the contention of the assessee and treated the capital gain as well as interest in the hands of the individual. The CIT(A) upheld the findings of the Assessing Officer. On appeal by the assessee the Tribunal allowing the appeal held: Since the income shown by the HUF has been accepted by the department, the same cannot be assessed in the individual capacity. (A.Y. 2008-09) **Jyotindra Natwarlal Naik v. ITO (2013) 21 ITR 252/57 SOT 114 (Mum.)(Trib.)**

20. S.4: Charge of income-tax-Mesne profits-Mesne profits received for unauthorized occupation of the premises constitute capital receipts.

During the year the assessee received mesne profits for unauthorized occupation of the premises from central Bank of India who was in possession of rented premises belonging to the assessee. The assessee regarded the said receipt as capital in nature. Assessing Officer relying on in the case of P. Marippa Gounder (1984) 147 ITR 676 (Mad.)(HC), assessed the receipts as to be chargeable to tax On appeal the Commissioner (Appeals) held that held that the case before the Madras High Court was year of taxability. Tribunal relying on the ratio of the decision in Special Bench in the case of Narang Overseas P. Ltd. v. ACIT (2008) 111 ITD 1, appeal against this was dismissed by Bombay High Court vide order dt.25-06-2009 (ITA No. 1791 of 2008), the Commissioner (Appeals) allowed the appeal of assessee. On appeal by revenue the Tribunal confirmed the order of Commissioner (Appeals) (A.Y.2008-09) (ITA No.8185/Mum/2011 dt.19-06-2011 Bench G) **ACIT v. Good will Theaters Pvt. Ltd. (2013) BCAJ–August–P. 34 (Mum.)(Trib.)**

21. S.4: Charge of income-tax-Non-resident-Banking company. [S.5]

The assessee a non-resident banking company did not offer the interest received by it from its Head Office and other fore ign branches to tax on the ground that these were receipts from self. The Assessing Officer and the CIT(A) taxed the same as income. On appeal the Tribunal following the decision of the Special Bench in the case of Oman International Bank S.A.O.G. v. ACIT reported in (2012) 136 ITD 66 held that interest received by assessee from its head office and overseas branches was not taxable. (A.Ys. 1999-2000, 2000-01) **Dy. DIT v. Dresdner Bank AG (2013) 22 ITR 500 (Mum.)(Trib.)**

22. S.4: Charge of income-tax–Income–Mutuality–Income of tenants' association looking after members' common interest–Exempt on the ground of mutuality. [S. 28(iii)]

The assessee institution was formed to work for the common interests of its members. The assessee claimed exemption from the tax on the ground of mutuality. The Assessing Officer denied the same for the reason that the assessee has not been able to demonstrate that it is working only for its members and the members have deducted tax at source while making payment to the assessee, therefore, the provisions of section 28(iii) is applicable to the assessee. The CIT(A) confirmed the view of the Assessing

Officer. The Tribunal decided the issue in favour of assessee following the ratio of CIT v. Bankipur Club Ltd. (1997) 226 ITR 97 (SC) and held that income of tenants' association looking after members' common interest is exempt from tax on the ground of mutuality. (A.Y. 2006-07) **Belvedere Estates Tenants Association v. ITO (2013) 86 DTR 129/154 TTJ 764 (Kol.)(Trib.)**

23. S.5(2): Income–Accrual–Interest on foreign currency convertible bonds paid to non-resident investors [S. 9(1)(v), 196C]

The assessee paid interest to non-resident investors on FCCB. The Assessing Officer held that the interest income has accrued or arisen in India on the basis that the payer is on Indian company and the Assessing Officer has totally ignored this aspect of the matter as to where the money lending transaction has taken place. It is admitted factual position that money lending transaction has taken place outside India and the same was utilized for the overseas business of the assessee. The Tribunal held that interest payment by the assessee to non-resident investors cannot be said to have accrued or arisen in India and it also cannot be said that this interest income can be deemed to have accrued or arisen in India. Therefore, no TDS is to be deducted by the assessee from this payment. The Tribunal confirmed the order of CIT(A) and decided the issue in favour of assessee. The assessee had filed cross objection which was dismissed by the Tribunal as no TDS was deductible from interest paid to non-resident bond holders. (A.Y. 2009-10) **Addl. DIT (IT) v. Adani Enterprises Ltd. (2013) 153 TTJ 476/85 DTR 33(Ahd.)(Trib.)**

24. S.9(1)(i): Income deemed to accrue or arise in India-Business connection–liaison office-Profit attributable to the liaison period was deleted.

The taxpayer had set up a liaison office in India with the permission of the Reserve Bank of India. Role of liaison office was limited to co-ordinate market survey; support services to new clients; etc. At later date, the tax payer set up a Branch office and closed its Liaison office. The Assessing authority held that tax payer was involved in business activity and was liable in respect of profits earned by head office as also USCO. The Tribunal held that there was a clear distinction between the liaison activities and the branch activity and the tax payer was not involved in business activity when they were only permitted to do liaison activity by the Reserve Bank of India and accordingly the

profit attributable to the liaison period was deleted (A.Y. 1999-2000, 2000-01 dt.05-06-2013) **St. Jude Medical (Hong Kong) Limited (2013) BCAJ-August –P. 35 (Mum.)(Trib.)**

25. S.9(1)(i): Income deemed to accrue or arise in India-Permanent Establishment – DTAA – India-UK [Art. 5]

The Tribunal held that liaison offices and project offices form part of one single entity and need not be subject to different tax audits & returns as no benefit was accruing separately to the head office through the liaison office. (A.Y. 2005-06 & 2007-08) **ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)**

26. S.9(1)(i): Income deemed to accrue or arise in India-Systematic research service falls under technical services-Payment of FTS in cases where no PE in India, Tax to be deducted at source-DTAA-India-Italy [Art. 13]

The assessee company paid its overseas agent to provide systematic research service without deducting tax at source. The Assessing Officer disallowed the same under 40(a)(ia). Assessee' contention payee did not have PE & services rendered outside India & systematic research not technical service. The CIT(A) deleted the addition. The Tribunal restoring the Assessing Officer's order held that systematic research service falls under the technical service and as per provisions of section 9(1)(vii) it is not necessary for non-resident to have residence or place of business or business connection in India for taxing fees for technical services in India. (A.Y. 2009-10) **ACIT v. Evolv Clothing Co. (P). Ltd. (2013) 142 ITD 618 (Chennai)(Trib.)**

27. S.9(1)(i): Income deemed to accrue or arise in India – DTAA-India-USA–Australia-Italy-Permanent establishment-"Force of attraction rule" [Art. 5 & 7]

The Assessee entered into a distribution & representation agreement with the 5 Group Companies of its parent company. The assessee carried out two types of sales a) Indirect Sales of analytical lab instruments, & b) direct sales of spares for the same. The A.O. held that the assessee was a dependent company & by virtue of "Force of Attraction Rule" under Art 7(1) of the respective DTAA, the profits of the UGC's was taxable in India. The CIT(A) upheld the order of the A.O. On appeal, the Tribunal, held, in favour of the assessee: Under Article 5(4), an agent is deemed to be PE if (a) he independently

concludes contracts, (b) Maintains Stocks, (c) Secures order; and none being fulfilled by the assessee and similarly also under para 38 of the OECD an agent is dependent if (a) Has authority to conclude contracts, & (b) Is ready to bear entrepreneurial risk; and the above conditions are also not being fulfilled by the assessee. The Tribunal held that the assessee held only obligations of pre sale and post sale, none regarding the actual sale. Since the assessee is not a dependent agent & thus not a PE, hence "Force of attraction rule" will not apply. (A.Y. 2002-03 to 2006-07).**Varian India (P.) Ltd. v. ADIT (2013) 142 ITD 692 (Mum.)(Trib.)**

28. S.9(1)(i): Income deemed to accrue or arise in India-Business connection-Without proper examination of facts and giving chance of cross examination–Determination of profit attributable to PE in India- Not justified. [Art. 5]

Assessing Officer determined profit attributable to PE in India @ 90% of business profits as entire income earned by assessee. Singapore Company was from operations in India. Assessee claimed that Indian company was appropriately remunerated at arms' length by rebates and incentives directly from vendors. Assessee alleged that it was not allowed to cross examine individuals who records statements against it. Tribunal restored the matter back to the Assessing Officer for fresh examination and directed the Assessing Officer to give an opportunity assessee for cross examining persons whose statements are used against the assessee. The statements have been recorded from the Indian personnel and management have been examined with reference to the Indian company. The Assessing Officer was directed to allow the assessee to cross examine the individuals whose statements were recorded & were relied upon by the Revenue so that the assessee can contest / justify / accept the statements. (A.Y. 2008-09) **Ingram Micro (India) Experts (P) Ltd. v. Dy. CIT (2013) 56 SOT 273 (Mum.)(Trib.)**

29. S.9(1)(vi): Income deemed to accrue or arise in India-Royalty-Value of software sold in equipment not to be treated as Royalty-DTAA–India-Germany. [Art. 13]

The Assessee was engaged in the business of sale of equipment. The Assessing Officer held that the value of embedded software in the equipment supplied was to be treated as Royalty. The CIT(A) held that it can't be treated as Royalty. The Tribunal dismissing the appeal upheld the order of CIT(A) that amount received by assessee towards supply of software could not be segregated from supply of equipment and hence it cannot be

considered as Royalty. **ADIT v. Siemens Aktiengesellschaft (2013) 142 ITD 614 (Mum.)(Trib.)**

30. S.9(1)(vi): Income deemed to accrue or arise in India–Royalty–payment made for buying space for advertisement on website is in the nature of business profit and not royalty [S.40(a)(i), 195]

Amount paid by the assessee to foreign company for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profits and not royalty on which no tax was deductible at source since the same was not chargeable to tax in India in the absence of any PE of such foreign company in India and therefore disallowance under section 40(a)(i) was not sustainable. (A.Y.2006-07) **Pinstorm Technologies (P.) Ltd. v. ITO (2013) 86 DTR 162 (Mum.)(Trib.)**

31. S.9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services-DTAA-India-Thailand - Royalty and fees for technical services cannot be taxed under residual Article 22 of India-Thailand DTAA, unless item of income does not fall under any other express provisions of DTAA. [Art.22]

The assessee, a non-resident company of Thailand, entered into technical assistance know-how agreement and India Company for transfer of technology know-how. The assessee received technical know-how fees for five years, which was treated as not taxable as per Article 12 of DTAA between India and Thailand. The Assessing Officer took a view that what was transferred was sharing of knowledge and not know-how, and therefore, consideration received was not covered by definition of royalty under Article 12 of DTAA. Therefore, he held that consideration could be taxed only or in the contracting State where the income arose under the residual clause that is Article 22 of DTAA. On appeal High Court held that residual clause of Article 22 of DTAA had no relevance as far as royalty and fees for technical services were contemplated as it would come into play only when item of income did not fall for consideration under any express provisions of DTAA. (A.Ys. 1991-92 to 1995-96) **Bangkok Glass Industry Co. Ltd. v. ACIT (2013) 82 DTR 326/215 Taxman 116(Mag.) (Mad.)(HC)**

32. S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services-Deduction at source-Non-resident–Meaning of source of income. [S.40(a)(ia), 195]

Assessee manufactured products in India. Payments were made to US company for obtaining certification facilitating exports. Testings were carried outside India. Payments were also made outside India. Held that source of income within India and therefore, section 9(1)(vii) became applicable. Since question of liability under DTAA was not considered, matter was remanded back to the Tribunal. (A.Y. 2005-06) **CIT v. Havells India Ltd. (2013) 352 ITR 376 (Delhi)(HC)**

33. S.9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services-Sub-arranger fee paid to non-resident does not amount to fees for technical services. Doing small parts of overall activity cannot be regarded as rendering managerial services. [s.195]

The assessee was appointed as arranger by an Indian Bank for mobilising deposits from NRI customers and collecting bank for receiving and handling application forms under "India Millennium Deposit" scheme. The assessee in turn appointed sub-arrangers for mobilizing IMDS both in and outside India .The sub-arrangers work was in the nature of soliciting NRI customers for IMD of Indian banks and then to remit the amount received by them to the designated banks. Tax authorities disallowed the payments of sub-arranger fees on the grounds that such payments to non-residents were in the nature of FTS on which tax was required to be with held under the Act. On appeal the Tribunal held that from the nature and scope of services rendered by the sub-arrangers , it was clear that no technical knowledge, expertise or qualification was required .Convincing potential customers and helping them to fill requisite forms and coordinating transfer of funds, cannot be considered as a " technical services". The services rendered by the sub-arranger were only a small part of the management of the IMD issue. Sub-arrangers were not involved in the "management" of MID issue .The assessee was simply acting as commission agent or broker for which it was entitled to a particular rate of commission. Sub-arranger obligation was a part of overall obligation of IMDs and hence services cannot be regarded as fees for managerial services.(A.Y.2001-02) dt.22-05-2013) **Credit Lynonnais (Through their successor: Calyon Bank) v. ADIT (2013) BCAJ –August –P. 36 (Mum.)(Trib.)**

34. S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services-Works contract for operation and maintenance of power plant-DTAA–India-UK [S.44AD,Art. 13]

The Tribunal held that no technical service ensued and that assessee could not be taxed on gross basis & section 44AD has no application & Article 13(4)(c) read with Article 26 of DTAA does not permit to discriminate vis-à-vis domestic company. (A.Ys. 2005-06, 2007-08, & 2008-09) **ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)**

35. S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services–Fees paid to non-resident divers [S. 40(a)(i), 195]

The assessee was in the business of providing underwater diving services in Saudi Arabia under a contract and paid fees to non-resident divers outside India. The Assessing Officer held that the services rendered by the divers were technical services falling under section 9(1)(vii) of the Act and therefore, was liable for deduction of tax at source which the assessee had not deducted and therefore, the provisions of section 40(a)(i) were applicable. The CIT(A) upheld the disallowance made by the Assessing Officer. On appeal by the assessee, the Tribunal allowing the appeal held that the services of non-residents to whom the technical fee was paid by the assessee were utilized for the business which was carried on outside India for earning income from a source outside India and therefore section 195 does not apply hence the amount cannot be disallowed under section 40(a)(i). (A.Y. 2008-09) **Aqua Omega Services P. Ltd v. ACIT (2013) 23 ITR 191 (Chennai)(Trib.)**

36. S.10(10): Exempt income–Gratuity-Applicability of benefit of gratuity & Leave encashment–Governed By definition. [S.10AA]

During assessment proceedings, the Assessing Officer included basic pay plus Dearness Allowance and applied the formula as applicable to the gratuity and leave encashment for the purpose of working out the eligible amount of gratuity and leave encashment. The CIT(A) confirmed the order of the Assessing Officer. On appeal the Tribunal dismissed the appeal of assessee and held that the computation of the benefit of gratuity & Leave Cash encashment as contemplated under section 10(10) & 10(AA) are to be governed by the definition of "salary" contained in the Explanation of section 10(AA) vis-a-vis clause (h) of Rule 2 of Part of 4th Schedule not by any agreement, as

contained in 8th Bipartite Settlement on wage revision & other similar conditions between Indian Banks Association & their workmen. The Tribunal further held that the definition of salary is specifically covered by definition of section 10 & section 10(AA) of the IT Act. (A.Y. 2008-09) **Gurmit Singh v. ITO (2013) 56 SOT 91 (Chd.)(Trib.)**

37. S.10(23C): Exempt income-Educational institution-Test of profit motive.

Educational Institution–Trust / Institution established with its clear objection for educational purposes and education alone. Test of clauses (iiiab) (iiad) or (vi) of Section 10(23C) are fulfilled. If in a particular year, a surplus has resulted will not render such as institution existing prima facie for profit motive only. The exemption cannot, therefore, be denied.**Tolani Education Society v. Dy. DIT (2013) 259 CTR 26 (Bom.)(HC)**

38. S.10A: Free trade zone–Manufacture-Blending and packing of Tea.

Blending and packing of Tea amounts to manufacture and assessee eligible for deduction u/s. 10A. (A.Y.'s 2004-05 to 2006-07) **AL Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 (Cochin)(Trib.)**

39. S.10A: Free trade zone-Newly established undertakings–Amounts disallowed treated as "business income" eligible for exemption. [S.43B]

The assessee claimed a deduction for payments made after due date to employees' provident fund. Alternatively, it claimed that even if the amount was disallowed, the sum has to be treated as a part of its business income which is eligible for exemption under section 10A of the Act. The Assessing Officer held that the employees' contribution of provident fund was paid after the due date and hence treated it as deemed income of the assessee. The stand of the Assessing Officer was confirmed by the CIT(A). The Tribunal allowing the appeal of the assessee held that the addition could not be made under section 43B of the Act if the actual payment was made by the assessee before the due date of filing of return. Further, the Tribunal following the decision of the Bombay High Court in the case of CIT v. Gem Plus Jewellery India P. Ltd. (2011) 330 ITR 175, also held that if the amount was disallowed the sum was to be treated as part of the business income of the assessee eligible for exemption under

section 10A of the Act (A.Y. 2006-07) **ITO v. Patni Telecom Solutions P. Ltd. (2013) 23 ITR 534 (Hyd.)(Trib.)**

40. S.10B: Hundred per cent export-Oriented undertakings–Foreign currency-Export turnover-Total turnover.

In the present case, the expenditure incurred in foreign currency which were excluded from export turnover should also be excluded from total turnover was the question to be decided for claiming the benefit under section 10B of the Act. (A.Y. 2005-06) **ACIT v. Charon Tec (P) Limited (2013) 56 SOT 65 (UO)(Chennai)(Trib.)**

41. S.10B: Hundred per cent export – Oriented undertakings – Initial year.

Once the deduction was allowed in the 'initial year' viz. the first year of claim of the deduction, the same could not be disturbed in the subsequent years. Eligibility has to be tested in the first year. **Tyco Valves & Control India (P) Ltd. v. Dy.CIT (2013) 81 DTR 48 (Ahd.)(Trib.)**.

42. S.11: Property held for charitable purposes-Intention of donor. [S.80G]

The voluntary contribution made to a trust is without any specific direction to treat the same as corpus, if the intention of the donor is to give the money to a trust and they will keep the same in trust account and the income from the same thing will be utilized for carrying trust activities, then the donation should be treated as corpus and the same should be entitled for the benefit under section 11(1)(d). **DIT (Exem) v. Ramakrishna Seva Ashrama (2013) 258 CTR 201 (Karn.)(HC)**

43. S.11: Property held for charitable purposes-Business held in trust.

Assessing Officer arrived at the finding that the primary object of the trust was charitable in nature and the property gifted was impressed with the character of trust property. Assessing Officer was not justified in holding that there was no evidence to hold that the business of manufacture and sale of paper caps carried on by the trust was in the course of the actual carrying on of the primary objects. Tribunal was just in

allowing exemption under section 11. (A.Y. 1991-92) **CIT v. Janakiammal Ayyanadar Charitable Trust (2013) 87 DTR 134 (Mad.)(HC)**

44. S.11: Property held for charitable purposes – Investment in immoveable property- Rent was used for the charitable purpose, registration cannot be refused. [S. 12A]

The assessee was entitled u/s 11(5)(x) to invest its surplus funds in immovable property and in absence of any evidence on part of department that assessee had applied rent received from commercial property for non-charitable purpose, registration u/s 12A could not have been cancelled.(A.Y. 2005-06) **DIT(Exemption) v. Abul Kalam Azad Islamic Awakening (2013) 215 Taxman 148 (Mag.)(Delhi)(HC)**

45. S.11: Property held for charitable purposes -Exemption- Can be denied- In absence of production of details of expenditure. [S.12AA]

Assessee trust being registered under section 12AA claimed exemption under section 11 of the Act. The Assessing Officer asked for details of various expenditure whereas assessee failed to submit the same. The Assessing Officer denied exemption under section 11 of the Act and taxed the amount as Income from business as the trust failed to achieve other activities required for exemption under section 11 of the Act. CIT(A) allowed the appeal of the assessee. Tribunal allowed the appeal of the Revenue and held that when the registration is granted, it does not debar the Assessing Officer from examining the details of various activities / work undertaken by the trust to achieve the object of the assessee trust. Secondly the Tribunal also held that the assessee trust has not proved its case for seeking exemption under section 11 by producing various details of expenditure incurred by the assessee Trusts on various activities undertaken to achieve its objects before the Tribunal not even before the Tribunal inspite of asking to the counsel for the assessee trust. (A.Ys. 2006-07, 2007-08) **ACIT v. Amritsar Improvement Trust (2013) 153 TTJ 364/56 SOT 106 /85 DTR 99 (Asr.)(Trib.)**

46. S.11: Property held for charitable purposes–Payment made to office bearers out of the corpus fund cannot be the basis to deny exemption under section 11 of the Act. [S. 13(1)(c)]

The Assessing Officer denied the claim of exemption under section 11 of the Act on the ground that certain payment have been made to the founder members out of the

corpus funds and hence, the same constitutes clear violation on the part of the assessee and hence, the consequences of provisions of section 13(1)(c) of the Act are attracted. The CIT(A) upheld the action of the Assessing Officer. The Tribunal allowed the appeal on the ground that assessee society cannot be denied exemption under section 11 where persons of prohibited category render services to the society and in turn, get some remuneration. The Tribunal remanded the matter to the file of Assessing Officer with the direction to examine the situation which warranted the assessee to make payments to such members and decide the issue in accordance of law. (A.Ys. 2003-04 & 2004-05) **Hyndavi Educational Society v. ADIT (Exempt) (2013) 86 DTR 196 (Hyd.)(Trib.)**

47. S.12A: Registration–Withdrawal of exemption –Registration granted cannot be withdrawn merely because exemption under section 10(23C)(vi) has been denied. [S. 10(23C)]

Proceeding u/s 10(23C)(vi),wherein exemption was denied on the ground that the assessee trust was not formed solely for educational purposes, was an independent proceeding and could not be sole ground for cancelling registration granted u/s 12A.(AY 2004-05 and 2006-07) **CIT v. Society of Advanced Management Studies (2013) 215 Taxman 146(Mag.)/260 CTR 199 (All)(HC)**

48. S.12A: Trust or institution-Registration-Delay of 1660 days-Wrong advice.

There was delay of 1660 days in filing the appeal before the Tribunal. The Tribunal found reasonable cause and condoned the delay on the basis that the assessee was wrongly advised and also the persons who were managing the institution were ignorant of law. It further held that: The Registration has to be deemed to have been granted to the assessee-institution from the date of its inception as claimed and not from a later date where the CIT has passed the order under section 12A(a) beyond six months from the date of receipt of application in Form No. 10A. **Nosegay Public School, Managing Committee v. CIT (2013) 153 TTJ 1 (UO)/58 SOT 185(Jodhpur)(Trib.)**

49. S.12A: Trust or institution-Registration-Commercial activity.

Tribunal held that in view of commercial activities with profit motive, the registration granted could be cancelled but cancellation of registration shall not date back to the date of signing of the agreement one shall be effective from 1st June 2010, in view of

introduction of sub-section (3) of section 12AA w.e.f. 1-6-10. **Mumbai Cricket Association v. DIT (Exempt) (2013) 153 TTJ 166/84 DTR 162 (Mum.)(Trib.)**

50. S.12A: Registration-Trust or institution-Objects of trust. [S. 2(15), 12AA]

The Tribunal found that the learned CIT(A) has not raised any objection against the objects of the assessee-society. The main object of the assessee society is education which, undeniably, is of charitable nature, in line with the provisions of section 2(15) of the Act. The CIT(A) has no jurisdiction and competence to examine an issue under the RTE Act obviously lies with authorities mentioned therein. CBDT circular No. 11 of 2008 dated 19th Dec., 2008 (2009) 221 CTR (St) 1 clearly states, inter alia, that the proviso to section 2(15) does not apply in the case of education, it will constitute 'charitable purpose' even if it incidentally involves carrying on of commercial activities. The Tribunal directed the CIT to grant registration to the society on verifying the original documents of establishment of the assessee trust. **Shri Gian Ganga Vocational & Educational Society v. CIT (2013) 154 TTJ 74/85 DTR 66 (Delhi)(Trib.)**

51. S.12AA: Procedure for registration-Trust or institution–Scope of Enquiry – CIT not entitled to examine compliance of conditions of section 11– section 13–Mere earning of surplus income does not render charitable activity non-genuine [S.2(15), 12A]

The assessee was a society engaged in carrying on activities in relation to healthcare and education. The CIT did not allow registration under section 12A of the Income Tax Act, 1961 as the assessee allegedly had earned surplus income in violation of amended definition of charitable purposes in section 2(15), and had not complied with certain conditions in section 11 and section 13. On appeal, held, allowing the appeal: It is incumbent upon the CIT, while considering granting of registration under section 12AAof the Act that he should satisfy himself only about genuineness of activities of the trust, in accordance with its objects and not about credential, capacity and qualification etc. of trust. The satisfaction of statutory conditions of Sections 11, 12 and 13 of the Act, for the purpose of grant of registration under section 12A and 12AA, are not relevant. CIT erred in heavily relying on the issue of corpus fund and secured loans raised by the appellant society, in concluding the activities of the appellant as non-genuine. The same considerations were not relevant at the stage of registration under section 12AA. **PIMS Medical and Education Charitable Society v. CIT (2013) 56 SOT 522 (Chd.)(Trib.)**

52. S.13: Denial of exemption – Trust or Institution-Investment restrictions- Inflated cost of construction of building

The assessee had constructed a building, for which the Assessing Officer referred to DVO to estimate the cost of construction. The Assessing Officer considered difference in amount claimed and estimated to have been siphoned out & thereby violating section 13(1)(c). The Assessing Officer withdrew exemptions under section 11 & 12. The CIT(A) upheld the order of the Assessing Officer. The Tribunal allowing the appeal of the assessee held:The revenue could not bring on record any cogent evidence indicating that amount in construction had been availed by the managing trustee for his personal benefit. The Tribunal held that as there was no violation of Section 13, the Assessing Officer's order was to be set aside. (A.Y. 2006-07 to 2008-09). **Shri Amol Chand Varshney Sewa Sansthan v. Addl. CIT (2013) 142 ITD 658/25 ITR 211 (Agra)(Trib.)**

53. S.14A: Disallowance of expenditure–Exempt income- Bifurcation of expenses–Proportionate disallowance is permissible. [Income-tax Rules,1962, Rule 8D]

Assessee had exempt income arising out of Mutual Fund investment. Since no bifurcation was made the Assessing Officer disallowed the total expenditure under section 14A.Tribunal held that in the absence of rule 8D, no disallowance can be made. On appeal the Court held that as the amount involved was not very large, issue was not considered on merits, however it could not be said that in absence of rule 8D, no disallowance can be made u/s.14A by proportionate bifurcation of expenditure for taxable income and exempt income. **CIT v. Sintex Industries Ltd.(2013) 215 Taxman 148(Mag.) (Guj.)(HC)**

54. S.14A: Disallowance of expenditure-Exempt income-Short term gain-Rule 8D does not apply to short-term investments gains from which is taxable. [Rule 8D]

Some of the investments made by the assessee are short term. Since assessee is paying capital gains tax on short term investments, Rule 8D will not apply on them and the AO is directed to recompute disallowance u/s 14A read with Rule 8D after excluding short term investments ITA No. 1774/Mds/2012, dt.19 July, 2013) (A.Y.2008-09) **Sundaram Asset Management Co. Ltd v. DCIT (Chennai)(Trib.)**

55. S.14A: Disallowance of expenditure-Exempt income-Interest-Interest on loans for specific taxable purposes to be excluded. [Rule 8D]

In AY 2009-10, the assessee contended that in computing the disallowance to be made u/s 14A and Rule 8D(2)(ii), the interest on bank loans and term loans taken for specific taxable purposes had to be excluded. The AO rejected the claim though the CIT(A) accepted it. On appeal by the department to the Tribunal, HELD: Rule 8D(2)(ii) refers to expenditure by way of interest which is not directly attributable to any particular income or receipt. If loans have been sanctioned for specific projects/expansion and have been utilized towards the same, then obviously they could not have been utilized for making any investments having tax-free incomes and have to be excluded from the calculation to determine the disallowance under Rule 8D(2)(ii) (**Champion Commercial Co. Ltd** (ITAT Kol.) followed)(ITA No. 1603/Mds./2012, dt. 16/07/2013) (A.Y.2009-10) **ACIT v. Best & Crompton Engineering Ltd (Chennai)(Trib.).**

56. S.14A: Disallowance of expenditure-Exempt income-Shares held as stock-in-trade-In arriving at the disallowance u/r.8D, the amount as per Rule 8D(2)(ii) qua shares held as stock-in-trade would be restricted to 20% thereof. [Rule 8D]

In AY 2008-08, the assessee, a trader cum investor in shares, offered Rs. 10 lakhs as disallowance u/s 14A. It claimed that the amount invested in shares was funded by its own, non-interest bearing funds and that there was no direct expenditure relatable to the investments. The AO applied Rule 8D and computed the disallowance at Rs. 1.40 crore. On appeal, the CIT(A) upheld the stand of the assessee as to the quantum of the disallowance. On appeal by the department, the Tribunal had to consider (i) whether s.14A applies to shares held as stock-in-trade?, (ii) whether it could be said that the expenditure having been incurred for the share trading business, no expenditure can be said to be in relation to the dividend income?, (iii) whether it can be argued that the investment in tax-free securities is made out of own funds and no disallowance of interest on borrowed funds can be made?, (iv) whether Rule 8D(2)(ii) which deals with interest expenditure not directly attributable to any particular income or receipt requires modification if the dominant purpose is to earn share trading income?, (v) Whether Rule 8D(2)(iii) which prescribes the ratio in respect of indirect expenditure can be modified if the dominant purpose is to earn share trading income? & (vi) whether the allowance for depreciation u/s 32 has to be excluded in computing the disallowance? HELD by the Tribunal:

S. 14A gets attracted on incurring of expenditure in relation to tax-exempt income. The purpose for which the shares are purchased and held would not impact the applicability of s. 14A. S. 14A comes into play irrespective of the head of income (on account of it arising qua a trading asset) under which the income is assessable. The fact that the share trading business yields both taxable income in the form of share trading profit and tax-exempt income by way of dividend income makes no difference to the applicability of s.14A. Accordingly, s.14A applies to shares held as stock-in-trade;

The argument that all expenditure has been incurred for the share trading business and that there is no additional expenditure incurred for earning dividend is not acceptable because though the expenditure is incurred for the purpose of the business of share trading, the said business yields taxable and non-taxable income. It is the integral activity of purchase and holding the shares which generates two separate streams of income. Accordingly, some of the expenditure has to be attributed to the dividend income;

The argument that investment in shares yielding tax-free dividend income has been made out of own funds and so no interest expenditure has been incurred in relation to the dividend income is not acceptable. No presumption of investment of own funds, on ground of its sufficiency, on the basis of CIT v. Reliance Utilities and Power Ltd (2009) 313 ITR 340 (Bom.) can be drawn;

If Rule 8D(2)(ii) which quantifies the interest on the investments, income from which is not taxable, on a proportionate basis, is applied literally, it will lead to absurd results because then the entire interest relatable to the average share holding will be attributed to the tax exempt dividend income even though the shares are bought and held primarily for share trading income. Rule 8D(2)(ii) needs to be scaled down by bifurcating the expenditure so arrived at between the tax-free and the taxable incomes. Given that the dominant objective of the share holding is to earn share trading income, an ad hoc ratio of 20% toward tax-exempt dividend income will be reasonable. Accordingly, in arriving at the disallowance u/r 8D, the amount as per Rule 8D(2)(ii) qua shares held as stock-in-trade would be restricted to 20% thereof;

Rule 8D(2)(iii) which prescribes the ratio of indirect expenditure required to support an investment need not be modified because though the expenditure prescribed for disallowance is based only on one variable, i.e. the average value of investments, the prescribed allocation ratio of 0.5% of the investment value qua indirect expenditure is very nominal and not harsh;

Depreciation – an economic and accounting concept – statutorily recognized and provided, is only a charge on capital account, i.e., a capital expenditure. It has to be excluded in computing the s. 14A disallowance (ITO v. Daga Capital management Pvt Ltd. (2009) 117 ITD 169 (Mum)(SB), Dhanuka & Sons v. CIT (2011) 339 ITR 319 (Cal.) & American Express Bank followed; CCI Ltd (2012)71 DTR (Kar) 141, CIT v. Leena Ramachandran (2011) 339 ITR 296 (Ker) & Yatish Trading not followed; Godrej & Boyce MFG Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom) & CIT v. Walfort Share and Stock Brokers (P) Ltd. (2010) 326 ITR 1 (SC) referred/ followed).(A. Y. 2008-09) **DCIT v. Damani Estates and Finance P.Ltd.(2013) 25 ITR 683(Mum.)(Trib.)**

57. S.14A: Disallowance of expenditure-Exempt income-Interest expenditure has to be netted against interest income and only the difference, if any, can be considered for disallowance. [Rule 8D]

In AY 2008-09, the assessee invested Rs. 95 lakhs in shares on which it earned Rs. 300 as dividend. The AO applied Rule 8D and made a disallowance of Rs. 15 lakhs. The assessee claimed that no expenditure had been incurred to earn the dividend income on the basis that while the interest expense was Rs. 1.83 crore, the interest income was Rs.1.86 crore and there was a net surplus interest income of Rs.3.79 lakh. The CIT(A) held that the AO had not established a nexus between the expenditure incurred and the tax free income and that as the assessee had net positive interest income, there could be no disallowance of the interest expenditure u/s 14A read with Rule 8D. He sustained the disallowance at 0.5% of the average investment. On appeal by the department HELD dismissing the appeal: No nexus has been established by the AO between the expenditure incurred by the assessee and the tax free income earned by him. Further, as the interest income was more than interest expense and the assessee was having net positive interest income, the interest expenditure cannot be considered for disallowance u/s 14A and Rule 8D (**Trade Apartment** (ITAT Kol) & **Morgan Stanley** (ITAT Mum) (*both included in the file*) followed)(ITA No. 2282/Ahd/2012, dt. 30/03/2012 (A.Y.2008-09) **ITO v. Karnavati Petrochmem Pvt. Ltd. (Ahd.)(Trib.)**

58. S.14A: Disallowance of expenditure-Exempt income-Disallowance is warranted even if there is no exempt income.

The Tribunal following the decision of the Special Bench in the case of Cheminvest Ltd. v. ITO (2009) 121 ITD 318 (Delhi)(SB) has held that the disallowance under section 14A is

warranted even if there is no exempt income. (A.Y. 2006-07) **Stream International Services P. Ltd. v. ACIT (2013) 23 ITR 70 (Mum.)(Trib.)**

59. S.14A: Disallowance of expenditure-Exempt income-Borrowed money invested in shares held as stock-in-trade.

Tribunal held that in view of the fact that shares in which the borrowed money was invested are trading shares, disallowance of interest under section 14A cannot be made in relation to stock-in-trade but the authorized representative conceded that in respect of investment in shares, some administrative expenses have been incurred by the assessee. Therefore, the disallowance was restricted to 25% of the dividend income. (A.Y. 2007-08) **Oasis Securities Ltd. v. Dy. CIT (2013) 154 TTJ 17 (UO)(Mum.)(Trib.)**

60. S.17(2): Perquisite-Expatriate employee-Stock options-ESOP to expatriate employee of foreign company not chargeable for period he was outside India even if ESOP was vested and exercised in India.

The assessee, an employee of M/s UTIO, USA, was granted "employee stock options" of 34000 shares on 9.01.2004 when he was outside India. The assessee was deputed to the India liaison office on 01.04.2006 and the stock options vested on 09.01.2007 when he was in India. The assessee exercised the stock options on 01.02.2007, when he was still in India. The AO held that as the assessee was in India on the date of vesting and exercise of the stock options, the entire benefit thereof was assessable as a perquisite in his hands. However, the CIT(A) held that as the employee had been in India for only for a part of the time of the vesting period, only a proportionate stock option benefit, which is attributable to the period spent in India accrued to the employee and was chargeable to tax in India. On appeal by the department to the Tribunal HELD: If a part of the activity done by the assessee-employee has no relation to any India specific job or activity it is not chargeable to tax in India. On facts, the assessee was in India only for a short period i.e. 1.4.2006 onwards. Prior to that, he has not done any service connected with any activity in India. Accordingly, as the assessee has not rendered service in India for the whole grant period, only such proportion of the ESOP perquisite as is relatable to the service rendered by the assessee in India is taxable in India (**Sumit Bhattacharya v. Asst. CIT (2008)** 112 ITD 1 (SB) referred)(ITA No. 3452/Del/2011 dt. 24/05/2013)(A.Y. 2007-08) **ACIT v. Robert Arthur Keltz (Delhi)(Trib.) www.itatonline.org.**

61. *S.24: Income from house property–Deductions–Interest on borrowings– Interest on borrowed capital utilized for purchase of flats to be allowed in equal proportion.*

The assessee claimed deduction on account of interest paid to bank on borrowed capital against the rental income and also produced a certificate from the bank. The Assessing Officer disallowed the interest claim by holding that a similar certificate was produced during the course of assessment proceedings of his spouse and the loan was advanced to him for purchase of two flats. The CIT(A) upheld the disallowance. On appeal, the Tribunal deleted the disallowance by holding that: As the rental income from the individual flats owned by the assessee and her husband were included in their respective hands, deduction of interest paid on borrowed capital utilized for the purchase of the flat was to be allowed in equal proportions in their respective hands.Moreover, the bank certificate mentioned the name of the applicant to be the husband and the name of the co-applicant to be the assessee.The total loan was utilized for the purchase of two flats, which admittedly were owned by the assessee and her husband. (A.Y. 2006-07) **Gurdas Mann v. Dy. CIT (2013) 21 ITR 57 (Chd.)(Trib.)**

62. *S.24: Income from house property – Deductions – Prepayment charges paid for closure of loan are covered under the definition of interest and deductible.*

The assessee claimed deduction on account of repayment charges for the closure of the loan which was taken for acquisition of the property. Assessing Officer and Commissioner (Appeals) confirmed the disallowance .On appeal the Tribunal held that repayment charges have live and direct link with obtaining of loan which was availed for acquisition of property .Both the direct interest and repayment charges are species of the term 'interest' .Hence the prepayment charges paid by assessee for closure of loan qualify for deduction under section 24(b). (A.Y.2006-07) **Windermere Properties (P) Ltd. v. DCIT (2013) 88 DTR 150 (Mum.)(Trib.)**

63. *S.28(i): Business income-Income from other sources–Interest on fixed deposit with the bank. [S. 56]*

Assessee has put the fixed deposits as margin money to obtain bank guarantees in favour of NSE. The CIT(A) enhanced the interest income and treated as income from other sources. The Tribunal held that the interest income had been considered in preceding assessment years as well as subsequent assessment years as business

income. Therefore, such income has rightly been considered by the Assessing Officer as business income. **Oasis Securities Ltd. v. Dy. CIT (2013) 154 TTJ 17(UO) (Mum.)(Trib.)**

64. S.28(va): Business income-Sale of units-Non-compete fee-Non-complete fees received taxable under the head. Profits and gains of business or profession. [S.54EC]

The assessee company was engaged in manufacturing various types of equipments, sold one of its units to a company. It entered into an agreement with the said company for not carrying at any similar business against payment of a sum of Rs.5 crores for a period of 4 years. It treated the said sum as a long term capital gain and claimed exemption under section 54EC of the Act. Assessing Officer held that the non-complete fee was clearly taxable under section 28(va) and treated the said receipt under the head 'Profit and gain from business or profession. The CIT(A) also confirmed the Assessing Officer's order on appeal. The Tribunal held that past amendment, a perusal of amended section 28(va) clearly shows b that any sum received in cash or kind under any agreement for non-carrying out any activity in relation to any business shall be taxed under the head 'Profits and gains of business'. Hence the Tribunal upheld the CIT(A)'s order and held the non-complete fees received taxable under the head. Profits and gains of business or profession under section 28(va) of the Act. (A.Y. 2009-10) **Anurag Toshniwal v. Dy. CIT (2013) 56 SOT 62 (UO) (Mum.)(Trib.)**

65. S.28(i): Business income-Commencement-Set-up-Acts of applying for participation in tender, borrowing of fund on interest and deposit of borrowed monies as earnest money clearly establish that business had been set-up by assessee in relevant year.

Assessee, engaged in realty business, participated in an auction to acquire a piece of land. It obtained loan from its holding company and deposited same as earnest money to acquire land. However, it could not succeed in auction. As the assessee had paid interest on borrowed fund and received interest on earnest money, it claimed differential between interest as loss and claimed for carry forward of said loss. The Assessing Officer found that current year was first year of existence of assessee and since it failed to acquire land, it could not be said that business was set up in relevant year, accordingly, he disallowed the assesse's claim. The High Court affirming the finding of the Tribunal held that the acts of applying for participation in tender, borrowing of monies on interest from holding company and deposit of borrowed monies on same day

as earnest money clearly established that business had been set-up and assessee's claim of loss cannot be disallowed. (A.Y. 2006-07) **CIT v. Dhoomketu Builders & Development (P) Ltd. (2013) 87 DTR 249 (Delhi)(HC)**

66. S.28(i): Business income–Construction and sale of commercial complex with a view to earn profit is to be assessable as business income and not as income from other sources. [S. 56]

The assessee, a co-operative society, engaged in the business of purchase and sale of agricultural implement, etc. demolished its office and godown and constructed shops at that site and sold such shops to individual purchasers, after permission of Registrar. The Assessing Officer treated the profit earned on sale of shops as income from other sources as against business income claimed by the assessee. Held that the construction and sale of shops was only with a view to earn profit by assessee and, accordingly, concluded that income in question should be treated as business income.(A.Ys. 2006-07,2007-08) **CIT v. Sabarkantha District Co-op. Purchase and Sales Union Ltd. (2013) 215 Taxman 149 (Mag.) (Guj.)(HC)**

67. S.28(i): Business loss–Loss on sale of securities shown as investment consistently in the Balance Sheet cannot be treated as business loss. [S.45]

During the year the assessee a co-operative bank incurred loss on sale of Government securities and debited the same in profit & loss account. The assessee claimed the said loss as business loss. During the course of the assessment proceedings the Assessing Officer sought an explanation of the business loss incurred by the assessee. In reply to the same the assessee explained that as per the provisions of section 6 read with section 5(b) and (c) of Banking Regulation Act, the transaction of securities forms part of the banking business and bank can purchase and sell securities. The assessee also relied on the CBDT Circular No. 599 dated 24/04/1991 reported in [(1991) 94 CTR 65 (St.)] wherein it was clarified that the claim of loss on securities, if debited in the books of accounts would be given the same treatment as is normally given to stock-in-trade. However, the Assessing Officer disallowed the claim of the assessee and treated the loss suffered on sale of Government securities as "long-term capital loss". On appeal, the CIT(A) reversed the order of the Assessing Officer and held that the loss suffered on sale of Government securities is allowable as business loss only. The department carried the matter further in appeal before the Income Tax Appellate Tribunal. The Tribunal

reversed the order of the CIT(A) by holding that the assessee consistently treats Government securities held by it as "investment" and not "stock-in-trade" and valuing them "at cost" in its balance sheet as also in its IT return, loss from sale thereof cannot be treated as business loss. (A.Y. 2007-08) **Dy.CIT v. Co-op. Bank Mehsana Ltd. (2013) 86 DTR 247 (Ahd.)(Trib.)**

68. S.32: Depreciation–Explanation 5 is prospective.

Explanation 5 to s. 32 introduced with effect from 1-4-2002 which contemplates compulsory deduction of depreciation in those cases where no depreciation has been claimed is only prospective and it has no application to assessment year 1998-99. (A.Y. 1998-99) **CIT v. Mysore Cements Ltd. (2013) 215 Taxman 151 (Mag.) (Karn.)(HC)**

69. S.32: Depreciation–Goodwill–Depreciation is allowable on revalued amount of good will.

The assessee purchased rights of distance learning division from another company and the amount paid of Rs 51.63 crore was reflected in sale agreement. The assessee revalued price of such rights at Rs 98.73 crore and claimed depreciation on revalued rights. Assessing Officer held that excess consideration paid over value of net assets was in the nature of goodwill paid for future profits and allowed depreciation only on value mentioned in agreement. The Court held that Supreme Court in CIT v. SMIFS Securities Ltd. (2012) 24 Taxman.com 222 has held that goodwill is an asset under Explanation 3(b) to section 32(1) and therefore, depreciation is allowable even on goodwill. Following the ratio the court held that depreciation was to be allowed on revalued rights as well. (A.Y. 2003-04) **CIT v. Manipal Universal Learning (P.) Ltd. (2013) 215 Taxman 151 (Mag.) (Karn.)(HC)**

70. S.32: Depreciation–Finance lessor-Rule of consistency depreciation is allowable.

Where the assessee was a financer-lessor and revenue could not prove that assessee did not have any interest in assets, depreciation claim was allowable following rule of consistency. **DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)**

71. S.32:Depreciation-Intangible assets-Payment to erstwhile share holders-Non-compete fee-Depreciation is not allowable.

The assessee company paid certain sums to its erstwhile shareholders for giving up their right to carry on peroxide business in India for five years. The said payment was treated as an intangible asset and depreciation was claimed thereon. Following the decision of the tribunal in Sharp Business Systems (India) Ltd. v. Dy. CIT (2011) 133 ITD 275, depreciation on non-complete fee could not be allowed. (A.Y. 2003-04) **Arkema Peroxides India (P) Ltd. v. ACIT (2013) 56 SOT 64(UO) (Chennai)(Trib.)**

72. S.32: Depreciation-Rate permitted in building, which is partly let out.

The assessee claimed depreciation on building which was disallowed by Assessing Officer on grounds that it was let out. The assessee claimed only part of it was let out; the rest was used for business purpose of assessee. The Tribunal remanding the matter held depreciation could be denied only to the extent let out. **AL Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 (Cochin)(Trib.)**

73. S.32: Depreciation-Block of asset-Discontinue of business.

The assessee claimed depreciation on its edible oil refinery. The auditor had noted that the refinery had been discontinued during the year and management has not planned any refinery activity. The Assessing Officer therefore held that the refinery was not used for the purpose of business and was discontinued and the assessee had no intention to utilise it in the future and therefore held that it is not entitled to depreciation. The CIT(A) confirmed the disallowance. On appeal the Tribunal allowing the ground of the assessee held that once the concept of block of assets had been brought into the picture, the identity of any new asset merges into the block. Therefore, even if some of the assets in the block are functioning, the entire block gets depreciation. (A.Y. 2005-06 to 2007-08) **Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 (Mum.)(Trib.)**

74. S.32: Depreciation–Windmills.

The assessee was engaged in manufacture of cotton yarn and power generation for captive consumption through windmills. It claimed depreciation at the rate of 80% on the windmills. This claim of 80% was denied by the AO. The CIT(A) held that the assessee was entitled to claim depreciation on the windmill at 80%. On appeal by the department, the Tribunal following the decision of the coordinate bench in the case

of K. K. S. K. Leather Processors P. Ltd. v. ITO (2011) 9 ITR 758 (Trib.)(Chennai) held that the assessee is entitled to claim depreciation at the rate of 80%. The Tribunal also held that the fact that the Department had not accepted the order of the co-ordinate Bench and had preferred an appeal before the High Court, was not a valid ground to take a different view especially without any distinguishing features being pointed out by the Department. (A.Y. 2004-05) **ACIT v. Rajave Textile P. Ltd. (2013) 22 ITR 475 (Chennai)(Trib.)**

75. S.32(1)(iia): Depreciation- Additional depreciation can be claimed only on acquisition & installation of new machinery or plant after 31/3/2005.

The assessee claimed additional depreciation on plant and machinery which was acquired in A.Y.2005-06, whereas the installation of the said Plant & machinery was completed on 31/3/2006 i.e. in the year under consideration. The Assessing Officer denied the claim as the Plant and machinery was acquired in the A.Y. 2005-06 i.e., before 31/3/2005 and as per section 32(1)(iia) of the act, additional depreciation is allowed in respect of new plant and machinery installed after 31/3/2005. CIT(A) confirmed the order of the Assessing Officer. On appeal in Tribunal, the Tribunal upheld the order of the CIT(A) and held that for the purpose of the word 'acquisition' and 'installation' may be different but both the conditions were required to be fulfilled only after 31/3/2005. During the year, for claiming additional depreciation there was specific conditions prescribed under section 32(1)(iia) of the act. As the new machinery or plants were not acquired after 31/3/2005, the authorities below were justified in denying the additional depreciation under the said provisions. (A.Y. 2006-07) **International Cars & Motors Ltd. v. ITO (2013) 56 SOT 50 (Delhi)(Trib.)**

76. S.35: Expenditure-Scientific research-Explanation-Scientific research expenditure–Explanation to section 35(2AB)(1) does not require that expenses included in said Explanation are essentially to be incurred inside an approved in-house research facility.

The assessee carried out scientific research in its facility approved by the prescribed authority. It incurred various expenditure including on clinical trials for developing its pharmaceutical products. These clinical trials were conducted outside the approved laboratory facility. The Assessing Officer denied deduction under section 35(2AB) of the Act as the expenditure on clinical trials were incurred outside the approved facility. On

appeal the High Court held that section 35(2AB) of the Act provides for deduction to a company engaged in business of bio-technology towards expenditure of scientific research development facility approved by the prescribed authority. Merely because the prescribed authority segregated the expenditure into two parts, namely, those incurred within the in-house facility and those were incurred outside, by itself would not be sufficient to deny the benefit to the assessee under section 35(2AB) of the Act. **CIT v. Cadila Healthcare Ltd. (2013) 87 DTR 56 (Guj.)(HC)**

77. S.35D: Amortisation of preliminary expenses–Nexus with eligible projects–Following the rule of consistency claim was allowed.

The Assessing Officer restricted the claim u/s 35D to the extent it had nexus with eligible projects. The Tribunal, however allowed claim holding that no such disallowance was made in last seven years and such claim could not be disallowed suddenly. Held, following rule of consistency, Tribunal correctly allowed claim of assessee. **DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)**

78. S.35D: Amortisation of preliminary expenses-Professional fees to lawyers.

The assessee claimed one fifth of preliminary expense under section 35D. Assessing Officer disallowed holding it as capital in nature. The Tribunal held that the said fees were incurred for expansion of business and therefore one-fifth of it was allowable as preliminary expense. (A.Y. 2007-08) **Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)**

79. S.36(1)(iii):Interest on borrowed capital Expansion of business interest is allowable.

Interest on amount borrowed for expansion of business for an existing plant is allowable u/s 36(1)(iii). **DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)**

80. S.36(1)(iii):Interest on borrowed capital-Interest free advances.

The assessee claimed deduction under section 36(1)(iii) on account of interest free amount advanced to a partnership firm, in which the directors of assessee have full

interest, which was for development of inhouse software. The Assessing Officer disallowed part of the interest. The Tribunal on remanding the matter held that it needs to be examined whether the funds advanced were used for business of for personal needs. **AL Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 (Cochin)(Trib.)**

81. S.36(1)(iii): Interest on borrowed capital–Maintenance of huge cash not a ground for disallowance of interest on borrowed fund.

The partnership firm, a courier agent, claimed deduction of interest on borrowed fund and partners' capital. The Assessing Officer disallowed a portion of the interest under section 36(1)(iii) on the ground that the assessee failed to explain any utilization of borrowed funds for business purpose. The CIT(A) upheld the disallowance made by the Assessing Officer. The Tribunal held that maintenance of huge cash in courier business should not be a ground for disallowance of interest on borrowed funds by placing reliance on a decision of the co-ordinate bench. The Tribunal remanded the matter to the CIT(A) as the decision was not available when the assessment order was passed. (A.Y. 2004-05) **Patel Vishnubhai Kantilal & Co. v. ITO (2013) 21 ITR 204/58 SOT 309 (Ahd.) (Trib.)**

82. S.36(1)(iii):Interest on borrowed capital–Interest on bank loan utilized for placing margin money for investment in shares not an allowable deduction.

The Assessing Officer disallowed the interest expenditure claimed by the assessee on the ground that the assessee failed to prove that borrowed capital is utilized for the purpose of business. The CIT(A) upheld the disallowance by observing that the assessee admitted that the bank loan has been utilized for margin deposits with stock brokers. On appeal by the assessee the Tribunal partly allowing the appeal held: The entire interest should not have been disallowed by the Assessing Officer as interest can be disallowed only on the amount of Rs. 13.66 lakhs which was deposited with the share broker companies to make the investments in shares. (A. Y. 2008-09) **Prakash Narottam Das Gupta v. ITO (2013) 21 ITR 255/57 SOT 336 (Mum.)(Trib.)**

83. S.36(1)(vii):Deductions–Bad debts–Amalgamation-Allowable in the hands of transferee company. [S.72A]

Where the amalgamating company carried certain doubtful debts till date of amalgamation, subsequently, this debt was written off as bad debts by the transferee company, the claim for bad debts was allowable in hands of the transferee company. (A.Y. 2004-05) **CIT v. Sambhav Media Ltd. (2013) 215 Taxman 161(Mag.)(Guj.)(HC)**

84. S.36(1)(vii):Deductions-Provision for doubtful debt which is debited to profit and loss account is allowable as deduction. [S.36(2)]

The assessee-company made provision for doubtful debt given to its group concern and claimed the same to be allowed as deduction u/s 36(1)(vii). It had debited the provision of doubtful debt to profit and loss account and correspondingly reduced assets by reducing amount of unsecured loans. Held the doubtful debt in question qualified for deduction u/s 36(1)(vii) read with s. 36(2).(A.Y. 2004-05) **CIT v.Tainwala Chemicals & Plastics India Ltd. (2013) 215 Taxman 153(Mag.) (Bom.)(HC)**

85. S.36(1)(vii): Deductions-Bad Debts-Dues from patients.

The assessee claimed small amounts due from patients as bad debts. The Assessing Officer held that it was premature to declare bad debts and disallowed the same. The Tribunal held that merely because it was second year of assessee operations and period between revenue recognition and write off of debt was short, amount claimed as bad debts could not be disallowed. (A.Y. 2008-09) **Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)**

86. S.36(1)(viia):Deductions-Provisions for bad and doubtful debts-Schedule Bank-S.36(1)(viia) & S.36(1)(vii) separate independent provisions-Banks to maintain separate books for Rural and Urban advances.

The assessee bank claimed deduction under section 36(1)(viia) considering first proviso to section 36(1)(viia). Assessee claimed additional deduction for five consecutive years in accordance with the guidelines issued by the Reserve Bank of India. The Assessing Officer rejected the claim and the CIT(A) upheld the order of the Assessing Officer on appeal by the assessee to the Tribunal, held, remanding the matter: Section 36 (1) (vii)

and section 36 (1) (viia) are independent provisions and cannot be intermingled. The provisions of section 36(1)(vii) are subject to limitations contained in section 36(2). Similarly by virtue of section 36(2)(v) any question of double benefit to arise from section 36(1)(viia) is put into check. The provisions were formulated to promote RURAL BANKING to assist in making adequate provisions for the risks in relation to RURAL ADVANCES. The Scheduled commercial bank would continue to get benefit of write off of irrecoverable debts under section 36 (1)(vii) in addition to the benefit of deduction of the provision for bad and doubtful debts under section 36(1)(viia). Normally banks maintain separate books for rural and urban branches, wherein no such bifurcation or whether non-profit asset or loss asset had been worked out as per RBI guidelines was recorded. The Assessing Officer is directed to examine the claim afresh in the light of Catholic Syrian Bank Ltd. v. CIT. (A.Y. 2002-03, 2003-04). **State Bank of Indore v. ACIT (2013) 142 ITD 215 (Indore)(Trib.)**

87. S.36(1)(viii):Deductions-Eligible business-Special reserve-Financial corporation–Profits and gains derived from business.

Processing fee, penal interest and other charges received by the assessee from debtors has a direct nexus with the business of long-term finance and form part of eligible profit for the purpose of deduction under section 36(1)(viii). (A.Ys. 1998-99, 2000-01 & 2001-02) **CIT v. Weizmann Homes Ltd. (2013) 86 DTR 41 / 215 Taxman 264 (Karn.)(HC)**

88. S.37(1): Business expenditure–Commission–when no defects were found in the books of account disallowance cannot be made only on the ground that percentage of commission paid was more in the relevant year.

The assessee had claimed commission expenses. The Assessing Officer disallowed the same to tune of 20% on ground that in preceding year commission expenses was claimed only at 0.7% of gross turnover whereas in year under consideration it was 1.93% of the gross turnover. Held, in absence of any defect in maintenance of books of account, disallowance could not be made merely on ground that expenses incurred in current year were more than that in preceding year. (A.Y.2005-06) **CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 157 (Mag.) (Guj.)(HC)**

89. S.37(1):Business expenditure-Capital or revenue expenditure-Expenditure on installation of new unit

Expenditure on installation of new unit allowed as revenue expenditure considering the facts that new unit constituted extension of existing business; there was intermingling and interlacing of funds; and there was common management. (A.Y. 2005-06) **CIT v. Havells India Ltd. (2013) 352 ITR 376 (Delhi)(HC)**

90. S.37(1):Business expenditure-Capital or revenue expenditure–Expenditure on debenture issue.

Expenditure in relation to issue of debenture subsequently to be converted into equity shares allowed as revenue expenditure. (A.Y. 2005-06) **CIT v. Havells India Ltd. (2013) 352 ITR 376 (Delhi)(HC)**

91. S.37(1):Business expenditure–Advertising expenses–Rasna-Brand value-Commercial expediency-Benefit to third party cannot be the ground for disallowance.

The Assessing Officer disallowed the advertisement expenses on the ground that other parties were also benefited and an intangible asset was created, which was not even owned by the assessee. The court held that when the expenditure has been incurred by assessee for publicity or advertisement, it is not for department to consider what commercial expediency justifies such expenditure and the mere fact that on account of expenditure, incidentally some third party is also benefited is no ground to disallow any part of such expenditure. Disallowance was deleted. **CIT v. Khambhatta Family Trust (2013) 215 Taxman 602 (Guj.)(HC)**

92. S.37(1): Business expenditure-Freight and transportation expenses–Ad-hoc disallowance of 2% expenses- No question of law. [S.260A]

The assessee is in the business of transport. The Assessing Officer disallowed the 2% of such expenses .Commissioner (Appeals) deleted the said disallowance. Tribunal up held the order of Commissioner (Appeals).On appeal by revenue the court held that since the issue was based on factual matrix as regards incurring of freight and transportation expenses with no perversity in findings of appellate authorities, no question of law

arose for consideration. **CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)**

93. S.37(1): Business expenditure–Chairman's perquisite-Salary paid to staff employed at Chairman's residence is allowable as deduction.

The staff deployed at residence of Chairman, for purpose of looking after basic requirements like cleaning of house, attending to official guests, receiving telephones and other sundry responsibilities could be considered as expended wholly for purpose of business and allowed as revenue expenditure. **CIT v. Gujarat Mineral Development Corpn. Ltd. (2013) 215 Taxman 155(Mag.) (Guj.)(HC)**

94. S.37(1):Business expenditure–Cash payments to drivers food and miscellaneous expenses is allowable as deduction-Disallowance at ad- hoc 10% was not justified–No question of law. [S. 260A]

The assessee which is in the business of transport made payments to drivers towards their food and miscellaneous expenses in cash and claimed deduction of such expenses. The Assessing Officer has disallowed 10& of such expenses. Commissioner (Appeals) deleted the said disallowance which was confirmed by Tribunal. On appeal by revenue the Court held that since the appellate authorities had dealt with issue of disallowance of expenses appropriately on basis of substantive material available in support thereof, no question of law arose for consideration. Held that since the Assessing Officer had failed to bring on record any evidence suggesting that any portion of such expenses was non-genuine or not for purpose of business, deletion of disallowance was justified. **CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)**

95. S.37(1): Business expenditure–Amortised in the books for five years-Premium on redemption of debentures allowable as revenue expenditure. [S. 36(1)(iii)]

The assessee had paid premium on redemption of debentures which was spread over a period of 5 years which it claimed deduction of same proportionately either u/s.36(1)(iii)/37(1). Where the discounted amount paid over and above amount received for debentures was a liability incurred by the company for purposes of business, same was allowable as revenue expenditure u/s 37(1) and not u/s 36(1)(iii). **DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)**

96. S.37(1): Business expenditure–Bank guarantee–Equity shares and fixed deposits–Written off on liquidation of bank is allowable as revenue expenditure.

The assessee company deposited equity shares and fixed deposits with the bank for obtaining bank guarantee for securing government tender.RBI ordered liquidation of said bank. The assessee company wrote off the balance of fixed deposit and equity shares and claimed as business expenditure. Assessing Officer disallowed the claim. On appeal Commissioner (Appeals) allowed the claim. Order of Commissioner (Appeals) was affirmed by the Tribunal. On appeal by revenue the court held that, where equity shares and fixed deposits were deposited for obtaining a bank guarantee were written off on liquidation of bank, the same could be allowed as revenue expenditure. **CIT v. Rao Construction (P.) Ltd. (2013) 215 Taxman 159(Mag.) (Guj.)(HC)**

97. S.37(1):Business expenditure–Bogus purchases–Search by Excise department-No adverse finding by Excise department for the relevant year-Addition was deleted.

A search was carried out by Central Excise department prior to start of the financial year. However, nothing was brought on record by the income-tax authorities if any adverse findings were given by Central Excise authorities against assessee for assessment year under appeal. Addition only on basis of presumption and assumption that assessee would continue to receive bills without actual delivery, in absence of any material against assessee, such addition could not have been made. (A.Y. 2003-04) **CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 158 (Mag.) (Guj.)(HC)**

98. S.37(1):Business expenditure–Clearing and forwarding–Incorrect understanding.

The assessee is in the business of transport. The assessee claimed deduction in respect of clearing and forwarding expenses incurred by it. The Assessing Officer disallowed said expenses .Commissioner (Appeals) deleted the impugned disallowance .Tribunal affirmed the view of Commissioner(Appeals). On appeal by revenue the Court held that the claim of the assessee in respect of the clearing and forwarding expenses incurred by it disallowed by the Assessing Officer was allowed on the ground that the disallowance was based on incorrect understanding of financial transactions and supported by cogent

reasons, the disallowance was not justified. **CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)**

99. S.37(1):Business expenditure–Capital or revenue–Expenses for registration in foreign countries

Expenses for registration in foreign countries for marketing assessee's products in foreign countries and promoting sales are allowable as business expenditure. (A.Y. 1999-2000) **CIT v. Torrent Pharmaceuticals Ltd. (2013) 87 DTR 54 (Guj.)(HC)**

100. S.37(1): Business expenditure-Expenditure on maintaining garden.

Expenditure incurred by assessee on maintaining garden with the object of controlling pollution inside the factory premises is allowable as revenue expenditure. (A.Y. 1999-2000) **CIT v. Torrent Pharmaceuticals Ltd. (2013) 87 DTR 54 (Guj.)(HC)**

101. S.37(1):Business expenditure-Illegal purposes-Explanation-Expenditure incurred for any illegal purpose or prohibited by law.

Misuse charges. Assessee wrongly utilised certain residential premises for commercial purpose and for which a regularisation fee was paid to the civic authority which was styled as 'misuse charges'. The said charges were claimed as 'business expenditure'. Held the misuse charges were paid for violating the rules of use of premises and hence Explanation-1 to section 37 gets attracted. Misuse charges and interest on misuse charges not eligible for deduction. **ACIT v. Mohan Exports (P) Ltd. (2013) 82 DTR 110 (Delhi)(Trib.)**

102. S.37(1):Business expenditure-Service charges .

The payment made by the assessee to visa / Master Card international on account of their charges for services provided by them to the assessee was held as an allowable deduction under section 37 of the Act. (A.Ys.2003-04 to 2005-06) **ACIT v. Bobcards Limited (2013) 56 SOT 232 (Mum.)(Trib.)**

103. S.37(1):Business expenditure-Voluntary retirement scheme.

Business expenditure relating to voluntary retirement scheme is of revenue nature and is an allowable deduction. Such expenditure cannot be disallowed on the ground that it was of capital nature since it was incurred upon closure of the business. **Dy. CIT v. Bisleri Sales Ltd. & Ors. (2013) 81 DTR 197 (Mum.)(Trib.)**.

104. S.37(1):Business expenditure-Capital or revenue-Relocation of the office are 'revenue' in nature.

Expenses incurred on relocation of the office are 'revenue' in nature as no benefit that can rightly be called as 'benefit of enduring nature' arises. **Transwitch India (P) Ltd v. Dy. CIT (2013) 81 DTR 233 (Delhi)(Trib**.)

105. S.37(1):Business Expenditure–Cannot be disallowed without pointing out defects in the accounts.

The Tribunal held that the Assessing Officer cannot disallow expenses without pointing out defects in the accounts and explanations to those defects are to be sought. The Assessing Officer has to state failure of proving genuineness of the expenditure. **ACIT v. Ganpati Enterprises Ltd. (2013) 142 ITD 118 /154 TTJ 1(UO) (Delhi)(Trib.)**

106. S.37(1): Business expenditure-Repairs-Civil work-Rented premises.

The assessee incurred expenditure on repair of a rented building. Repair and construction work including roof work, plumbing, civil & carpentry work. Assessee claimed it as revenue expenditure. The A.O. held it as capital expenditure and he after allowing depreciation disallowed the balance amount. The CIT(A) upheld the Assessing Officer's order. The Tribunal allowing the assessee appeal held the expenditure as revenue expenditure. (A.Y. 2005-06) **Cymorza Art Gallery v. ACIT (2013) 142 ITD 799/21 ITR 262 (Mum.)(Trib.)**

107. S.37(1): Business expenditure–Capital or revenue-Registration charges of long lease-is revenue expenditure.

The assessee claimed expenditure incurred towards registration of building taken on long lease. The Tribunal held that it was a business / revenue expenditure and not a

capital expenditure. (A.Y. 2007-08) **Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)**

108. S.37(1): Business expenditure–Dealer Commission-Income deemed to accrue or arise in India [S. 9, Art. 5 & 7]

The assessee, an Indian branch of an American Company was primarily engaged in the distribution of products of its parent company. The assessee followed mixed system of account, i.e. accrual of sales in one year and expenses debited at a later year, which was rejected by the Assessing Officer and Assessing Officer's order upheld by the CIT(A), on second appeal, the Tribunal held affirming the order of the CIT(A), that in absence of an agreement between the dealers and the assessee to the effect that commission is payable only on execution of various formalities, the assessee cannot be allowed to follow mixed system of accounting. **Varian India (P.) Ltd. v. ADIT (2013) 142 ITD 692 (Mum.)(Trib.)**

109. S.37(1):Business expenditure-Expenditure on recruitment through manpower agencies.

The assessee incurred expenditure for identification and recruitment of manpower. The Assessing Officer held that such an expense was non-recurring & is capital in nature. The CIT(A) held it as a revenue expenditure. The Tribunal held that it was allowable as a revenue expenditure. (A.Y. 2008-09) **Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)**

110. S.37(1):Business expenditure–ad-hoc disallowance deleted.

The Assessing Officer disallowed 15% of the repairs and maintenance and 20% of the vehicle expenses on the ground that the supporting evidence furnished was not verifiable as they were self-serving vouchers. The CIT(A) confirmed the disallowance made by the Assessing Officer. On appeal by the assessee the Tribunal allowing the ground held that if the Assessing Officer was not satisfied either about the maintenance of vouchers or the verifiable nature of the vouchers, he could have identified them and disallowed the entire amount, rather than resorting to ad hoc disallowance and that the reasons for disallowance were general without any specific mistakes being pointed out by the Assessing Officer. Accordingly, considering that the assessee was an agro-based chemical company and also a public limited company, it was not necessary to disallow

the expenditure on ad hoc basis. (A.Ys. 2005-06 to 2007-08) **Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 (Mum.)(Trib.)**

111. S.37(1):Business expenditure–Keyman insurance premium

Tribunal held that the whole of the keyman insurance premium paid by the assessee firm on the life of its partners is business expenditure in view of circular No. 762 dated 18th Feb., 1998. **ACIT v. Agrawal Enterprises (2013) 154 TTJ 12 (UO)(Pune)(Trib.)**

112. S. 37(1) : Business Expenditure – Agency commission paid to agents

Tribunal held that the confirmations of all the agents have been filed alongwith their PAN before the CIT(A) and it was not the case of Assessing Officer that the confirmations furnished by the agents were false, the CIT(A) was fully justified in deleting the disallowance made by Assessing Officer. (A.Y. 2009-10) **Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)**

113. S.37(1): Business expenditure–Failure to produce bills for manufacturing and administrative expenses.

Tribunal held that if an expenditure remains unsupported then in the absence of bill, vouchers, etc. the revenue department has no option but to disallow the same. The CIT(A) investigated the correctness if the expenditure and disallowed. The findings on facts given by CIT(A) are required to be affirmed. **B.M.S. Projects (P) Ltd v. Dy. CIT (2013)153 TTJ 649/85 DTR 393 (Ahd.)(Trib.)**

114. S.37(1): Business expenditure–Payment of commission to distributors.

The Tribunal held that the purchases made by the distributors for their own consumption or sale to others was in fact sale in the hands of assessee and therefore, commission paid on such sales was a genuine expenditure for business purposes. The percentage of commission to sales for the year under consideration is lower as compared to preceding years which was accepted by the department, hence, it cannot be said that the assessee has inflated the commission expenses. The Tribunal deleted the disallowance made by the Assessing Officer and sustained by the CIT(A). (A.Y. 2009-10) **Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1/86 DTR 49 (Jodhpur)(Trib.)**

115. S.37(1): Business expenditure–Expenses incurred on Writer Relocations – Allowable

The assessee company incurred certain expenditure in connection with Writer Relocations under the head legal and professional charges. The Assessing Officer disallowed the same treating the same as personal expenditure and not connected with the business of the assessee-company. The Appellate Tribunal decided the issue in favour of the assessee-company by observing that CIT(A) having allowed the expenses incurred by the assessee company in connection with passenger baggage clearing in respect of its foreign employees on their return to their home countries in the preceding assessment year and the DRP having also allowed similar expenditure in the later year, impugned expenditure of similar nature cannot be disallowed in the relevant year. (A. Y. 2007-08) **Sumitomo Corporation India (P.) Ltd. v. Dy. CIT (2013) 85 DTR 1 (Delhi)(Trib.)**

116. S.37(1):Business expenditure–Expenses for shifting of machinery–capital or revenue expenditure.

In course of the assessment proceeding the Assessing Officer noticed that the assessee had claimed an amount of Rs. 1,31,06,000/- towards shifting expenditure under the had 'other expenses'. The assessee had incurred expenditure towards relocation of plant and machinery, transportation charges, hamali charges, loading and unloading charges of machinery, stores and other office material, etc. The Assessing Officer held that as the assessee had shifted the plant and machinery to another unit and the expenditure incurred towards installation of plant and machinery in another unit including loading and unloading charges, transport charges, etc., are capital in nature. The CIT(A) held that shifting of existing asset from one location to another is revenue expenditure and has to be allowed. The Tribunal while dismissing the departmental ground of appeal held that the expenditure incurred was towards shifting existing plant, machinery equipments, records, etc. and that the incurring of expenditure did not result in any benefit of enduring nature to the assessee. (A.Y. 2007-08) **ACIT v. Praga Tools Ltd. (2013) 23 ITR 622 (Hyd.)(Trib.)**

117. S.40(a)(ia): Amounts not deductible-Deduction at source-Disallowance applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year. Merilyn Shipping (SB) approved.

The assessee engaged Mercator Lines Ltd to perform ship management work on behalf of the assessee for which it paid an amount of Rs. 1.17 crore. The assessee claimed that the amount paid by it to Mercator was a '*reimbursement of salaries*' and that as Mercator had deducted TDS on the payments made by it to the employees, the assessee was not required to deduct TDS. The AO disagreed and disallowed the entire payment u/s.40(a)(ia). The Tribunal upheld the assessee's claim and held that no TDS was required to be deducted on a reimbursement. It also relied on Merilyn Shipping and Transport Ltd. v. Add. CIT (2012) 136 ITD 23 (Vishkhapatam)(SB) where it was held that s. 40(a)(ia) applied only to amounts that were "*payable*" as at the end of the year and not to amounts that had already been "*paid*" during the year. On appeal by the department, HELD dismissing the appeal:
The revenue cannot take any benefit from the observations made by the Special Bench of the Tribunal in Merilyn Shipping and Transport Ltd. v. CIT (2012) 136 ITD 23 (Vishakhapatnam) (SB) to the effect that s. 40(a)(ia) was introduced by the Finance Act, 2004 w.e.f. 1.4.2005 with a view to augment the revenue through the mechanism of tax deduction at source. S. 40(a)(ia) was brought on the statute to disallow the claim of even genuine and admissible expenses of the assessee under the head 'Income from Business and Profession' in case the assessee does not deduct TDS on such expenses. The default in deduction of TDS would result in disallowance of expenditure on which such TDS was deductible. On facts, tax was deducted as TDS from the salaries of the employees paid by Mercator Lines and the circumstances in which such salaries were paid by Mercator Lines for the assessee were sufficiently explained. It is to be noted that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year. (ITA No. 122 of 2013, dt. 09/07/2013) **CIT v. Vector Shipping Services (P) Ltd. (All)(HC)**

118. S.40(a)(ia): Amounts not deductible-Deduction of tax at source-Interest disallowance – "Paid" or "payable"-Question of law admitted-Pending for final disposal. [S. 260A]

The decision of the Special Bench in the case of Merilyn Shipping & Transports v. Addl. CIT (2012) 136 ITD 23(SB) (Visakhapatnam)(Trib.), wherein it was held that s. 40(a)(ia) would apply only to expenditure which is payable as on 31st March of year under consideration and not to expenditure which had already been paid during year itself deals with an issue of recurring nature, ratio requires a serious consideration. **CIT v. Odedara Construction (2013) 215 Taxman 161(Mag.) (Guj.)(HC)**

119. S.40(a)(ia) : Amounts not deductible-Deduction at source-Amount paid vis-à-vis payable.

Section 40(a)(ia) covers not only the amounts which are payable as on 31st March of a particular year but also which are payable at anytime during the year. (A.Y. 2007-08) **CIT v. Sikandarkhan N. Tunvar (2013) 87 DTR 137 (Guj.)(HC)**

120. S.40(a)(ia): Amounts not deductible-Deduction of tax at source-Transporter-Form no was filed before the Commissioner who had no jurisdiction of assessee, however the copy was filed before the Assessing Officer–Disallowance was not justified. [S.194C, Form No.15J]

The assessee is a transporter who had taken services of various small truck owners. The freight charges were paid to them without deduction of tax at source. The assessee filed the form before the Assessing Officer, which was filed before the Commissioner –II, Baroda. On appeal the Court held that Tribunal found that Form 15J was submitted by assessee with Commissioner II, though the jurisdiction was to file before Commissioner I, and that in assessment proceedings assessee had filed copy of said form with the Assessing Officer who had not doubted payment of freight charges as non-genuine. Hence, the disallowance on non-deduction of tax at source was rightly deleted. **CIT v. Gurvinder Transport (2013) 215 Taxman 593 (Guj.)(HC)**

121. S.40(a)(ia): Amounts not deductible-Deduction at source–Interest-No disallowance can be made merely on the ground of non filing of Form 15H/15G to Commissioner as prescribed in Rule 29C.[Rule 29C]

The Assessing Officer disallowed interest paid to various parties on the ground that the assessee had not filed Form 15H/15G to Commissioner as prescribed under Rule 29C,which was confirmed by Commissioner (Appeals) .On appeal Tribunal held that No disallowance can be made merely on the ground of non filing of Form 15H/15G to Commissioner as prescribed in Rule 29C.Tribunal relied on Vipin P.Mehta v.ITO (2011)(11 taxman .com 342 (Mum.)(Trib.)(A.Y. 2008-09)(ITA no 6822/Mum/2011 dt 10-07-2013) **Karwat Steel Traders v.ITO (2013) BCAJ –August –P. 35 (Mum.)(Trib.)**

122. S.40(a)(ia): Amounts not deductible-Deduction at source–Provision do not apply where there is shortfall in deduction of tax at source. [S.194C, 194I]

In some cases the assessee treated the payment to be covered under section 194C of the Act, where as the authorities treated the same payment being covered under section 194I of the Act, there by resulting in short deduction of tax at source. Following the ratio of various judgments the Tribunal held that provisions of section 40(a)(ia) do not apply to a case where there is short fall in deduction of tax at source. (A.Y.2007-08) **Cinetek Telefilms P. Ltd. v. ACIT (2013) TIOL-641-(Mum)(Trib.).**

123. S.40(a)(ia): Amounts not deductible-Deduction at source-Business disallowance-Paid without deduction of tax at source [Form 15I]

The assessee was a transport contractor who whenever there was a requirement hired truck from truck owners on payment basis for which the truck owners furnished declaration for non-deduction of tax at source in Form 15I. The Assessing Officer held that there was a contract between the assessee and truck owner & disallowed amount paid to truck owner. The CIT(A) affirmed the order of the Assessing Officer The Tribunal allowing assessee appeal held that assessee could not be treated in default for non deducting tax from truck owners and hence no TDS liability arose in hands of assessee. (A.Y. 2009-10) **Govind Ram Gupta v. JCIT (2013) 142 ITD 776 (Cuttack)(Trib.)**

124. S.40(a)(ia): Amounts not deductible-Software-Income deemed to accrue or arise in India–Royalty–No TDS on software purchased along with hardware and hence no disallowance permissible under S. 40(a)(ia). [S.9(1)(vi), 194J]

The assessee purchased software, capitalised the payment to the computers account as the software came along with the hardware of computers and claimed depreciation. The Assessing Officer invoking the provisions of section 40(a)(ia) disallowed the expenditure on the ground that tax had not been deducted at source under section 194J of the Act. The disallowance was confirmed by the CIT(A). On appeal by the assessee, the Tribunal allowing the ground held:That mere purchase of software, a copyrighted article, for utilization of computers cannot be considered as purchase of copyright and royalty. The assessee did not acquire any rights for making copies, selling or acquiring which generally could be considered within the definition of "royalty". Explanation 2 to section 9(1)(vi) cannot be applied to purchase of a copyrighted software, which does not involve any commercial exploitation thereof. The assessee simply purchased software delivered along with computer hardware for utilisation in the day-to-day business. That there was no intangible asset involved in this and the assessee's claim of depreciation could not be disallowed u/s. 40(a)(ia). Under section 40(a)(ia) if at all applicable, disallowance is only with reference to the claim made in the profit and loss account towards revenue expenditure. Purchase of an asset and consequent claim of depreciation cannot be considered under that section. The Assessing Officer was to allow the depreciation as claimed. (A.Y. 2005-06 to 2007-08) **Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 (Mum.)(Trib.)**

125. S.40(a)(ia): Amounts not deductible-Deduction at source-Deposited before the due date of filing of the return.

Tribunal held that of TDS is deposited before the due date of filing of the return the provisions of section 40(a)(ia) cannot be invoked. **B.M.S. Projects (P) Ltd. v. Dy. CIT (2013) 153 TTJ 649/85 DTR 293 (Ahd.)(Trib.)**

126. S.40(a)(ia): Amounts not deductible-Deduction at source Disallowance of expenses on proportionate basis.

The Assessing Officer made proportionate disallowance on the TDS made by the assessee under section 40(a)(ia) as the TDS made by the assessee was at the rate of

2.25% against required rate of 11.33% on commission. The Tribunal sent the matter back to the file of Assessing Officer to verify as to whether the assessee obtained the certificate for deducting TDS at lower rate from the competent IT authority and if certificates were in order and in accordance with law then no disallowance to be made. (A.Y. 2009-10) **Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1/86 DTR 49 (Jodh.)(Trib.)**

127. S.40(a)(ia): Amounts not deductible-Deduction at source–Provisions of section 194J applicable on settlement and custody fees paid. [S.194J]

During the assessment proceedings, the Assessing Officer noticed that the assessee has claimed a deduction for 'settlement and custody fees' on which tax was not deducted at source. The Assessing Officer disallowed the said expenses under section 40(a)(ia) of the Act, since in his view tax was deductible at source thereon under section 194J of the Act. The CIT(A) allowed the appeal of the assessee. On appeal by the department the Tribunal reversed the decision of the CIT(A) by following the decision of the Bombay High Court in the case of CIT v. Kotak Securities Ltd. (2011) 203 Taxman 86 and holding that the assessee is availing managerial services for which the assessee paid the fees in question. (A.Y. 2008-2009). **ACIT v. Karvy Computershare P. Ltd. (2013) 23 ITR 599 (Hyd.)(Trib.)**

128. S.40(b): Amounts not deductible–Depreciation-Revenue cannot insist on depreciation being charge on profit has to be deducted first before considering any interest payment on the capital of the firm.

The assessee claimed deduction under section 40(b) towards the payment of interest to the partners on the balances in the capital accounts in terms of the partnership deed. The Assessing Officer held that since the depreciation is a charge on the profit of the company, charging of interest has to be on the book profit of the firm. View of the Assessing Officer was affirmed by the Commissioner (Appeals) and Tribunal. On appeal the Court held that there being no restriction on the working of interest before working out depreciation as has been provided in case of salary that payment of salary to partners for purpose of deduction has to be worked out on percentage of book profit, revenue cannot insist that depreciation being a charge on profit, had to be deducted first before considering any interest payment on capital of firm. Order of Tribunal was set a side. (A.Ys. 1996-97 to 2000-01) **Sri Venkateswara Photo Studio v. ACIT (2013) 215 Taxman (Mag.) 119 (Mad.)(HC)**

129. S.40A(2): Expenses or payments not deductible-Excess or unreasonable- Remuneration to Directors.

Disallowance under section 40A(2) by linking remuneration to directors with assessee's turnover or profit earned by the assessee was not proper. The only thing is to be seen is as to whether the remuneration was excessive. The Assessing Officer did not doubt the payment of remunerate on to the directors and it was not the case of that the services were not rendered. The Tribunal deleted the addition made by Assessing Officer and sustained by the learned CIT(A) on the basis that the directors who were well experience and having proper qualification rendered the services to the assessee company. **Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1/ 86 DTR 49 (Jodh.)(Trib.)**

130. S.40A(3): Expenses or payments not deductible-Cash payments exceeding prescribed limits-Test of circumstances [Rule 6DD(k)]

Assessee a railway catering contractor engaged in respect of two trans to supply food articles, soft drink and basic commodities to the passengers wherein his business income was primarily on cash basis. In the peculiar circumstances under Rule 6DD(k) the case of the Assessee gets protected and no disallowance under section 40A(3) could be made. (A.Y. 2008-09) **RC Goel v. CIT (2013) 259 CTR 15 (Delhi)(HC)**

131. S.41(4): Profits chargeable to tax – Bad debt.

The Tribunal held that where doubtful doubts had not been allowed as deduction in previous years, same could not be taxed as income when they were recovered, as it would lead to double disallowance. (A.Ys. 2005-06, 2007-08, 2008-09) **ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)**

132. S.43B: Deductions on actual payment–Employees' contribution to PF, ESI, etc.–Payment before due date of filing return and beyond due dates prescribed under respective statues is allowable as deduction. [S.2(24)(x), 36(1)(va), 139,264]

The assessee claimed deduction of Rs 22,91 lakhs, being employee's contribution under the EPF Act, and ESI Act, which were remitted beyond the due dates prescribed under the statutes. An amount of Rs 20.76 lakhs was paid during the financial year ending 31-03-2006 and balance was paid prior to last date for filing return under section 139(1),

extended up to 30-11-2006. Assessing Officer disallowed the payment on the ground that section 43B(b) allowed payment of only employer's contribution till due date of filing of return. The assessee filed revision application under section 264, which was dismissed. The assessee challenged the said order by filing writ petition. Allowing the petition the Court held that where the assessee remitted employees' contribution under EPF Act, and ESI Act after due dates prescribed under said statutes, but before extended due date for filing return u/s 139(1), deduction could not be disallowed. Followed the ratio in CIT v. Alom Entrusions Ltd (2009) 319 ITR 306(SC) and CIT v. Sabari Enterprises (2008) 298 ITR 141 (Karn.)(HC) (A.Y. 2006-07) **Spectrum Consultants India (P.) Ltd. v. CIT (2013) 215 Taxman 597 (Karn.)(HC)**

133. S.43B: Deductions on actual payment-Employees' provident fund-Payments made after due date. [S.10A]

The assessee claimed a deduction for payments made after due date to employees' provident fund. Alternatively, it claimed that even if the amount was disallowed, the sum has to be treated as a part of its business income which is eligible for exemption under section 10A of the Act. The Assessing Officer held that the employees' contribution of provident fund was paid after the due date and hence treated it as deemed income of the assessee. The stand of the Assessing Officer was confirmed by the CIT(A). The Tribunal allowing the appeal of the assessee held that the addition could not be made under section 43B of the Act if the actual payment was made by the assessee before the due date of filing of return. Further, the Tribunal following the decision of the Bombay High Court in the case of CIT v. Gem Plus Jewellery India P. Ltd. (2011) 330 ITR 175, also held that if the amount was disallowed the sum was to be treated as part of the business income of the assessee eligible for exemption under section 10A of the Act, (A.Y. 2006-07) **ITO v. Patni Telecom Solutions P. Ltd. (2013) 23 ITR 534 (Hyd.)(Trib.)**

134. S.44D: Foreign companies-Royalties-Computation-DTAA-India-Russia- Agreement for technical know-how. [S. 115A, 195, 254, Art. 7 & 12]

The assessee company having entered into an agreement for technical know-how with a Russian Company "T" made certain remittances to "T" applying TDS at 20 per cent treating the payment as FTS, which the Assessing Officer rejected holding the said payment taxable under section 44D read with section 115A at 30 per cent. The CIT(A)

upheld the order of the Assessing Officer. The Tribunal on appeal remanded the matter to be decided in the light of the earlier orders of CIT(A) in the preceding 3 years. The Assessing Officer passed fresh order again determining rate of TDS @ 30%. On appeal CIT(A) upheld orders of Assessing Officer on appeal the Tribunal allowing assessee appeal held: The Assessing Officer without complying with the orders of the Tribunal determined TDS @ 30% and CIT(A) upheld this action on grounds of non examining issues and those years he had considered ELECTRIM WARSAW CASE. The Bench stated the prior consideration was whether Assessing Officer was justified and in case the dept. was aggrieved, remedy was to prefer an appeal to High Court. The Assessing Officer was directed to give compliance of the said order of the Tribunal. (A.Y. 1999-2000) **Steel Authority of India Ltd. v. ITO (2013) 142 ITD 547 (Delhi)(Trib.)**

135. S.45: Capital Gains-Business income–transactions involved in shares whether attributable to Capital Gains as declared against Assessing Officer treating the same as Business Income. [S.28 (i)]

Held, it is open for the Assessee to maintain two separate portfolios one for investment and other for maintaining business activities of shares – These are pure questions of fact – No question of law is involved. (A.Y. 2006-07) **CIT v. Suresh R. Shah (2013) 256 CTR 104 (Mad.)(HC)**

136. S.45: Capital gains–Computation-floor space index ["FSI"]-Amount received on transfer of additional FSI was not chargeable to tax in its hands-"principle of mutuality" applied in this case between the society and its members and therefore, the sum could not be taxed as dividend in the hands of the assessee. [S.4, 48, 50]

In the year 1984, the assessee purchased a residential flat in a co-operative society. Under the Development Control Regulations, 1991, the society became entitled to the right to allow the usage of additional floor space index ["FSI"] of an area equivalent to the existing FSI, which was available for development. The society decided to demolish the existing building and construct two new buildings on the property by utilizing the FSI. For this purposes, development of the building was undertaken and the transferable development rights ["TDRs] were sold to the builder for a consideration of Rs. 8.35 crores towards collective share of the 24 occupants of the flats. In this amount, the assessee's share was Rs.33,23,522/- out of which Rs.16,61,761/- was receivable at the time of execution of the agreement. In its books, the assessee recognized the entire

amount as income following the mercantile system of accounting, but in the return of income, the assessee claimed that cost on transfer of additional FSI was not chargeable to tax in its hands. The Assessing Officer held that the net amount was chargeable to capital gains under section 50 of the Act. Alternatively, the Assessing Officer held that the amount was taxable as dividend received by the assessee from the co-operative housing society. The CIT(A) overruled the view of the Assessing Officer. On appeal by the Department, the Tribunal dismissing the revenue appeal held:That even though the transfer of transferable development rights amounts to transfer of a capital asset, the gains could not be subjected to tax under the head "Capital gains" for the reason that there was no cost of acquisition in acquiring the flat which had been transferred and the computation mode given under section 48 was, thus, inapplicable in such cases.That firstly money has not been received by the assessee from the society – under the agreement entered into between the developer, the society and the members, the consideration was payable to the members by the developers for transfer of respective entitlements of the members and secondly, the "principle of mutuality" applied in this case between the society and its members and, therefore, the sum could not be taxed as dividend in the hands of the assessee. (A.Y. 2005-06) **Dy. CIT v. IGE India Ltd. (2013) 22 ITR 462 (Chennai)(Trib.)**

137. S.47: Capital gains-Transaction not regarded as transfer-Assessee acquiring title directly or indirectly before 1/4/81, the FMV as on 1/4/81 was to be adopted as cost of acquisition for purpose of computing capital gain on sale of said property. [S.2(42A,49(1)(ii) 55]

In this case, Ld. CIT(A) agitates the direction by the Ld. CIT(A) in taking the fair market value of the capital asset as on 1/4/81, being prior to that date, as its cost of acquisition, as against of the said value by the Assessing Officer. The issue in dispute before Tribunal was whether from which date the cost inflation index would apply in computing the LTCG under reference. Dismissing the appeal, the Tribunal held that the conveyance of property through inheritance or by will is not regarded as a transfer under section 47 of the Act. The cost of acquisition to the previous owner i.e., the owner who comes to own the property through inheritance by will is not regarded as a transfer under section 47 of the Act. The cost of acquisition to the previous owner i.e., to the owner which comes to own the property in a manner other than these specified in section 49(1)(ii), or succession or inheritance or devolution as per section 49(1)(iii) is to be deemed as the cost of acquisition in the hands of the assessee, in whose hands the entire capital gains

on the transfer of the property is to be computed. The fiction extends to be holding period of the asset as well, so that the lives of the testator and the legatee/s are combined for reckoning the holding period (Expl. 19b) to section 2(42A). Further, where the date of acquisition is prior to 1/4/81 i.e., the cut-off date, the assessee, may at its option substitute the fair market value of the capital asset as on that date for its cost of acquisition. Therefore the cost held that the treatment of FMV of the asset as on 1/4/81 was to be treated as the cost of acquisition. (A.Y. 2006-07) **ITO v. Noella P. Perry(Ms) (2013) 56 SOT 495 (Mum.)(Trib.)**

138. S.48: Capital gains – Full value of consideration – Family arrangement-Sale of shares at loss due to family arrangement disallowance of loss was not valid. [S.45]

Assessee company sold some shares and claimed long-term capital loss on sale of such shares .The Assessing Officer disallowed the claim of loss on the plea that the shares were sold due to family arrangement at the low price and hence the loss had been contrived. Tribunal allowed the claim of loss. On appeal by revenue the Court held that the Assessing Officer disallowed the assessee's claim on plea that the shares were sold due to family arrangement at very low price. However, assessee's claim was to be allowed as the Assessing Officer had merely alleged that shares were sold at very low price, but he had not discharged burden of proving the same.(A.Y. 2004-05) **CIT v. Tainwala Chemicals & Plastics India Ltd. (2013) 215 Taxman 153(Mag.) (Bom.)(HC)**

139. S.48: Capital gains –Leasehold Land acquired at NIL value prior to 1.4.81 – determination of "fair market value" – provision of section 55(2)(a)(ii) is not applicable while valuing the "cost of acquisition" of the land and value of the lease-hold rights in the land in question has to be determined in accordance with the section 48 of the Act by valuing "fair market value" of the land as on 1.4.1981. [S.55(2)(a)]

The assessee had taken land on lease for 98 years vide registered deed dated 15.9.1966. Revenue authorities took the cost of acquisition of the land as NIL by invoking the provisions of section 55(2)(a)(ii). The assessee claimed that in accordance with the scheme of the Act and in particular the provision of section 48 of the Act, the assessee was entitled to adoption of fair market value of the land as on 1.4.1981 and the indexed cost of the acquisition thereof. On appeal by the assessee to the Tribunal, held partly

allowing the appeal: Section 55(2)(a) applies only in relation to the capital assets specifically mentioned in the Section only. The capital assets as mentioned in the Section are exhaustive and all inclusive of capital assets, such as goodwill, trade mark brand name, right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours, and being an exhaustive list of capital assets, any other capital asset such as land etc. could not be included for the purpose of valuation of "cost of acquisition" for the purposes of sections 48 and 49. The Legislature has intentionally not added word "land" in the provision of Section 55(2)(a). Accordingly, the value of the lease-hold rights in the land in question of the assessee, has to be determined in accordance with the provision of section 48 of the Act by valuing "fair market value" of the land as on 1.4.1981 and the indexed cost of acquisition has to be determined in order to assess long term capital gains in the hands of the assessee; and cost cannot be taken as 'nil'. (A.Y. 2007-08) **Natraj v. Dy. CIT (2013) 56 SOT 23 / 152 TTJ 619 (Ahd.)(Trib.)**

140. S.50: Capital gains–Chargeability–Slump sale or itemised sale–Mere execution of a conveyance. [S.45]

The mere execution of a conveyance of immovable properties by itself do not constitute sale of itemised assets. It could not be made out whether any other movable assets used by the transferor or the assessee were also the subject matter of sale. It could not be held that sale was a slump sale. Matter was remanded for reconsideration. (A.Y. 1996-97) **CIT v. Mahabaleswara Enterprises (2013) 86 DTR 297 (Karn.)(HC)**

141. S.50C: Capital gains–Value of transferred property–Insertion of the words "or assessable" will have prospective.

The insertion of the words "or assessable" in section 50C w.e.f. October 1, 2009 introduces a new set of class of transfer and would have prospective effect only. (A.Y. 2005-06) **CIT v. R. Sugantha Ravindran (2013) 352 ITR 488 (Mad.)(HC)**

142. S.50C: Capital gains-Full value of consideration-Stamp valuation-lease hold rights – MIDC Land.

It is settled position that the provisions of section 50C do not apply to lease hold rights. However whether or not an assessee has mere lease hold rights or has rights superior to lease rights would depend upon correct interpretation of the deeds. Merely because the

nomenclature given to the deed is of 'Lease', it does not follow that the assessee has only lease rights. Matter remanded. **Shavo Norgren (P) Ltd v. Dy. CIT (2013) 81 DTR 434 (Mum.)(Trib.)**

……..End of the Document……..