1. BASIC CONCEPTS

1. **Whether the action taken by the assessee in giving up her right to claim the property amounts to transfer as defined in section 2(47) of the Income-tax Act, 1961?)**

   CIT v. Smt. Laxmidevi Ratani (2008) 296 ITR 363 (MP)

   Relevant Section: 2(14) & 2(47)

   The assessee-firm entered into a contract to purchase certain immovable property. The agreement was not carried out by the seller and the assessee was compelled to file a suit for specific performance of contract against the owner of the property. Ultimately a compromise was arrived at. In terms of the compromise the vendor agreed to pay the assessee a sum as consideration. The Assessing Officer treated the receipt of Rs.14,85,001 to be in the nature of capital gains in the hands of the assessee and accordingly taxed it. In appeal filed by the assessee, the Commissioner (Appeals) upheld the view of the Assessing Officer. The Tribunal however held that the receipt in question could not be regarded as and taxed as capital gains as defined under section 2(47) of the Act in the hands of the assessee.

   The High Court held that the receipt was exigible to capital gains tax as it involved transfer of property within the meaning of section 2(47). The action on the part of an assessee in giving up her right to claim the property and instead accepting money compensation is a clear case of relinquishment of a right in the property resulting in transfer as defined in section 2(47). When the legislature defines a particular type of transaction to be in the nature of transfer for taxing purpose, effect has to be given to it.

2. **Can the amount of share application money be treated as undisclosed income if it was found that the subscribers to the share capital were not genuine?**

   CIT v. Electro Polychem Ltd. (2007) 294 ITR 661 (Mad)

   Relevant Section: 68

   The assessee-company filed its return of income for the relevant assessment years. The Assessing Officer found that the assessee had brought share capital by way of share applications in fictitious names. Accordingly, he made additions under section 68 in respect of the share application money.

   The issue under consideration in this case is whether the amount of share application money can be treated as undisclosed income if it is found that the subscribers to the share capital are not genuine.

   The Madras High Court applied the ratio of the decision of the Delhi High Court in *CIT v. Stellar Investment Ltd. (1991) 192 ITR 287* in this case. In that case, it was held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company. This observation of the Delhi High Court was confirmed by the Apex Court in *CIT v. Stellar Investment Ltd. (2001) 251 ITR 263.*

3. **Can there be any addition under section 69A on account of the valuation report of the Valuation Officer that the assessee has invested unexplained income?**

   CIT v. Star Builders (2007) 294 ITR 338 (Guj.)

   Relevant Section: 69A

   The issue of whether a reference can be made to any Valuation Officer to find out the cost has been considered in the case of *Smt. Amiya Bala Paul v. CIT (2003) 262 ITR 407,* wherein the Supreme Court held that reference can be made to the Valuation Officer for the purpose of sections 55A, 131, 133(6) and 142(2) but not for the purpose of finding out the cost. Further, in this case, the High Court observed that since the business of the assessee is construction, even if some unexplained income has been invested in construction, the effect would be nullified on account of consideration of such investment as cost of construction.

2. INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

1. **Whether the share income of a partner received by a sub-partnership firm from the main partnership firm is exempt under section 10(2A) in the hands of the sub-partnership firm?**

   Radha Krishna Jalan v. CIT (2007) 294 ITR 28 (Gauhati)

   Relevant Section: 10(2A)

   The High Court observed that the pre-requisite for claiming exemption under section 10(2A) is that a person should be a partner of a firm which is separately assessed. Though sub-partnership has not been defined under the Indian Partnership Act, 1932 or in the Income-tax Act, 1961, it has been recognized in India and registration concurred under the Indian Income-tax Act, 1922. The diversion of income of a partner in the main partnership at source to the sub-partnership [on account of the overriding obligation created by the sub-partnership] vests an enforceable right upon the sub-partnership to claim a share in the profits accruing to, or received by, a partner. Therefore, a sub-partnership which is in receipt of the share of profit of a partner in the main partnership, has to be deemed to be a partner in the main partnership for the limited purpose of section 10(2A).

   Note – Let us understand the concept of sub-partnership with the help of a small example. ABC & Co. is a partnership firm with partners A, B and C. B and C constitute a sub-partnership BC & Co. The share income of B and C from the main-partnership ABC & Co. gets diverted at source by overriding title to the sub-partnership BC & Co., which is entitled to exemption under section 10(2A)

3. CHARITABLE OR RELIGIOUS TRUSTS AND INSTITUTIONS

1. **Is a trust entitled to exemption under section 11, where its object was to establish a dharamshala mainly for its members and the amount charged from outsiders was considerably higher in comparison to the nominal charges paid by the members?**

   Shri Dhakad Samaj Dharamshala Bhawan Trust v. CIT (2008) 302 ITR 321 (MP)

   Relevant Section: 11 & 12A

   The assessee-trust applied for registration under section 12A. The Commissioner of Income-tax refused registration mainly on the basis that : (i) the object of the trust was to establish a dharamshala only for the members of the Dhakad Samaj; (ii) Dhakad Samaj was not a backward class as it was not limited to the Dhakad community, but included persons from Brahmin, Jain, Maheshwari and Kirar communities; and (iii) it was not a religious trust as providing accommodation to the pilgrims, could not be said to be a religious function nor had the trust so far carried out any religious activity. The Tribunal on appeal affirmed the order passed by the Commissioner of Income-tax.

   The High Court held that though provision had been made for charging a token amount from persons belonging to the Dhakad Samaj, the charges for stay in the case of persons not belonging to the Samaj were many times the charges for persons belonging to the Samaj. Merely because the accommodation created was in a religious place, it could not be said that providing dharamshala was for religious purposes. There should be something more to suggest its nexus with the religious or charitable purpose. It might not be with the intention to make money, but at the same time it did not fulfil the requirement of section 11. The assessee-trust was not entitled to registration.

   It is only when it is proved that the property is consecrated for charitable or religious purposes that the trust may become entitled to registration subject to fulfillment of other conditions. Since section 11 of the Income-tax Act, 1961, provides for exemption to the trust registered under the Act, it is primarily the purpose of section 11 that will dominate or prevail over other consideration.

2. Is it necessary for the assessee-trust to specify in Form No. 10 the purpose for which the accumulation of money is sought to be made?

Director of Income-tax v. Mitsui and Co. Environmental Trust (2008) 303 ITR 111 (Del.)

Relevant Section: 11

The assessee, a charitable trust, filed an application with reference to section 11(2) of the Act for accumulation of income. In the application, the assessee stated that the amount would be utilised for the objects of the trust. The Assessing Officer was of the view that the purpose of accumulation had not been specified, but only mentioned in a general manner and, therefore, the primary condition of section 11(2) of the Income-tax Act, 1961, was not fulfilled. It was also held by the Assessing Officer that the amount so accumulated or set apart was not invested by the assessee as provided under section 11(5) of the Act. The view taken by the Assessing Officer was accepted by the Commissioner of Income-tax (Appeals) but the Tribunal reversed this view.

In the case of accumulation of income by a charitable trust the purpose or purposes to be specified cannot be beyond the objects of the trust. Plurality of the purposes for accumulation is not precluded. In other words, it need not necessarily be specifically stated for which purpose the accumulation is sought. Hence, the High Court held that the purpose of accumulation need not be specified.

3. Whether the assessee is entitled to exemption under section 11 in case he has submitted the returns for admitting the income as business income?

CIT v. Sengunthar Thirumana Mandapam (2008) 298 ITR 330 (Mad.)

Relevant Section: 11

The assessee-society was allotted a land by the Collector of Salem District in 1984, on the specific condition that the land should be used for kalyana mandapam. As per the guidelines given by the Collector, the assessee should build a kalyana mandapam and it should function for the benefit of local people, mainly weavers and agriculturists. Any infringement of the above condition would enable the Collector to take over the land along with the building. The grant also provided to charge a very nominal rent for the building to meet maintenance, repairs and renovation expenses. Accordingly, the assessee was running a kalyana mandapam and collecting minimum nominal charges from the users. That apart, the assessee also started receiving voluntary donations from the accounting year 1989-90. A notice was issued to the assessee under section 148 of the Income-tax Act, 1961, for the assessment years 1990-91 to 1997-98, since the assessee itself admitted the income for the assessment years 1998-99 and 1999-2000, as income from business, which was also accepted under section 143(1)(a). The assessee filed nil returns and claimed exemption under section 11. The Assessing Officer rejected the claim but the Commissioner of Income-tax (Appeals) and the Tribunal accepted it.

On appeal, the High Court held that both the Commissioner of Income-tax (Appeals) and the Tribunal had rendered a clear finding based on the admitted facts of the case that the land was given by the Collector of Salem District to the assessee to construct a kalyana mandapam on the specific condition that it should function for the benefit of local people, mainly weavers and agriculturists. The grant also provided for collecting nominal rent for the building to meet maintenance, repairs and renovation expenses. It was not in dispute that the assessee used to let the kalyana mandapam for social and charitable activities collecting nominal rent. The assessee had applied for registration as required under section 12AA on December 31, 1999, and the registration was given with retrospective effect from April 1, 1990, by the competent authority. The failure to use the accumulated funds for any other charitable purpose, by itself, would not divest the assessee of the right to claim exemption under sections 11 and 12AA. The mere fact that the assessee submitted the returns for the assessment years 1998-99 and 1999-2000 admitting the income as business income would not take away the rights of the assessee to claim the benefit of exemption, as there could not be any estoppel against section 11. The assessee was entitled to exemption under section 11.

4. INCOME FROM SALARIES

1. **Whether the reimbursement of medical expenditure incurred outside India can be considered as an amenity or benefit provided by a company to its director?**
   CIT v. D. P. Kanodia (2008) 296 ITR 616

   Relevant Section: 17

   The assessee, a director in a public limited company, claimed deduction in respect of the expenditure incurred on his heart surgery. The Assessing Officer held that the expenses although allowed on the strength of a resolution of the board of directors could not be permitted to the assessee even on humanitarian grounds as it was not obligatory on the part of the employer to bear such expenses. Therefore, he taxed the amount treating it as a perquisite in terms of provisions of section 17(2)(iii)(a), and this was confirmed in appeal. The Tribunal, on further appeal, held that the receipt towards reimbursement of medical expenses could not constitute a perquisite or benefit received by the assessee from the employer company. It was also held that the expenditure was actuated by motive of commercial expediency and that in the case of the employer, the expenditure was allowed without making any disallowance under section 40A(5).

   The High Court held that reimbursement towards medical expenditure could not be considered as an amenity provided by a company to its director. It was only an exceptional situation that the director had to undergo the surgery. Moreover, it could not be treated as a benefit. It would not qualify under sub-clause (a) of sub-section (2) of section 17 as it could not be considered as an amenity or benefit granted by the employer and therefore, it was not a "perquisite" within the meaning of section 17(2)(iii)(a).

5. INCOME FROM HOUSE PROPERTY

1. **Whether the rental income received from any property in the construction business can be claimed under the head of 'Income from property' even though the said property was included in the closing stock and expenses on maintenance were debited to the profit and loss account?**

   CIT v. Neha Builders P. Ltd. (2008) 296 ITR 661

   Relevant Section: 22

   The assessee-company was engaged in the business of construction of property, and one of the building properties was included in the closing stock in the balance-sheet drawn for the business. The assessee filed a revised return submitting that a part of its property was given on rent and the income derived on that basis should be computed under the head "Income from house property" and not as business income. The Assessing Officer, during the course of the assessment proceedings, observed that the expenses on maintenance of the property were debited to the profit and loss account and so also the building was shown as stock-in-trade, and therefore the property would partake the character of stock and any income derived from stock could not be taken to be income from property. He assessed it as business income. The Tribunal held that it was assessable as income from property.

   The High Court held that from the statement of the assessee, it would clearly appear that it was treating the property as "stock-in-trade". Not only this, it would also be clear from the records that, except for the ground floor, which had been let out by the assessee, all other portions of the property constructed had been sold. If that be so, the property, right from the beginning was "stock-in-trade". Income derived from property would always be termed as "Income from house property", but if the property is used as "stock-in-trade", then the said property would become or partake the character of stock, and any income derived from the stock, would be "Income from business", and not income from house property. The income was therefore assessable as business income.

2. **Whether income from lease of a property by company can be assessable as income from house property?**

   Keyaram Hotels P. Ltd. v. ACIT (2008) 300 ITR 118 (Mad.)

   Relevant Section: 22

   The assessee-company had let out the premises. The lease agreement executed clearly specified that the rent payable for the premises let out to the lessee for ground and first floors. The assessee claimed that the income was assessable as business income. The Assessing Officer held that it was income from property and this was upheld by the Commissioner (Appeals) and the Tribunal.

   The High Court held that no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease amount, rent or licence fee) received by an assessee from leasing or letting out the assets would fall under the head of "Profits and gains of business or profession". It is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case including the true interpretation of the agreement under which the assets are let out.

   In the instant case, that the assessee earned income out of exploitation of the property by letting it out to the lessee. There was neither commercial activity nor business activity carried out by the assessee to earn such income. The objects clause contained in the memorandum of association of the assessee-company would not alter the nature of the activity of the assessee-company. It was clear that the assessee-company was only exploiting the property as owner by leasing out the same and realised income by way of rent. Such rental income was liable to be assessed as income from house property.

3. **Whether the amount spent by the assessee towards stamp duty for drawing up the lease deed and the registration could be allowed to be as deducted while determining the annual value?**

   CIT v. Premnath Motors (Raj) P. Ltd. 297 ITR 083 (Raj.)

   Relevant Section: 23 & 24

   The assessee is a private limited company. For the assessment year 1985-86, in its return, the company claimed a sum of Rs.33,074 as a deduction on account of payments for stamp duty and registration charges from the income shown under the head "Income from property". The Assessing Officer did not allow the claim of the assessee-company. While doing so, the Assessing Officer held that the expenses in connection with lease agreement are in the nature of capital expenditure and section 24 does not provide any allowance of such expenditure from the property income.

   In the determination of annual value of property under section 23 of the Income-tax Act, 1961, what is to be deducted is provided in the section itself, for example where the property is in the occupation of a tenant, the tax levied by any local authority in respect of the property to the extent such taxes are borne by the owner are allowed to be deducted in the determination of annual value of the property of that previous year in which such taxes are actually paid. Once the annual value is determined what deductions are to be made from income from house property is provided in section 24.

   Hence, it was held, that the amount spent by the assessee towards stamp duty for drawing up the lease deed and the registration could not be allowed to be deducted in determining the annual value.

6. PROFITS AND GAINS OF BUSINESS OR PROFESSION

1. **The assessee purchased units of a mutual fund, primarily out of borrowed funds, and sold the same at a loss after declaration of dividend. Is such a transaction a business transaction or an adventure in the nature of trade?**

   Ajit Jain v. CIT (2007) 294 ITR 435 (SC)

   Relevant Section: 28

   The assessee purchased units of a mutual fund for Rs.1 crore using Rs.5 lakhs out of own funds and by borrowing Rs.95 lakhs. He sold the same for Rs.68.25 lakhs after the mutual fund declared a dividend of Rs.29.03 lakhs. The issue under consideration is whether such a transaction can be considered as a business transaction and can such loss be allowed as a business loss.

   Although the Tribunal had proceeded on the premise that the transaction under consideration was genuine, the High Court observed that this was not a genuine business transaction and that the assessee had not incurred any such loss. The assessee contended that it had a clear intention to earn profit as the amount of dividend earned should have been taken into consideration having regard to the decision of the Supreme Court in *G. Venkataswami Naidu and Co. v. CIT (1959) 35 ITR 594*. Further, similar transactions entered into by the assessees during the subsequent years had been accepted as business transactions.

   The Supreme Court, in view of its judgment in *G. Venkataswami Naidu and Co.,* opined that one of the relevant factors for determining whether the transaction is one of business or an adventure in the nature of trade is whether the assessee had carried on similar transactions. The matter was remitted to the Tribunal for consideration of this aspect.

2. **Whether the expenditure incurred on replacement of turbine rotor would be allowed as revenue expenditure under section 31 of the Income-tax Act, 1961?**

   CIT v. Renu Sagar Power Co. Ltd. (2008) 298 ITR 094 (All.)

   Relevant Section: 31

   The assessee had two thermal power plants of generating capacity of 67.5 MW each for its captive power plant. The Assessing Officer rejected the claim of the assessee amounting to Rs. 1,05,44,904 as the cost of the turbine rotor. However, the Tribunal found that the turbine rotor was an essential part of turbo generator set. It was not an independent machinery or plant. The turbine rotor on its own independent functioning could not generate electricity. Hence, the assessee was entitled to the deduction. The High Court, relying on the tribunal's finding that the turbine rotor was part of the turbo generator set, held that the expenditure by the assessee on the replacement of one turbine rotor amounting to Rs.1,05,44,904 was on account of current repairs and hence, allowable as revenue expenditure.

3. **In respect of machinery installed in an earlier year, is depreciation allowable for that year on additional customs duty paid during the subsequent year?**

   CIT v. Funskool (India) Ltd. (2007) 294 ITR 642 (Mad)

   Relevant Section: 32

   On this issue, the High Court followed the ruling of the Gujarat High Court in *Atlas Radio and Electronics (P) Ltd. v. CIT (1994) 207 ITR 329*. In that case, the issue was whether the assessee was entitled to claim development rebate in the subsequent year for the machinery purchased during the preceding assessment year. The Gujarat High Court had held that even though the amount of sales tax was paid in the subsequent year, the liability to pay sales tax arose in the accounting period relevant to the assessment year in which machinery was purchased. Since the liability to pay sales tax increased the cost of machinery, development rebate had to be claimed in the assessment year in which machinery was purchased. Accordingly, the assessee was entitled to development rebate in the assessment year in which machinery was purchased.

In the instant case, the assessee paid the additional customs duty in the subsequent period of acquisition and claimed depreciation during the period when the machinery was imported. The Tribunal allowed the claim of the assessee towards depreciation holding that the payment of additional customs duty had to be added to the cost of machinery imported. The Madras High Court applied the ratio of the decision of the Gujarat High Court in *Atlas Radio and Electronics (P) Ltd.* and allowed the assessee's claim for depreciation during the year in which the machinery was imported.

Note *- Development rebate is not relevant for the students since it is no longer allowable under the Income-tax Act. The Gujarat High Court ruling has been elaborated above only for the purpose of understanding the principle enunciated therein and applying the same to find out the admissibility of depreciation in the year of importing machinery on additional customs duty paid during the subsequent year.*

4. **Whether the container/tanker mounted on a vehicle was nothing but a big cylinder because it had all attributes of a cylinder?**

CIT v. Goyal Mg Gases Ltd. (2008) 296 ITR 72 (Del)

Relevant Section: 32

The assessee claimed depreciation at the rate of 100 per cent on containers/cylinders mounted on trucks. The Assessing Officer was of the view that the so called cylinders were merely containers and were mounted on trucks, the assessee was entitled to depreciation at the rate of 25 per cent (now 15%) as eligible to "plant and machinery". In his appeal before the Commissioner (Appeals), the assessee submitted that the tanks were nothing but cylinders mounted on vehicles. It was also explained that the truck chassis on which the cylinders were mounted were not owned by the assessee but were taken on hire. The Commissioner (Appeals) accepted by the assessee's plea, and his order has been upheld by the Tribunal.

In the instant case, the High Court held that the expression "gas cylinder" used in Appendix I to the Income-tax Rules does not mention the size of the gas cylinders nor does it say that gas cylinders should be only for cooking purpose or for any other particular purpose. Hence, all gas cylinders are entitled to depreciation at the rate of 100 per cent. The chassis on which the cylinders are carried does not belong to the petitioner. Hence, it cannot be said that the cylinders are part of the truck.

5. **Whether the proportionate lease rent paid by the mining lessee for acquiring such leasehold rights would be a capital expenditure or revenue expenditure?**

Enterprising Enterprises v. DCIT (2007) 293 ITR 437 (SC)

Relevant Section: 37

The assessee had taken a quarry on lease for 10 years. It paid a one-time lease rental for acquiring such leasehold rights for extracting minerals from mineral bearing land. The assessee claimed proportionate lease rental for acquiring such leasehold rights as revenue expenditure.

The issue under consideration is whether the proportionate lease rent paid by the mining lessee for acquiring such leasehold rights would be a capital expenditure or revenue expenditure.

The Supreme Court observed that there is a distinction between a case where royalty or rent is paid and a case where the entire amount of lease is paid either one-time or in installments. The Apex Court observed that in the former case, it would be revenue expenditure but in the latter case, it would be a capital expenditure.

Therefore, in the case on hand, the one-time lease rental paid is a capital expenditure.

6. **Whether the expenditure incurred by the assessee to set up the new unit which was a part of the existing business would be a capital expenditure or revenue expenditure?**

CIT v. Relaxo Footwears Ltd. (2007) 293 ITR 231 (Delhi)

Relevant Section: 37

The assessee-company was engaged in trading rubber footwear of all types. During the relevant assessment year, it started the business of manufacture and sale of hawai chappals. The assessee claimed the expenses incurred on the new unit prior to commencement of the manufacturing process as deduction, which was disallowed by the Assessing Officer. The Revenue filed an appeal before the High Court contending that such expenses incurred prior to commencement of manufacture had to be capitalised.

The High Court dismissed the appeal of the Revenue holding that the new unit was a part of the existing business and there was unity of control and interlacing of the units. Therefore, the expenditure incurred by the assessee to set up the new unit which was a part of the existing business was allowable as revenue expenditure.

7. Can expenses incurred prior to formation of a firm be allowed as a deduction in a case where the contract receipts were received after the firm came into existence?

CIT v. Guru Nanak Construction Co. (2007) 294 ITR 294 (P&H)

Relevant Section: 37

The issue involved in this case is regarding the admissibility of deduction in respect of expenditure incurred prior to formation of a firm. The firm came into existence on 1st April of the relevant assessment year and expenses were incurred prior to that date. Receipts against the contract work done prior to 1st April were received after that date. Therefore, the assessee contended that since such expenses could not be claimed until the receipts were booked, the same had to be carried forward and allowed in the succeeding accounting period commencing from the relevant assessment year.

The High Court observed that the expenditure incurred by the assessee was genuine business expenditure. The assessee incurred expenditure during the previous year in which there were no receipts from business. Therefore, there was no question of such expenditure being set-off against any income. Hence, such expenditure had to be carried forward to the next year when the firm got receipts from the contract, and allowed as deduction in that year.

8. Can bakshish paid to the labourers of a co-operative society engaged in the manufacture and sale of sugar be allowed as a deduction?

CIT v. Samarth Sahakari Sakhar Karkhana Ltd. (2007) 294 ITR 540 (Bom.)

Relevant Section: 37

The assessee co-operative society was engaged in the manufacture and sale of sugar. The tripartite agreement between the assessee, the State Government and the harvesting and transport contractors provided for payment of a mutually agreed rate and commission by the assessee to the harvesting and transport contractors for transporting the harvested sugarcane to the factory. The Assessing Officer disallowed the following expenditure –

(a) Interest paid by the society on borrowed funds on the ground that the society had borrowed such funds at a higher rate of interest and diverted a portion of the same to the harvesting and transport contractors at a lower rate of interest.

(b) Bakshish paid by the society to the labourers employed by the contractors.

The High Court observed that –

(a) timely supply of harvested sugarcane by the harvesting and transport contractors is very critical for the assessee during the crushing season. Therefore, it was in the business interest of the assessee to give some amount in advance to meet the requirements of the contractors. Such advances were interest-bearing and were given to guarantee that the contractors supplied harvested sugarcane on time. Thus, interest paid on funds borrowed by the assessee cannot be disallowed since such funds were advanced to the contractors in the business interests of the assessee.

(b) the practice of giving bakshish to the workers employed by the harvesting and transport contractors has been prevailing in the State of Maharashtra for decades. Such expenditure had been consistently allowed in the past in the case of the assessee and also many other sugar factories. Since only the skilled labourers could do the job of harvesting and transporting the sugarcane, bakshish to the tune of Rs.200 to Rs.250 was given to induce them to continue the work during the summer months as well. Such payment is, therefore, deductible.

9. Is expenditure incurred by the assessee-company on the training of an employee allowable as deduction, if there is no business necessity for such training?

Silicon (India) Ltd. v. DCIT (2007) 295 ITR 422 (Mad)

Relevant Section: 37

The Assessing Officer, in this case, disallowed the training expenses incurred by the assessee-company on the ground that such expenses were not related to the business of the assessee. The disallowance was upheld by the Tribunal on the following grounds –

(1) the expenses were incurred on an employee, who was the son of the director of a group company, for his higher education abroad;

(2) the business was not commenced by the end of the relevant previous year in respect of which such deduction was claimed;

(3) the employee had joined a full-time Master's course of Engineering Degree in computer science, which cannot be considered as a training course. Therefore, it is not the case of sending an employee to acquire technical competency;

(4) no material or evidence or compelling reason was given as to how the higher studies are indispensable for the company;

(5) the assessee-company had received unsecured loan from a group company, in which the employee's father was a director and it had utilised the said loan to meet the education expenses of the employee.

The High Court, therefore, held that such expenses were not deductible since there was no material to show that there was a commercial expediency or business necessity for sending the employee abroad for higher education.

10. Whether the Commissioner (Appeals) can decide on the reasonableness of expenses for the purpose of determining whether in fact the amount was spent?

CIT v. Devayhi Beverages Ltd. (2008) 296 ITR 41 (Del.)

Relevant Section: 37

The assessee, a manufacturer of soft drinks, claimed breakage, leakage and burst, etc., of bottles and debited an amount of Rs.1,38,54,100. Out of this amount, the assessee voluntarily added back a sum of Rs.85,52,347 leaving a balance of Rs.53,01,853 which was claimed as discount, etc., allowed to dealers for breakage, leakage, etc. The Assessing Officer without giving opportunity to the assessee added the entire amount of Rs.53,01,853 to the income of the assessee. The assessee placed all the relevant material before the Commissioner (Appeals). The Commissioner (Appeals) did not doubt the nature of the transactions nor the transactions themselves but came to the conclusion that the percentage of commission given to sales in the earlier year should not be exceeded in the present assessment year as well. The Tribunal held that the Commissioner (Appeals) could not assume the role of the assessee and decide what should have been the appropriate expenditure towards discount, etc. Reasonableness of expenses could be gone into for the purpose of determining whether in fact the amount was spent. But, if there is a nexus between the expenditure and the purpose of the business, the Revenue cannot be allowed to substitute its opinion for that of the assessee, as if the Revenue were itself the businessman.

11. **Can the expenditure incurred by the assessee on shifting the factory be treated as a revenue expenditure?**

CIT v. Loyal Super Fabrics (2008) 304 ITR 078 (Mad.)

Relevant Section: 37

The assessee-company, engaged in the business of dyeing and processing of cloth, had claimed in its return a sum of Rs.6,80,908 being the expenses incurred for shifting the factory as revenue expenditure. The Assessing Officer disallowed the claim and treated it as capital expenditure. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal considering the reason for shifting the factory held that the expenditure incurred was revenue expenditure.

The High Court held that the assessee did not have any option but to shift the factory due to opposition by the public against letting out of the sewage water. If the very survival of the assessee-factory in the existing place itself was at stake, the question of applying the test of enduring advantage did not arise. The test of enduring benefit was not certain and conclusive test and it could not be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. Therefore, the expenditure incurred by the assessee on shifting the factory was revenue expenditure.

12. **Can advertisement expenditure incurred on products of a sister concern be allowed as business expenditure?**

CIT v. Sabena Detergents P. Ltd. (2008) 303 ITR 320 (Mad)

Relevant Section: 37

The assessee-company, engaged in the business of trading in scouring powder, pickles etc., claimed expenditure for advertisement of pickles marketed by it, which were manufactured by its sister concerns. The Assessing Officer noting that the advertisement expenditure incurred was for promoting the products manufactured by its sister concerns and observing that there was no memorandum of understanding or agreement between the assessee-company and the manufacturing company in this regard, held that the advertisement expenditure could not be allowed as expenses attributable to its business. The Commissioner (Appeals) dismissed the appeal filed by the assessee on the finding that the assessee was required to bear the cost of exhibition, display and screening of advertisement and the letter dated March 31, 1995, of the principal manufacturer was only self-serving evidence and in the absence of any validly executed agreement or understanding between the assessee and its sister concerns, the expenditure incurred could not be allowed. The Tribunal allowing the appeal by the assessee held that the advertisement expenditure incurred by the assessee could not be strictly construed as expenditure incurred for promoting the products manufactured by its sister concerns, but also for the purpose of the assessee's trade, as the assessee itself was the marketing agent and sole distributor of the pickles and the scouring powder manufactured by its sister concerns.

The High Court held that the marketing of the products of its sister concerns, by itself, was a trade undertaken by the assessee and the expenses claimed by the assessee were the expenses incurred during the course of such marketing. The assessee incurred expenses not in its personal capacity as an agent for the products manufactured by its sister concerns but in its capacity as a businessman in marketing the products by itself.

13. **Whether an expenditure on payment to eliminate competition is a capital expenditure?**

CIT v. Eicher Ltd. (2008) 302 ITR 249 (Del)

Relevant Section: 37

In order to protect its business interests, market position and profitability, the assessee paid an amount of Rs.4 crores to restrain VCPL and V, one of its full time employees, from becoming its potential business rivals and claimed this amount as business expenditure. The Assessing Officer disallowed the claim. The Commissioner (Appeals) and the Tribunal held that the payment was made to protect the assessee's business interests with no new asset being created, that its profit-making apparatus was not

expanded or increased as it did not suffer any loss or erosion in its capital assets, and that the payment was allowable as a business expenditure.

The High Court held that the assessee did not acquire any capital asset on payment of the non-compete fees but merely eliminated competition in the two-wheeler business for a while. It was not clear from the record, for how long the restrictive covenant was to last. It was neither permanent nor ephemeral and the advantage was not of an enduring nature. There was nothing to show that the amount was drawn out of the capital of the assessee. The Commissioner (Appeals) and the Tribunal were right in concluding that the payment of non-compete fee was business expenditure and not capital expenditure.

14. Whether the payments made to the partners by the assessee-firm for the specific services rendered by them were allowable under section 40(b)?

CIT v. Rajam Ramaswamy and Sons (2008) 298 ITR 325 (Mad.)

Relevant Section: 40(b)

In this case, the Assessing Officer has disallowed the claim of the assessee for a sum of Rs. 1,30,000 paid to the partners under section 40(b) of the Income-tax Act and adds as the income of the firm. On appeal, the CIT(Appeals) allowed the appeal directing the Assessing Officer to delete the addition, which was, on further appeal, confirmed by the Income-tax Appellate Tribunal.

The High Court held that on the facts of the case, it was found that payments made to the partners were not in their capacity as partners, but were made for the specific services rendered by them. By applying the ratio laid by the Andhra Pradesh High Court in *CIT v. Chitra Kalpana (1988) 169 ITR 678*, the High Court upheld the order of the Tribunal by holding that the payments made to the partner, by the assessee-firm, for the specific services rendered cannot be disallowed under section 40(b) of the Act.

15. Can sales tax collected but not paid to the sales tax department be included in the total income of the assessee?

CIT v. United Cardamom Auctioners (2007) 295 ITR 574 (Ker)

Relevant Section: 43B

The assessee-firm filed its return of income for the relevant assessment year disclosing income of Rs.78,027. The Assessing Officer added the amount of sales tax etc., which was not paid to the sales tax department, to the income of the assessee. The High Court observed that sales tax collected is taxable as a trading receipt. Under section 43B, deduction is allowed only in the year in which such sums are actually paid over to the Government account. The sales tax recovered by the assessee along with the sale price would be a part of its trading receipts. The amount of sales tax should have been credited in the accounts as income and deduction should have been claimed for the amount actually paid over to the sales tax department. The High Court held that the amount collected as sales-tax but not paid over to the sales tax department and outstanding under the respective heads at the end of the accounting year is includible in the assessee's total income.

16. Can the amount of sales tax collected and kept as a contingency deposit be treated as a trading receipt?

Ishwardas Sons v. CIT (2007) 295 ITR 473 (Ker.)

Relevant Section: 43B

The assessee was a commission agent receiving commission from agency dispatches. The Assessing Officer, while completing the assessment of the assessee for the relevant assessment year, observed that a certain sum shown as "contingency deposit" in the balance sheet represented amounts collected as deposit towards sales tax but not remitted to the Department. The Assessing Officer, therefore, included the sum in the total income of the assessee. The assessee contended that section 43B was not applicable to the contingency deposit.

The High Court observed that the amount of sales tax collected formed part of the assessee's trading receipts. The mere fact that the assessee had created a head "Contingency deposit" and kept the collection as such without remitting the amount to the sales tax department would not alter the nature of

the receipt. The Court held that the sales tax collections made by the assessee and shown under the head "Contingency deposit" had to be considered as a trading receipt and included in the total income of the assessee.

Note *– The disallowance under section 43B would be attracted for non-remittance of tax collected irrespective of the nomenclature used and the accounting head under which it is categorized.*

17. Whether purchase of shares from a broker on 'principal to principal basis' and resale of the same without taking physical delivery thereof amounts to a speculative transaction, in a case where the assessee pays only the difference in the amount of the purchase and sale value.

Bhikamchand Betala and Sons v. ITO (2007) 294 ITR 10 (Gauhati)

Relevant Section: 43(5)

The High Court held, based on the Calcutta High Court decision in *Abdul Gani (1969) 72 ITR 6*, that the transactions which were settled by payment of differences must be treated as speculative transactions. This is irrespective of the fact that the assessee did not originally, at the time of entering into the contract, intend to settle the contract by payment of differences but was forced to do so by subsequent circumstances. The High Court held that such loss in share business was a speculation loss and hence not deductible.

18. Can a company, which has not made any export during the financial year under consideration, adopt the London Metallic Exchange Price for valuing its closing stock of zinc concentrate, since such value was lower than its cost?

Hindustan Zinc Ltd. v. CIT (2007) 295 ITR 453 (SC)

The Apex Court, in CIT v. Hindustan Zinc Ltd. (2007) 291 ITR 391, held that the settled tenet of commercial practice and accountancy was that the closing stock should be valued at the lower of cost or market price and that there should be no writing down of goods except when there was an actual or anticipated loss. The Court held that the assessee was not correct in writing down its stock of zinc concentrate at lower than the cost price by taking the London Metallic Exchange price as its net realisable value instead of taking into consideration the domestic price. The Supreme Court, accordingly, dismissed the review petition submitted by the assessee.

7. CAPITAL GAINS

1. Does the rearrangement of shareholdings in the company to avoid possible litigation among family members attract capital gains tax under the Income-tax Act, 1961?

CIT v. Kay Arr Enterprises (2008) 299 ITR 348 (Mad.)

Relevant Section: 45

There was a transfer of shares between the assessee-firm, which consisted of its partners, who were family members. Certain new shares were acquired in exchange for old shares, as also some consideration in cash. The assessees contended that the transfer was consequent to a family arrangement. But the Assessing Officer, after analysing the facts of the case and the legal aspects, concluded that there was a transfer involved and thus, subjected it to capital gains tax. On appeal by the assessee, the Commissioner (Appeals) upheld the order of the Assessing Officer.

The High Court held that Tribunal had rightly found that the transfer of shares by way of family arrangement would not attract capital gains tax, as the same was a prudent arrangement to avoid possible litigation among the family members and was made voluntarily and not induced by any fraud or coercion and therefore, could not be doubted. The Tribunal was justified in arriving at the conclusion that the family arrangement among the assessees did not amount to any transfer and hence was not exigible to capital gains tax.

2. **Whether the Appellate Tribunal was right in law in bifurcating the profit or gain arising from the sale of incomplete house in June, 1982, into long-term capital gain with reference to the acquisition of the plot and short-term capital gain with reference to the construction of a super structure made on the plot when the asset sold was one, i.e., incomplete house, and there was only one sale transaction?**

   CIT v a. S. Aulakh (2008) 304 ITR 27 (P & H)

   Relevant Section: 45

   The assessee purchased a piece of land in October, 1970. He sold the plot with a small super-structure on it for a sum of Rs.2,25,000 during the assessment year 1983-84. He claimed the benefit of section 54F of the Income-tax Act, 1961. The assessee claimed that the plot had been purchased and the construction was started long before the sale in June, 1982. The Assessing Officer rejected the claim. The Tribunal held that the capital gains arising out of the assets created by the assessee during the three years immediately preceding the sale should be considered to be short-term capital gains while gains on the remaining assets were to be considered as long-term capital gains.

   The High Court held that the Tribunal had taken a balanced view by bifurcating the profit or gain arising out of the sale of the incomplete house in June 1982, into long-term capital gain by keeping in view the date of acquisition of the plot and short-term capital gain by keeping in view the construction of super-structure made on the plot.

3. **Is the assessee liable to pay capital gain tax in respect of the capital asset acquired by him through the operation of law?**

   CIT v. Amrik Singh (2008) 299 ITR 14 (P & H)

   Relevant Section: 45

   The assessee had got the land under the provisions of the Punjab Occupancy Tenants Act, 1952 through court decree. No amount was paid in lieu of the acquisition of land. The assessee contended that he was not liable to pay any capital gains for the said land as the assessee acquired the rights of ownership of the land by operation of law and not by purchase or inheritance. However, the Income tax Officer did not agree with the assessee and the amount received by the assessee from the acquisition of the said was added to the income of the assessee.

   The High Court held that the assessee became the owner of the land in respect of which he had earlier acquired only tenancy rights. Thus, the assessee had acquired the ownership rights in the land by operation of law and not by purchase or inheritance. There was no record of any payment made for the acquisition of the land in question either by the assessee or his predecessor in interest. The cost of acquisition of the land to the assessee was nil. Therefore, in such a situation if the assessee sells such asset he would not be liable to pay any capital gains tax.

4. **Whether the expenditure incurred on obtaining probate, travel expenses of executors and expenditure on evicting illegal tenant are expenditure incurred wholly and exclusively in connection with transfer and allowable as deduction while computing the capital gains under section 48(i) of the Income-tax Act, 1961?**

   Mrs. June Perrett v. Income-tax Officer (2008) 298 ITR 268 (Kar.)

   Relevant Section: 48

   In this case, A, owner of a residential house in Bangalore, under a will, appointed executors, who were required to obtain probate of the will and thereafter sell the residential property and divide the sale proceeds and distribute them to the three sons and a daughter of A. After the death of A, the executors filed probate proceedings and obtained the probate by paying a court fee of Rs.1,23,000 towards the letter of administration. Further, a maid-servant illegally occupied the house. In order to secure vacant possession of the property, the executors were forced to file an eviction petition in Bangalore and ultimately they succeeded in the court. After obtaining possession and clearing all the litigation pending over the house property, it was sold for a total consideration of Rs.1,18,46,850. The assessee, being a daughter of A, while computing the capital gains, claimed certain expenditure incurred by the executors towards litigation expenses, travelling expenses incurred by them to travel from London to India and their stay at Bangalore and the fees paid to the lawyers towards litigation expenses. The Assessing Officer disallowed the expenses claimed by the assessee. The assessee filed an appeal before the CIT(Appeals), which was allowed in part denying the expenses incurred towards legal and professional charges, executors' expenses in India, executors expenses in England and the court fee paid to obtain the letter of administration. Against the order of the CIT(Appeals), an appeal was filed before the Tribunal that was rejected.

The High Court held that the executors who were residing in London could not sell the property to any party without letters of administration, therefore were required to obtain probate and letters of administration and any expenses incurred by the executors in order to obtain probate and letters of administration were to be treated as expenses incurred by them in connection with the transfer of property. Similarly, without paying the court fee, no letter of administration would be issued by the court. Therefore, sum paid by the executors as court fee at the time of obtaining the letter of administration had to be treated as expenditure incurred in connection with the transfer of property. If the unauthorised occupant had not been evicted the value of the property would have decreased instead of increasing. Therefore, the expenditure incurred by the executors to evict the unauthorised occupant had to be treated as an amount spent towards cost of improvement of the property. The cost of evicting the unauthorised occupant was also deductible.

5. **Whether for claiming exemption under section 54F of the Act, the conditions laid down in sub-section (1) of section 54F and the Board Circular No. 667, dated October 18, 1993 that the purchase/construction is to be completed within stipulated time is mandatory?**

CIT v. Sardarmal Lothario (2008) 302 ITR 286 (Mad)

Relevant Section: 54F

The assessee filed their returns of income claiming exemption of capital gains tax under section 54F. The Assessing Officer rejected the claim on the ground that the construction of the house was not completed. The Commissioner (Appeals) held that the assessee having invested the capital gains in the land had substantially completed the construction and directed the Assessing Officer to grant the benefit to the assessee. On an appeal preferred by the Department, the Tribunal confirmed the order of the Commissioner (Appeals).

The High Court held that admittedly the assessee had purchased the land by investing the capital gains and had constructed residential houses. Circular No. 667 dated October 18, 1993, did not stipulate that the construction would have to be completed in order to have the benefit under section 54F. In order to get the benefit under section 54F of the Act, the assessee need not complete the construction of the house and occupy it. It was enough if the assessee established the investment of the entire net consideration within the stipulated period.

8. INCOME OF OTHER PERSONS INCLUDED IN ASSESSEE'S TOTAL INCOME

1. ***Auto Sales Properties v. CIT (2007) 294 ITR 507 (All)***
Relevant Section: 64

B and A were partners in a firm which was dissolved and a new firm was constituted in which two of the partners were the wives of B and A who had 47 per cent share each in the new firm. A building was let out by B and A to the new firm at a monthly rent of Rs. 4,000 whereas prior to it the property fetched a rent of Rs. 7,515. Applying section 64(1)(iv), the income from the building was clubbed as income from house property with the income of the husbands. This was upheld by the Tribunal.

For the applicability of section 64(1)(iv) of the Income-tax Act, 1961, there are two conditions, assets should be transferred to spouse directly or indirectly by an individual and the transfer must be otherwise than for adequate consideration or under an agreement to live apart. If these two conditions are satisfied, the income arising from such asset directly or indirectly would be included in the total income of the individual who has made the transfer. A "lease" of a building or property is a "transfer" within the meaning of the Transfer of Property Act, 1882. For the purpose of clubbing income under section 64 it is relevant whether the income is from house property or business income.

In this case, the High Court held that the income arising from the building which had been let out would be liable to be included in the income of the husbands, who had let out the property in favour of their wives at the inadequate or reduced rent of Rs. 4,000. The lease or transfer was not in connection with an agreement between the husbands and wives to live separate from each other. Thus, the transfer in favour of the firm would be deemed to be a transfer "indirectly" to the wives.

9. DEDUCTIONS FROM GROSS TOTAL INCOME

1. **Does sawing of marble blocks into slabs and tiles amount to production to entitle the assessee to claim deduction under section 80-IB?**
   Arihant Tiles and Marbles P. Ltd. v. ITO (2007) 295 ITR 148 (Raj.)

   Relevant Section: 80-IB

   One of the conditions to be fulfilled by an industrial undertaking for the purpose of claiming deduction under section 80-IB is that it should manufacture or produce any article or thing, not being an article or thing specified in the list in the Eleventh Schedule.

   Where a natural produce is not usable or consumable when it is brought into existence out of surface, then, the process of bringing it to a marketable or consumable stage from where it can reach the end user is an activity of manufacturing. Marble blocks as a mineral produced from earth by itself is not usable for any purpose. Therefore, to make it usable, it has to be brought to a particular stage by applying various processes, which would amount to manufacture.

   The High Court referred to the decision of the Supreme Court affirming the decision of the Karnataka High Court in *CIT v. Mysore Minerals Ltd. (2001) 250 ITR 725*, where it was held that cutting of granite/marble block into usable slabs or tiles is a manufacturing activity. Also, *Circular No.729 dated 1.11.95* has considered granite as a mineral, and any process applied makes it a valuable marketable commodity.

   The High Court, therefore, held that conversion of marble blocks into slabs and tiles amounts to manufacture of article or thing within the meaning of section 80-IB. Since the assessee is engaged in this activity, it is entitled to deduction under section 80-IB.

2. **Is a trust publishing religious books entitled to benefit under section 80G?**

   Arsha Vijnana Trust v. D.P. Sharma, I.R.S., Director of Income-tax (Exemptions) (2007) 295 ITR 437 (A.P.)

   Relevant Section: 80G

   The assessee-trust, constituted in 1983, published several books, generally in Telugu and English, including the translations of Sanskrit Ramayana and Mahabharata. The trust also published Brahma Sutra Bhashyam, Bhagawadh Gita with Sankara Bhashyam. Benefit under section 80G was given to the trust from the time of its creation till notice was issued in the year 2003 followed by an order of the Director of Income-tax (Exemptions) holding that the trust had violated the provisions of section 80G(5)(iii). Consequently, the assessee's request for renewal of exemption was denied.

   The High Court, on receiving a writ petition against the order, dismissed the petition holding that the trust was not entitled to benefit under section 80G. The Court observed that the Director of Income-tax (Exemptions) is not barred for passing an order denying the extension of grant of exemption merely because the assessee had availed the benefit for 20 years on account of misinterpretation of the law.

   Note *- Donations made to charitable trusts are entitled to deduction under section 80G. However, one of the conditions for claim of exemption as contained in section 80G(5)(iii) is that the institution or fund should not be expressed to be for the benefit of any particular religious community or caste. Further, as per* Explanation 3 *to section 80G, "charitable purpose" does not include any purpose, the whole or substantially the whole of which is of a religious nature.*

10. INCOME-TAX AUTHORITIES

1. **Is the situation of the registered office the sole criterion for determining the jurisdiction of the Assessing Officer?**
   CIT v. Ganga Bani Mercantile and Finance (P) Ltd. (2007) 293 ITR 441 (Gauhati)

   Relevant Section: 124(2)

   In this case, the assessee-company had its registered office situated at Calcutta. The Assessing Officer at Guwahati issued a notice under section 158BD on the assessee. The assessee challenged that since it was registered with the Registrar of Companies at Calcutta, the jurisdiction in respect of the assessee would lie only with the income-tax authorities at Calcutta. The Tribunal concurred with the assessee's view and held that since no order under section 127 has been passed by the income-tax authorities at Calcutta transferring the case to Guwahati, the Assessing Officer at Guwahati does not have jurisdiction in respect of the assessee. Hence, the notice issued by the Assessing Officer at Guwahati totally lacked jurisdiction.

   The High Court observed that the jurisdiction of the Assessing Officer would be determined by taking into consideration the "principal place" of business or profession. An Assessing Officer will have jurisdiction over any person if the place where he carries on his business or profession is situated within that area. If the assessee carries on his business or profession at more than one place, the Assessing Officer having jurisdiction over the principal place of business or profession will have jurisdiction to assess the tax liability of such person.

   The High Court, therefore, set aside the order of the Tribunal holding that the location of the registered office of the assessee was of no consequence, and what was material was the principal place of business.

11. ASSESSMENT PROCEDURE

1. **Can the self-assessment tax paid under section 140A be taken into account while determining the interest on refund payable to the assessee under section 244(1A)?**
   CIT v. SIV Industries Ltd. (In liquidation) (2007) 295 ITR 114 (Mad)

   Relevant Section: 140

   On this issue, the High Court observed that the tax paid under section 140A can be treated as amount paid in pursuance of order of assessment for the purpose of computing interest under section 244(1A). The High Court, therefore, held that while determining interest under section 244(1A), the self-assessment tax paid under section 140A should also be taken into consideration as the tax paid by way of self-assessment under section 140A would get adjusted against the assessed tax and partake the character of tax paid in pursuance of the assessment order.

2. **Can the Assessing Officer pass an order under section 142(2A) directing the assessee to get new books of account prepared by the special auditor?**

   CIT v. Bajrang Textiles (2007) 294 ITR 561 (Raj)

   Relevant Section: 142(2A)

   In this case, the Assessing Officer had not merely referred the accounts to be audited under special audit by an auditor named by him, but he had directed the special auditor to prepare books of account in the form of cash book, ledger, on the basis of documents/papers seized during the course of search as per his directions.

   The issue under consideration is whether the Assessing Officer can pass an order under section 142(2A) directing the assessee to get new books of account prepared by the special auditor.

On this issue, the High Court observed that apparently, the order was for preparing fresh books rather than for conducting a special audit. The Court observed that under section 142(2A), no authority has been conferred on the Assessing Officer for directing the assessee to prepare fresh books by referring the matter to an auditor under special audit. Audit is for the purpose of satisfying one about the authenticity and credibility of accounts prepared by the assessee but not for preparing new account books as per the directions of the Assessing Officer.

3. **Whether a debatable issue can be a subject-matter for consideration while passing an order under section 143(1)(a) of the Income-tax Act, 1961?**

   CIT v. Smt. A. E. Sarojini (2007) 295 ITR 270 (Mad.)

   Relevant Section: 143(1)

   In the present case, the assessment was originally completed under section 143(1)(a). While making a prima facie adjustment in computing the claim on capital gains, the income-tax authority rejected the claim for exemption under section 54F of the Income-tax Act on the ground that the assessee had a residential house at the time of sale of the vacant site and the sale proceeds were utilised for the extension of the existing building. The assessee preferred an application under section 154 of the Income-tax Act, 1961, contending that the benefit of section 54F should have been considered and the question which is an arguable issue, ought not to have been a matter for consideration under section 143(1)(a). The Assessing Authority, however, rejected the petition under section 154.

   It is an admitted proposition of law that the exercise of power under section 143(1)(a) is limited not only to the obvious but also to what is deducible from the return without any doubt or debate. The Allahabad High court in the case of *CIT v. C. S. Kothari (2006) 286 ITR 397*, commenting on the jurisdiction of the officer under section 143(1)(a) , held that it is a summary act on the basis of undisputed material furnished by the assessee, without factually disputing its correctness. In the light of the above said view a debatable issue can never be a subject-matter for consideration while passing an order under section 143(1)(a).

4. **Whether lower profits in particular year can be considered as sufficient reason to invoke best judgment assessment under section 144?**

   Madnani Construction Corporation P. Ltd. v. CIT (2008) 296 ITR 45 (Gau.)

   Relevant Section: 144

   The assessee was a private limited company engaged in execution of works contracts. The assessee executed civil construction works under two projects, one in Assam and the other in U. P and received a sum of Rs.4,39,37,225 on account of both contracts. The assessee filed its return of income showing the net profit at 4.39 per cent along with the audited profit and loss account, balance-sheet and audited report as required under section 44AB. The Assessing Officer found that the expenses on account of purchase of raw materials were mostly vouched by internal debit vouchers which were not verifiable and the whereabouts of various sundry creditors were not ascertainable. The Assessing Officer issued a show cause notice dated January 17, 1996, calling upon the assessee to explain why the books of account should not be rejected and the net profit should not be estimated at a reasonable rate. The assessee, in its reply, objected to the notice and submitted a comparative statement of gross profit for the last five years. The Assessing Officer estimated the net profit at the rate of 8 per cent. The Commissioner (Appeals) directed the Assessing Officer to accept the net profit as disclosed in the books of account. The Tribunal, on consideration of the materials, found that the net profit was estimated by the Assessing Officer on the higher side and upon consideration of the peculiar facts and circumstances estimated the net profit at the rate of 6 per cent.

   The High Court held that the Assessing Officer did not record any finding that the books of account maintained by the assessee were incorrect rendering it impossible to deduce the profit and despite that he went on to complete the assessment invoking the principles of best judgment. The assessment order did not indicate that the Assessing Officer had noticed any inconsistency or infirmity in the audit report. On the other hand, the Assessing Officer accepted the report relating to the preceding year. The Assessing Officer abruptly came to the conclusion that the accounts did not disclose correctly the transactions in respect of purchase of raw materials without any enquiry as to whether such materials were commensurate with the volume of the work done. The Assessing Officer relied

upon a part of a transaction for the preceding year while rejecting the other. Without pointing out any error in the profit and loss account and the audited report, the powers of best judgment could not be invoked.

5. **Whether provisions of section 145 can be invoked if the method employed is not proper and where accounts are not correct and complete?**

Bajaj Steel Traders v. Income-tax Appellate Tribunal (2008) 303 ITR 448 (P&H)

Relevant Section: 145

The assessee filed its return of income. During the assessment, the Assessing Officer noticed that day-to-day opening stocks as well as closing stock had not been worked out. There was difference in the stock inventory figures as well as figures shown in the stock register. The assessee had sold certain items at rates lesser than the purchase price on the same day. The Assessing Officer rejected the accounts and estimated the income of the assessee. This was upheld by the Commissioner of Income-tax (Appeals) and the Tribunal.

The High Court held that the proviso to section 145(1) of the Income-tax Act, 1961, can be invoked not only where the method employed is not proper but also where the accounts are not correct and complete. In any case, under section 145(2) of the Act, the Assessing Officer can make best judgment assessment if the accounts are not correct or complete. Hence, provisions of section 145 were applicable.

6. **Whether the Assessing Officer has jurisdiction to issue notice under section 148 to reopen the same assessment order on the same grounds for which the notice under section 263 has been issued?**

Inductotherm (India) P. Ltd. v. James Kurian, ACIT (2007) 294 ITR 341 (Guj)

Relevant Section: 148 & 263

The assessment under section 143(3) was completed on March 10, 2004. For reopening of this assessment, notice under section 148 was issued by the Assessing Officer to the assessee and notice under section 263 was issued by the Commissioner of Income-tax for revision of the assessment order passed by the Assessing Officer dated March 10, 2004.

There is no bar under the provisions of the Income-tax Act, 1961, for parallel proceedings in consequence of notice under section 148 and notice under section 263. After issuance of notice under section 148, the Assessing Officer himself can pass a fresh assessment order and under section 263 if the original assessment order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue, the CIT can revise that order. Both the authorities are empowered under different provisions of the Act, though both have to see that the income escaped in the original assessment should be taxed.

Hence, the High Court held that the Assessing Officer had found that there were errors in the computation of allowances. The reassessment proceedings were valid. Further, it was also held that notice under section 263 had been issued, and those proceedings were stayed, but the proceedings initiated after the issuance of notice under section 148 were not stayed. Therefore, the Assessing Officer was at liberty to proceed with the proceedings and make final assessment. The court directed that since the reassessment order had already been passed, the notice under section 263 was to stand discharged subject to the outcome of the reassessment proceedings.

7. **Can the Assessing Officer reopen an assessment after the expiry of four years from the end of the relevant assessment year?**

CIT v. Premier Mills Ltd. (2008) 296 ITR 157 (Mad.)

Relevant Section: 148

The Assessing Officer completed assessment under section 143(3) of the Act and reopened the same with prior permission of the Commissioner of Income-tax and issued notice under section 148 of the Act and passed orders. Aggrieved, the assessee went on appeal to the CIT(Appeals), who dismissed the appeals. The Tribunal held that the notice under section 148 of the Act was issued after the expiry of four years from the end of the relevant assessment year and the same would amount to change of opinion and allowed the

appeals.

The High court held that where the assessment is completed under section 143(3) of the Income-tax Act, the reopening of the assessment under section 148 beyond the period of four years at the end of the relevant assessment year can be sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. In this case there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts. Further, all the material facts are available at the time of making original assessment. Hence, reassessment proceedings after the expiry of four years were not possible in view of the provisions of section 147 of the Act.

12. APPEALS AND REVISION

1. **Whether the Income-tax Appellate Tribunal was justified in reversing the order of the Commissioner of Income-tax (Appeals) without going into the nature of the items of expenditure and without giving any basis or reason for the same?**
Ram bagh Palace Hotel P. Ltd. v. CIT (2008) 303 ITR 178 (Del.)

Relevant Section: 254

In the instant case, the Assessing Officer held that the expenditure claimed by the assessee was capital expenditure. The assessee filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) discussed each item on the merits and after a detailed analysis came to the conclusion that these items represented revenue expenditure since no new capital asset had been created. On appeal by the Revenue, the Tribunal reversed the order of the Commissioner (Appeals) but did not give detailed reasons.

The High court held that the reason given by the Tribunal for upsetting the order of the Commissioner (Appeals) did not show the basis on which the Tribunal had come to a conclusion that was different from the conclusion given by the Commissioner (Appeals), apart from baldly stating that all the expenses incurred by the assessee related to fixed capital and the advantage derived by the assessee was of an enduring nature. Therefore, the order of the Tribunal was liable to be set aside.

2. **Whether the rectification order under section 254 of the Act can be passed beyond four years?**

Sree Ayyanar Spinning and Weaving Mills Ltd. v. CIT (2008) 301 ITR 434

Relevant Section: 254

Section 254(2) of the Income-tax Act, 1961, dealing with the power of the Appellate Tribunal to pass orders of rectification of mistakes, is in two parts. The first part refers to the suo motu exercise of the power of rectification, whereas the second part refers to rectification and amendment on an application made by the assessee or the Assessing Officer pointing out the mistake from the record. Where the application for rectification is made within four years of the appellate order of the Appellate Tribunal, the Appellate Tribunal has jurisdiction to pass the order disposing of the application and cannot reject the application on the ground that four years have elapsed.

3. **Whether the explanation offered by the assessee in relation to a particular credit or debit entry in the profit and loss account was acceptable or not was a question of fact or not?**

CIT v. Ashok Kumar and Party (2008) 299 ITR 35 (MP)

Relevant Section: 260A

The assessee derived income from liquor contracts. For the assessment year 1994-95 certain infirmities were noticed with regard to certain entries. The Commissioner did not accept the explanation of the assessee and passed the order. The Tribunal held some of the issues in favour of the assessee.

Under section 260A of the Income-tax Act, 1961, the appeal can be admitted for final hearing only when it involves any substantial question of law. Sub-section (3) obliges the High Court to formulate the substantial question of law which in the opinion of the High Court is involved. Sub-section (4) then empowers the High Court to hear and decide the appeal only on the question so formulated. The proviso to sub-section (4) enables the High Court to decide the appeal on reasons to be recorded on any question not initially framed

provided the High Court is satisfied that such question does arise and or is involved in the case.

In the instant case, the High Court held that the appeal did not involve the interpretation of any section, rule or circular. It did not involve interpretation of any judicial decisions. The question whether the explanation offered by the assessee in relation to a particular credit or debit entry in the profit and loss account was acceptable or not was a question of fact. The Tribunal had the jurisdiction to decide it and it did so. The court in appeal could not go into the same with a view to find out whether the reasoning assigned by the Tribunal in accepting the explanation was right or not.

13. PENALTIES

1. **Can the assessee be absolved of the penal consequences under section 271(1)(c) if he voluntarily files a revised return (before the order of assessment is made) after discovering an omission or wrong statement in the original return?**

CIT v. Manibhai and Bros. (2007) 294 ITR 501 (Guj.)

Relevant Section: 271(1)(c)

On this issue, the High Court observed that for imposition of penalty under section 271(1)(c), there should be a deliberate concealment of particulars or furnishing of inaccurate particulars by the assessee. For finding out whether there was a deliberate attempt to conceal particulars or furnish inaccurate particulars, the conduct of the assessee from the beginning till the end of the assessment proceedings in totality should be taken into consideration. If a revised return is filed by the assessee after the Assessing Officer has discovered, in the course of assessment proceedings, an omission or wrong statement in the original return, then the assessee cannot escape the liability for imposition of penalty under section 271(1)(c). However, if the assessee voluntarily files a revised return suo motu before the assessment order is passed, after he himself discovered an omission or wrong statement in the original return, then in such a case, penalty cannot be imposed under section 271(1)(c).

2. **Can penalty be levied under section 271(1)(c) on the difference between the value of stock declared to the bank and to the income-tax authorities, by treating such difference in value as undisclosed income?**

CIT v. Pioneer Breeding Farms (2007) 295 ITR 78 (Mad)

Relevant Section: 271(1)(c)

In this case, the Assessing Officer found that the assessee had declared a much higher value of closing stock to the bank than it had to the income-tax authorities. The Assessing Officer treated the difference in valuation of stock as undisclosed income and initiated penalty proceedings under section 271(1)(c) of the Act. The assessee contended that valuation at a higher rate was adopted as per the specific directions from the bank for the purpose of obtaining working capital loan.

The High Court observed that any addition on account of difference in stock can be made only on adequate material and not arbitrarily. There was a difference between the value of closing stock declared to the bank and to the income-tax authorities. However, the higher valuation given to the bank was merely based on the direction issued by the bank. The Court held that in view of the same, there is no basis to treat the difference in value as the assessee's undervaluation of stock or undisclosed income.

3. **Whether the Tribunal was right in deleting the penalty imposed under section 271(1)(c) on the ground that the assessee suffered a loss in the relevant assessment year ?**

   CIT v. MSK Constructions P. Ltd. (2008) 296 ITR 18 (Mad.)

   Relevant Section: 271(1)(c)

   In this case, the assessee filed a loss return and claimed deduction of interest paid to IREDA. The assessment was completed under section 143(3) of the Income-tax Act. The assessment was reopened by issue of notice under section 148 on the ground that the interests on borrowings from IREDA were not paid during the year. The Assessing Officer disallowed the unpaid interest resulting in reduction of loss and also levied penalty invoking section 271(1)(c) of the Act. The CIT(Appeals) deleted the penalty and allowed the appeals in favour of the assessee.

   The Tribunal after going through the records observed that the disallowance of interest under section 43B of the Act does not amount to concealment of income and when there is no tax payable, penalty could not be levied. Therefore, there is no illegality or infirmity in the order of the Tribunal in deleting the penalty.

4. **Whether the Tribunal was right in granting exemption under section 10(1A) on the basis that in earlier assessment years the department had treated that activity undertaken by the assessee as agricultural activity?**

   CIT v. Proagro Seeds Co. Ltd. (2008) 296 ITR 235 (Del.)

   Relevant Section: 271(1)(c)

   The assessee was engaged in the production and sale of hybrid seeds. The assessee has claimed exemption from payment of income-tax under section 10(1A) of the Income-tax Act, 1961 on the ground that the income derived by it was from "agricultural activities". The Assessing Officer rejected that claim and brought to tax the amount of income disclosed by the assessee. Simultaneously, proceedings under section 271(1)(c) were also initiated and penalty was levied. The CIT(Appeals), dismissing the appeal by the assessee, affirmed the penalty. On further appeal, the Tribunal held that the Department had not alleged any concealment or furnishing of inaccurate particulars of the assessee's income and that in the earlier assessment years the Department had treated the activity undertaken by the assessee as agricultural activity and accordingly granted exemption to the income derived from it.

   The High Court held that there was no deliberate concealment of income nor any furnishing of inaccurate particulars of the income and since the assessee's perception that its activities were agricultural in nature had been treated to be so for the previous years, no question of law could be said to have arisen for consideration.

5. **Can the Assessing officer can initiate penalty proceedings under section 271(1)(c) in case of dispute whether the assessee was entitled to exemption as claimed or not?**

   CIT v. Videon (2008) 301 ITR 260 (Del.)

   Relevant Section: 271(1)(c)

   The assessee filed its return of income disclosing capital gain from the sale of land. Later it filed a revised return on the basis of advise received from the Municipal Corporation and Thasildar claiming that the capital gain shown earlier was being exempt from agricultural land. The Assessing Officer did not accept the withdrawal of capital gain. When the matter was taken by the Assessing Officer on remand, the assessee admitted that the land was not agricultural land and surrendered its claim. The Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Income-tax Act, 1961. The Commissioner (Appeals) set aside the order passed by the Assessing Officer. The Tribunal dismissed the appeal filed by the Revenue.

   The High Court held that admittedly the assessee had declared its income in the original return and in the revised return it was merely contended that it was entitled to exemption since the land was agricultural land. There was nothing to suggest that the assessee had concealed its income. The only dispute was whether the assessee was entitled to exemption as claimed or not. Therefore, there was no concealment of income nor was there any attempt on the part of the assessee to hide any material facts from the Revenue.

6. **Whether the Appellate Tribunal was right in law in holding that clearance from the Committee on Dispute was mandatory for entertaining the appeal?**

CIT v. Manager, State Bank of India (2007) 294 ITR 269 (Mad)

Relevant Section: 272A(2)

The penalty under section 272A(2)(c) was levied against the assessee, a Government of India undertaking, for the failure to file the annual return of tax deducted at source. The Commissioner (Appeals) deleted the penalty accepting the reasons given by the assessee. When the Revenue preferred an appeal against the order of the Commissioner (Appeals) deleting the penalty, the assessee took a preliminary objection before the Tribunal that in view of the Supreme Court decision, the Revenue ought to have obtained the approval of the Committee on Disputes for processing the appeal before the Tribunal. The Tribunal noted that nothing was placed before the Tribunal to substantiate the action taken by the Revenue for obtaining the approval of the Committee on Disputes and dismissed the appeal.

The High Court dismiss the appeals at the admission stage, that the failure to obtain the approval from the Committee on Disputes would be fatal to the maintainability of the appeals. The Tribunal after referring to the decision of the Supreme Court held that no litigation between the Government and a Government undertaking could proceed before any court without the approval of the High Powered Committee. Further, the Tribunal had given liberty to the Revenue to prosecute the appeal on obtaining the approval and explaining the delay.

7. **Whether the penalty imposed under section 271B by the Assessing Officer for violation of the provisions of section 44AB was justified?**

CIT v. Mathana Model Co-op. Credit and Service Society Ltd. (2008) 299 ITR 70 (P&H)

Relevant Section: 271B

The assessee- co-operative society was required to get its accounts audited and furnish the report in the prescribed form duly signed and verified under the provisions of the section 44AB. Since the society failed to get its accounts audited and furnish the report, a show cause notice under section 271B of the Act was issued for imposition of penalty. The assessee replied to the notice stating that it being a co-operative society, was required to get its accounts audited by the auditor appointed by the Registrar, Co-operative Societies, under the provisions of the Haryana Co-operative Societies Act, 1984, and since the auditor was not appointed by the Registrar within the stipulated time, the audit report could not be submitted in time. The Assessing Officer imposed the penalty but the Tribunal cancelled it.

The High Court held that the assessee society was registered under the Haryana Co-operative Societies Act and the accounts of the co-operative society shall be audited in such manner as the Registrar may specify from time to time. The assessee society had given the explanation for not furnishing the required audit report within the stipulated time, that the Registrar did not appoint the auditor by that time. The Tribunal found that the explanation was satisfactory and once the explanation was satisfactory the benefit of section 273B was available to the assessee.

14. DEDUCTION, COLLECTION AND RECOVERY OF TAX

1. **Is a company liable to deduct tax at source in respect of payment of salary by its foreign collaborator to its Managing Director?**

CIT v. Woodward Governor India P. Ltd. (2007) 295 ITR 1 (Delhi)

Relevant Section : 192

The assessee-company is a joint venture in which 74% of the shareholding is with an American collaborator. The assessee-company deducted tax at source on the salary paid by it to its Managing Director. The Managing Director of the assessee-company received salary from the American collaborator also, which the assessee-company was not aware of. The Managing Director paid advance tax on his global salary, which included the salary received from the assessee and salary received from the American collaborator. The Revenue contended that the assessee was required to deduct tax at source even on the salary component paid by the American collaborator.

On this issue, the High Court observed that the assessee was liable to deduct tax at source only on the payment made by it to its Managing Director and it cannot be burdened with the liability of deducting tax at source on any other payment, either by way of salary or otherwise, received by the Managing Director from some other source. Therefore, the Court held that the assessee was not liable to deduct tax at source on salary received by its Managing Director from the American collaborator.

2. ***Hindustan Coca Cola Beverage P. Ltd. v. CIT (2007) 293 ITR 226(SC)***

Relevant Section : 194-I

The assessee treated warehousing charges paid to Pradeep Oil as a contract payment and deducted tax at 2% on the same. The Assessing Officer, however, treated the warehousing charges as rent as defined in section 194-I and asked the assesee to pay the difference and interest on the amount of tax short deducted. This view was upheld by the Appellate Tribunal and also the High Court, which dismissed further appeal therefrom. Thereafter, the assessee filed a miscellaneous application before the Appellate Tribunal contending that since Pradeep Oil had paid the tax on the said income, the same could not be recovered from the assessee. The Tribunal observed that there was a mistake in its earlier order and recalled it for the limited purpose of deciding the specific ground raised by the assessee. The Department did not challenge this order of the Tribunal. The Tribunal held that although the assessee was rightly held as an assessee-in-default, tax cannot be recovered from him since the tax had already been paid by the recipient of income, namely, Pradeep Oil. On appeal, the High Court held that since the original order had become final on account of dismissal by the High Court of the appeal filed therefrom, the Appellate Tribunal could not have reopened the matter.

The Supreme Court, on appeal, observed the Department did not challenge the order of the Tribunal recalling its earlier order. Therefore, the order had attained finality and the High Court could not interfere with the final order. Further, there was no dispute that the tax payable had been paid by the recipient of income. Therefore, in view of Circular No.275/201/95-IT(B) dated 29.1.97 and payment of interest under section 201(1A) by the assessee, the Supreme Court held that the tax could not once again be recovered from the assessee.

3. **Whether the purchase of pre-printed packing material by the assessee was a contract for sale and outside the purview of deduction of tax at source under section 194C of the Act?**

CIT v. Deputy Chief Accounts Officer, Markfed, Khanna

Relevant Section : 194C

The assessee had purchased printed packing material but did not deduct tax at source on the payments therefor under the provisions of section 194C of the Income-tax Act, 1961. The Assessing Officer levied penalty and interest on the assessee on the ground that the transaction was a works contract. The Commissioner (Appeals) cancelled the penalty and interest and his order was confirmed by the Tribunal.

The High Court held that there was no dispute that the main purpose of the assessee in buying packing material was to obtain goods for the purpose of packing its finished products. The factum of such packing material carrying some printed work could only be regarded as the work executed by the supplier incidental to the sale to the assessee. The fact of some printing being done as a part of supply was of no consequence to the contract being essentially of a sale of chattel. The predominant object underlying the contracts were sale/purchase of goods and the only intention of the assessee was to buy packing materials. Admittedly, the raw material for the manufacturing of such packing material was not supplied by the assessee. Thus, it was a case of sale and not a contract for carrying out any work. The purchase of particular printed packing material by the assessee was a contract for sale and outside the purview of section 194C.

4. **Whether the assessee was liable to deduct tax at source on milk and milk products sold by it through "concessionaires" appointed by it?**

Delhi Milk Scheme v. CIT (2008) 301 ITR 373 (Del)

Relevant Section : 194H

During the course of survey operation under section 133A of the Income-tax Act, 1961, it was found that the assessee had appointed a large number of agents (called concessionaires) for selling milk on its

behalf and had not deducted tax at source on the commission paid by it. The Assessing Officer, the Commissioner of Income-tax (Appeals) and the Tribunal rejected the contention of the assessee that there was no principal-agent relationship between the assessee and the concessionaires but a principal to principal relationship and therefore the definition of commission in the Explanation to section 194H of the Act was not applicable.

The High Court held that the milk booths were owned by the assessee with a right to enter the booth and take charge thereof at any time without assigning any reason or intimation to the concessionaires, the unsold milk was taken back and the cash collected daily was handed over to the assessee. The concessionaires only rendered service to the assessee of selling milk to customers and the ownership of the goods did not pass from the assessee to the concessionaires inasmuch as there was no sale of the milk or milk products to the concessionaires. The transaction between the assessee and the concessionaires was principal to agent and not principal to principal. Therefore, the assessee was liable to deduct tax on payments to the concessionaires.

15. INCOME-TAX ON FRINGE BENEFITS

1. Whether the transportation cost incurred by the appellant in providing transportation facility for movement of offshore employees from their residence in their home country to the place of work and back was liable to fringe benefit tax.
R & B Falcon (A) Pty. Ltd. v. CIT (2008) 301 ITR 309

Relevant Section: 115WB

The appellant, an Australian company, was engaged in the business of providing mobile offshore drilling rig along with crew on a day rate charter basis to drill offshore wells. Having regard to the harsh working environment the employees who might be residents of various countries worked on the mobile offshore drilling rig on a "commuter basis". The employees came to India, stayed on the rig for 28 days and went back to their country being the place of their residence for a further period of 28 days. The employees were transported from their home country to the mobile offshore drilling rig in two laps : (i) the first was from the nearest designated base city at the place of residence in their home country to a designated city in India for which the appellant provided free air ticket of economy class, and (ii) the second was from that city in India to the mobile offshore drilling rig through helicopter specially hired by the appellant for the purpose. On the completion of 28 days they went back from the rig to the designated base city in their home country in the same manner. No conveyance or transport allowance was paid to them.

The appellant having entered into a contract of supplying mobile offshore drilling rig along with equipment and offshore crew on charter hire basis with the ONGC, stated a case to the Authority for Advance Rulings on the question whether the transportation cost incurred by the appellant in providing transportation facility for movement of offshore employees from their residence in their home country to the place of work and back was liable to fringe benefit tax. The Authority ruled that the transportation cost incurred by the appellant in providing transportation facility for movement of offshore employees from their residence in their home countries outside India to the place of work (rig in India) and back was liable to fringe benefit tax.

The Supreme Court held that

(i) the provision relating to the computation of the value of the fringe benefit was contained in section 115WC. It was a settled principle of law that where the computation provision failed, the charging section cannot be effectuated. Therefore, if there was no provision for computing the value of any fringe benefit, such fringe benefit, even if it might fall within clause (a) or clause (b) of section 115WB(1), was not liable to fringe benefit tax.

(ii) Sub-section (1) of section 115WB refers to any consideration for employment, inter alia, by way of privilege, service, facility or amenity directly or indirectly, whereas sub-section (2) expands the definition by stating when fringe benefit would be deemed to be provided. Sub-section (3) refers only to sub-section (1) only. It does not have any application in regard to matters which were brought within the purview of application of the deeming provision. Sub-sections (1) and (2) of section 115WB must be held to pertain to different fields.

(iii) That the employees concerned were experts in their field. They were necessarily residents of other countries. They were brought to the rig by providing air tickets for their coming from their place of residence to the rig. The employer incurred the expenditure of necessity. This clearly fell within the purview of the words "consideration for employment". Therefore, clearly clause (a) of sub-section (1) of section 115WB was attracted.

(iv) That the Authority for Advance Rulings was correct in its opinion that the matters enumerated in sub-section (2) of section 115WB were not covered by sub-section (3) and, therefore, the amenity in the nature of free or subsidized transport was covered by sub-section (1) of section 115WB.

(v) That, however, the Authority for Advance Rulings was not correct in its view in reading the words "in India" in section 115WB(1). The statute did not say that the employee should be a resident of India. Fringe benefit tax being a tax on expenditure the only concern of the Revenue therefor should be as to whether such expenditure has been made. The appellant had a permanent establishment in India. It carried on business in India. It had for the purpose of carrying on its business activities engaged persons from within India and outside India. If it made any expenditure for bringing any employee from abroad, the same would also be liable to be taken into consideration for the purpose of sub-section (2) of section 115WB. The employees need not be based in India.

16. ADVANCE RULING

1. Is an application filed before the AAR maintainable, if the point raised in the application was not raised at the time of filing the original return but was raised at the time of filing the revised return, which was filed after the application was made to the AAR?
Mustaq Ahmed In Re. (2007) 293 ITR 530 (AAR)

Relevant Section: 245(R)

The non-resident applicant filed his original return of income for A.Y.2005-06 on 30.10.2005 and for A.Y.2006-07 on 31.10.2006. He filed a revised return for these two assessment years on 30.3.2007 claiming exemption in respect of income relating to purchase of gold ornaments for export under *Explanation 1* to section 9(1)(i). Prior to filing such revised returns, the applicant filed an application on 26.3.2007 before the AAR on certain questions relating to the exemption claimed. The Department objected that the application was not maintainable on the ground that the point raised in the application was pending before the income-tax authorities on the date when the application was filed.

The AAR rejected the claim of the Department holding that the point relating to the exemption was not raised at the time of filing of the original return of income for both the assessment years. Further, the application for advance ruling had been filed before the date of filing the revised return in which the claim for exemption was made for the first time. Therefore, on the date of filing of application before the AAR, the question raised in the application was not pending before any income-tax authority and hence, the restriction contained in section 245R(2) was not attracted.

2. Is an assessee entitled to relief under the DTAA in respect of salary income received in India for services rendered in Norway for a period of more than 182 days, if such income was not subject to tax in Norway?

S. Mohan, In re. (2007) 294 ITR 177 (AAR)

The applicant rendered services in Norway for a period of more than 182 days during the relevant previous year, for which he received salary in India in Indian rupees. He filed his return of income without claiming any exemption. Thereafter, he sought the ruling of the AAR on whether such income can be taxed in India in view of the DTAA between India and Norway.

The AAR observed that the fact that the applicant is not disentitled from seeking the ruling of the AAR merely because he had not claimed the exemption in his return of income.

The taxability of salary income has to be determined according to article 16(1) of the DTAA. This article provides that if the employment was exercised outside the usual State of residence, the remuneration

derived therefrom "may be taxed" in the State in which the employment was exercised. It was open to the State in which the employment was exercised to subject to tax the remuneration derived by a resident of a Contracting State. This means that though Norway could have taxed the applicant, however, it was not the applicant's case that he was taxed in Norway nor had the applicant voluntarily or otherwise paid tax to the Government of Norway. No relief was available to the applicant in such a case. The right of taxation in respect of such salary income was available to both the Contracting States in accordance with the relevant domestic laws.

Therefore, the salary income of the applicant had been rightly taxed in India and he was not eligible to get any relief under the DTAA.

1. ASSESSMENT PROCEDURE

1. **Whether the Income-tax Appellate Tribunal was correct in law in holding that assessment framed under section 16(1) of the Wealth-tax Act cannot be reopened under section 17 of the Wealth-tax Act on the ground of change of opinion on the part of the Wealth-tax Officer?**
Commissioner of Wealth-tax v. Mohan Das (2007) 295 ITR 580 (All.)

Relevant Section: 17

The assessee owned a property which was let out to bank for commercial purpose. The wealth-tax assessment orders for the assessment years 1982-83 to 1985-86 were framed determining the value of the building by applying the land and building method. The Assessing Officer reopened the assessment under section 17 of the Wealth-tax Act, 1957, on the ground that the property ought to have been valued by applying the rent capitalization method. The Deputy Commissioner (Appeals) partly allowed the appeal filed by the assessee holding that it would be reasonable if the value of the property was determined by taking the average of the rent capitalization method and the land and building method.

The High Court held that under section 7 of the Act the value of any asset has to be estimated on the basis of the price which in the opinion of the Assessing Officer it would fetch if sold in the open market on the valuation date. The building in question had been let out for commercial purpose. No specific mode of valuation of assets used for commercial purpose has been prescribed under the Act. It has to be the value which it would fetch if sold in the open market on the valuation date. The Assessing Officer while passing the original assessment had applied the land and building method for determining the value of the property which was one of the well accepted and well recognized modes of valuation. Merely because by applying another mode of valuation, the value would be a little higher, that would not clothe the Wealth-tax Officer with jurisdiction to proceed under section 17 of the Act, specifically when no specific mode of valuation of assets used for commercial purpose had been prescribed by section 7 of the Act and rules framed thereunder. Hence, the reassessment had been rightly annulled by the Tribunal.

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