

INCOME TAX APPELLATE TRIBUNAL ORDER

[2009-TIOL-515-ITAT-DEL-SB](#)

M/s Cheminvest Ltd Vs ITO, New Delhi (Dated: August 5, 2009)

Intervener Rep by : Shri Arvind Sonde, Adv. When the expenditure of interest is incurred in relation to income which does not form part of total income, it has to suffer the disallowance irrespective of the fact whether any income is earned by the assessee or not-case held against the assessee in [2008-TIOL-509-ITAT-MUM-SB](#)

[Also see analysis of the Order](#)

[2009-TIOL-514-ITAT-MUM](#)

M/s Universal Impex Vs ITO, Mumbai (Dated: May 7, 2009)

Income Tax - Survey u/s 133A - Assessee is a manufacturer and exporter of pharmaceutical medicines - AO on the basis of some notings in diaries and on the statement of one of the partners during survey makes additions - Assessee alleges coercion - CIT(A) confirms the addition to some extent - Held, the additions made solely on the strength of the statement without any supporting material are liable to be deleted as the initial burden placed upon the AO to prove that the notings reflect the receipts was not discharged effectively. Assessee's ground allowed.

[2009-TIOL-513-ITAT-MUM](#)

M/s Gomti Finlease (India) Ltd Vs ITO, Mumbai (Dated: April 16, 2009)

Income Tax - Assessee claimed depreciation on the machineries given on lease - AO held the lease transaction as a bogus transaction and therefore disallowed the depreciation but included the lease rentals under the head 'income from other sources' - CIT(A) confirmed the order - Held, assessee is not liable to be taxed on lease rentals as the whole transaction was a sham - Held, since the explanation offered by the assessee could not be substantiated and the bonafides of the explanation could not be proved by the assessee and all the facts relating to the transactions were held to be bogus and the transaction was held as sham, inaccurate particulars of income justify the levy of penalty u/s 271 (1)(c) - Assessee's appeal partly allowed.

[2009-TIOL-512-ITAT-BANG](#)

Shakuntala Devi Vs DDIT, Bangalore (Dated: June 23, 2009)

Income tax - Sec 54 - Assessee is a mathematician - sells two properties and buys one for residential purpose - Sec 147 - AO disallows Sec 54 benefits as the assessee fails to furnish papers relating to purchase of property - held, since the agreement to purchase the new property was cancelled after giving advance as the assessee could not raise required funds during the relevant FY, the transaction did not culminate into purchase either one year before or two years after the date of transfer nor a residential house constructed within a period of three years after the date of transfer. So, the CIT(A) was justified in denying the claim of exemption u/s. 54 of the IT Act. However, the case is remanded to verify the assessee's alternative claim about making investments as per proviso to sub-section 2 of section 54

[2009-TIOL-511-ITAT-BANG](#)

Yogesh Aurora Vs ITO, Bangalore (Dated: April 9, 2009)

Income Tax Act – Section 28 - assessee enters into an agreement to purchase a property. As per clause 9 of the agreement, it was mentioned that if the vendor fails or neglects to execute the deed of sale in favour of the purchaser within the period mentioned in the deed, then he shall become liable to liquidated damages in a sum of Rs.5 lakhs in favour of purchaser. The amount so paid shall be in addition to advance received by the seller. However, before the assessee could register the property, the seller declined to honour the contract and offered the liquidated damages as per the agreement - AO held that the said sum was taxable as business receipt – Held, that the appellant was working as a consultant in Pharmed Limited. M/s. Pharmed Limited was engaged in the business of marketing and trading of pharmaceutical products and that company appointed the appellant on the post of Consultant. Thus, the appellant was not engaged in the business of real estate. Hence, it cannot be said that the agreement for purchase of property was a part of business transaction – Also held that the appellant got a valuable right to purchase that property and thus the liquidated damages were accepted because the vendor was not willing to execute the sale deed – the liquidated damages were capital receipt.

[2009-TIOL-510-ITAT-DEL](#)

Sahara India Mass Communication Vs ACIT, Lucknow (Dated: May 29, 2009)

Income Tax - Assessee, engaged in publishing and printing business, claimed deduction on account of gift articles given - AO disallowed 50% of the deduction - CIT(A) confirmed disallowance - Held, the gift articles did not bear the logo of the assessee, they were distributed in the course of business to its customers and business associates in the course of business and the expenditure is allowable as business expenditure - Held, w.r.t expenditure on staff attending night shifts is incurred in the course of business and is reasonable with reference to the business needs and is fully supported by the vouchers furnished by the employees in respect of the expenditure - Held, assessee has a large number of bureau offices at different locations and the expenditure incurred on reimbursement of telephone expenses of the staff is prima facie for the purpose of business - Assessee's appeal partly allowed.

[2009-TIOL-509-ITAT-MUM](#)

M/s Sanjeev Woollen Mills Vs ITO,Mumbai (Dated: March 26, 2009)

Income Tax - Assessee company, manufacturer and exporter of blanket, claimed deduction u/s 80HHC - AO found that assessee valued the stock at market price and therefore revaluation was done and assessee's income was revalued and additions were made to assessee's income - CIT(A) dismissed assessee's appeal but Tribunal allowed assessee's appeal - HC allowed revenue's appeal and revenue thereafter imposed penalty u/s 271(1)(c) - Held the findings indicate that the explanation of the assessee that it was under bonafide belief that method followed had given the correct profit of the relevant years cannot be accepted—Held, however, that since the assessee was a 100% exempt export unit, the inflation of income hardly affected the quantum of tax to be paid—Assessee's appeal allowed.

[2009-TIOL-508-ITAT-DEL](#)

DCIT, New Delhi Vs M/s Silicon Graphics Systems (I) Ltd (Dated: May 22, 2009)

Income tax - Sec 43B - Assessee claims deduction for customs duty paid under protest - AO treats it as contingent liability and disallows - held, since it is settled law that it is not necessary that liability to pay duty must be incurred first and only thereafter the payment of such duty is made. The deduction is allowable u/s 43B of the Act on payment basis before incurring the liability to pay such amounts - Revenue's appeal disallowed

[2009-TIOL-507-ITAT-MUM](#)

ITO, Mumbai Vs M/s Ultra Entertainment (Dated: May 26, 2009)

Income tax - Penalty u/s 271C - assessee is into online lottery business - enters into an agreement with a company which is licensed by the State Government to conduct the entire online business - assessee pays certain percentage of its total revenue for using the infrastructure of the licensed company - fails to deduct TDS - AO says TDS u/s 194C was liable to be deducted and holds the assessee in default - CIT(A) holds TDS u/s 194J should have been invoked in this case but finds 'reasonable cause' u/s 273B for failure to comply with TDS provisions and dismisses penalty proceedings - held, since the assessee had a professional advice not to deduct tax at source it was a 'reasonable cause' for failure and penalty is not called for - CIT(A) order upheld - Revenue's appeal dismissed

[2009-TIOL-506-ITAT-MUM](#)

Shri Chandrakant H Shah, Mulund Vs ITO, Mumbai (Dated: January 12, 2009)

Income tax – Section 56(2)(v) – Assessee had taken loans from a builder and its three sister concerns and utilised it for purchase of flat from the same builder. The said loans were reflected by the assessee in his balance sheet as loan – AO treated these loan amounts of Rs. 54,70,000/- as gifts received and were given a colour of loan and considered it the income of the assessee u/s 56(2)(v) of the Act after giving

a rebate of Rs. 25,000/-, as per the findings that the repayment capacity of the assessee was very poor, loan was given without security, without any interest and without any repayment schedule and it was given as a mark of gratitude to the assessee having regard to the association of the assessee with the lender group. Hence, the entire transaction was of the nature of gift and not a loan. Further an addition was made for Rs. 6,56,400/- treating it as perquisite for interest free loan given to the assessee @ 12% of the loan amount.

CIT (A) disallowed the claim of the assessee in appeal stating that in absence of any interest and repayment terms and not having the capacity to repay the loan, loan transactions are abnormal in nature and without consideration. The fact that the assessee repaid loan to the extent of Rs. 15,00,000/- was also not brought to the notice of the AO which resulted into avoidance of further enquiry. Further regarding the claim of the assessee that out of the total loan amount Rs. 27,70,000/- was received prior to insertion of section 56(2)(v) i.e. prior to 1st Sep 2004 and therefore should not be considered as income u/s 56(2)(v), it was held that no such question was raised before the AO. Therefore, in view of above, the appeal of the assessee was rejected.

Regarding addition for perquisite for interest free loan, the addition was deleted as the entire loan was treated as income and there was no question of further addition for interest on such income.

On further appeal, held –

++ that at no stage of assessment proceedings, assessee was made aware of the intention of the AO to make the addition and in absence of the same, the assessee could not raise the fact that the out of the total loan amount Rs. 27,70,000/- was received prior to 1st September 2004 i.e. prior to the insertion of section 56(2)(v). Therefore, CIT (A) was not justified in not deleting the addition to this extent.

++ that the amount was shown by the assessee in its balance sheet as loan and this was also confirmed by the lenders by filing the loan confirmation statements. Therefore, it is purely loan and not a gift covered u/s 56(2)(v).

++ that before passing the assessment order, the assessee repaid loan taken from one of the concerns and it refutes the assumption of the AO that there was no obligation of the assessee to repay the loan amount.

++ that the said section was brought on statue to avoid the money laundering after the abolition of Gift Tax Act, 1958 in 1997 and the exemptions given in the section 56(2)(c) of the Act also leads to a conclusion that only bogus gifts are brought to tax under this provision and not the loan transactions.

++ that the charging of notional interest added as perquisite in the hands of the assessee is not correct as there was no employer and employee relationship and the contention of deemed dividend raised by the revenue is also not applicable as the assessee was not holding the required shareholding in the lender companies as is stipulated in section 2(22)(e) of the Act.

[Also see analysis of the Order](#)

[2009-TIOL-505-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Bajaj Hindusthan Ltd (Dated: April 20, 2009)

Income tax – AO disallows interest on excess levy of sugar price and on sugarcane rate difference which was later on allowed by the CIT (A) – Held that it has already been decided in assessee's favour in the assessee's own case and there is no flaw in the CIT(A) order allowing the assessee's claim - Revenue's appeal rejected.

Community Development expenses – AO disallows the expenses incurred by the assessee as non-business expenditure – CIT(A) restricts deduction to the extent of 50% - Held that the assessee is entitled to deduction of 100% following the decision of Kolkata Bench ITAT in the case of JCIT Vs. ITC Ltd. ([2008-TIOL-128-ITAT-KOL-SB](#)) .

Section 40(a)(ia) – Payment of wealth tax – Held that disallowance of claim of wealth tax payment is covered against the assessee in assessee's own case and therefore, cross objection raised by the assessee is dismissed.

[2009-TIOL-504-ITAT-MUM](#)

JCIT, Mumbai Vs Bombay Dyeing MFG Co Ltd (Dated: April 16, 2009)

Income Tax Act - Section 36(1)(iii) - By issuing Secured Premium Notes (SPNs) assessee raised funds and claimed deduction under section 36(1)(iii) - AO disallowed deduction alleging that it was capital in nature – Held, following ITAT order in assessee's own case for earlier assessment year that deduction claimed u/s 36(1)(iii) is allowable

Income Tax Act - Section 14A r.w sections 147 – Order u/s 143(3) was passed by AO on 23-1-2001 – Thereafter notice u/s 148 was issued on 21-4-2004 for reopening concluded assessment to disallow expenses claimed by assessee on account of exempted income – Held, that the proviso to section 14A inserted by Finance Act, 2002 with effect from 11-5-2001 does not confer any jurisdiction on AO to make reassessment under section 147 for any assessment year beginning on or before 1-4-2001 i.e AY 1998-99 in present case.

[2009-TIOL-503-ITAT-DEL](#)

Mitsubishi Corpn Vs ADIT, New Delhi (Dated: June 23, 2009)

Income tax - India-Japan DTAA - Interest u/s 234B - Assessee is a Japan-based non-resident company - carries out its activities through its LO - claims no income is taxable in India - Survey u/s 133A - based on documents found, Revenue attributes part of assessee's income to Indian operations and holds the same as taxable as per Articles of DTAA and also provisions of the Income Tax Act - tax determined accepted by the assessee but interest u/s 234B questioned - CIT(A) agrees with the AO - held, since there is no evidence that even after taking into reckoning the TDS, the assessee had liability to pay advance tax, the interest u/s 234B is not sustainable - Assessee's appeal allowed

[2009-TIOL-502-ITAT-MUM](#)

M/s Metal Extruders (India) Pvt Ltd Vs DCIT, Mumbai (Dated: January 27, 2009)

Income Tax - Assessee claims expenditure on account of remuneration to the Director - AO restricts the claim of remuneration to 35% and disallows the rest as excessive and unreasonable - CIT(A) finds the addition excessive and directs the AO to delete 50% of the addition - Held, the genuineness of expenditure have not been doubted. Disallowance of remuneration by the authorities below is not justified.

On the issue of disallowance of expenses out of miscellaneous expenditure where AO observed that examination of vouchers shows that several expenses shown under this head pertained to house property and apportion the expenditure in the ratio of lease rental and sales i.e. in the ratio of 65 : 35 - Held, AO has not pointed out any expenditure relating to house property nor CIT(A) has done so. The estimated disallowance not justified. Assessee Appeal allowed.

[2009-TIOL-501-ITAT-DEL](#)

DCIT, New Delhi Vs M/s Dalaer Singh Mehendi (Dated: June 12, 2009)

Income tax - Sec 80RR and India-Canada DTAA - assessee is a popular singer and stage show performer - performs shows in many countries - files return and the same is processed u/s 143(1) - Reassessment u/s 147 - return accepted - CIT invokes Sec 263 - directs AO not to consider the case under DTAA, withdraw deductions under Ss 80RR and 80G - AO acts on the order - CIT(A) directs the AO to allow deduction u/s 80RR after allowing deduction for 25% of total expenditure for shows held abroad - also directs the AO to verify documents and give tax credit under Article 23(3) of DTAA with Canada - held, since the AO has already worked out deductions as per the CIT order u/s 263, the CIT(A) not justified to interfere with the order - AO's order restored and assessee's appeal dismissed

[2009-TIOL-500-ITAT-MAD](#)

ITO, Chennai Vs M/s Sify E-Learning Ltd (Dated: May 26, 2009)

Income tax – Amortization of license fee expenditure on software over a period of three years – Where revenue expenditure results in a continuing benefit to assessee's business over a period of time, allowing expenditure in the year in which it is incurred will distort profits of that year, amortization of expenses permissible under concept of 'matching principle' – No reason to interfere with order of Appellate Commissioner

Income tax - Revenue earned by assessee from software and consultancy services recognized on delivery of goods/services – Accounting principle followed in terms of AS 9 in conformity with provisions of s. 145(2) – Appellate Commissioner's deletion of unearned income upheld

[Also see analysis of the Order](#)

[2009-TIOL-499-ITAT-MAD](#)

M/s Bengorm Nilgiris Plantaions Co Vs ACIT (Dated: February 27, 2009)

Deductibility of amount paid towards Mesne profits, interest on mesne profits and legal expense connected with the same.

Mesne profits were paid to legal heirs of the deceased partner in lieu of not paying any amount towards their legally entitled share – Suit filed by legal heirs finally settled by Apex court - On appeal, Tribunal held that the suit was against the other partners of the firm who enjoyed the benefits of the firm to the exclusion of the legal heirs of the deceased partner – Since firm was not in wrongful possession of the property, it need not have to pay any mesne profits and what was paid by the assessee firm was only application of income for the personal cause of partners – Such expenditure was not incurred wholly and exclusively for the purpose of the business.

[2009-TIOL-498-ITAT-MUM](#)

DCW Ltd Vs DCIT, Mumbai (Dated: February 18, 2009)

Income Tax Appellate Tribunal – Additional Ground – Held that, where the additional ground raises a question of law which arises from the undisputed facts as found by the income tax authorities and has a bearing on the tax liability of the assessee it merits to be admitted – Held further that Supreme Court decision in the case of Goetze (India) Ltd 284 ITR 323 (SC) will not impinge upon powers of ITAT to admit additional grounds as the same was concerned with the assessee's claim filed by way of letter before the AO and in that context, AO's authority to entertain the said claim was under consideration before the Hon'ble Supreme Court

Income Tax Act – Section 115JB – MAT – Assessee submitted that there has to be income tax payable on the total income as computed under I.T. Act in respect of previous year before any charge is attracted u/s. 115JB and since in its case there is net loss under the normal computation provisions, the provisions of section 115JB were not attracted – Held that the provisions of Section 115JB, are admittedly charging section. But at the same time, section 115JB is a code by itself and, thus, contains substantive as well as procedural provisions, therefore, which part of the section precisely creates the charge, has to be specifically identified. If closely section 115JB is examined, having due regard to the punctuation, then there is a comma between 'Income-tax' and 'payable' and further there is comma before 'is less'. Therefore, full effect will have to be given to the phrase following comma after the phrase 'Income-tax'. As per the terms of this section, it will be attracted if Income-tax payable in respect of total income computed under the Act is less than seven and one-half percent of its book profit. Thus, tax payable under the provisions of the Act should be less than seven and one-half percent of its book profit. Consequently, if the tax payable is more than seven and one-half percent of its book profit, then this section will not be attracted. Therefore, the dividing line for determining the applicability or non-applicability of the section is seven and one-half percent of its book profit as compared to tax payable, which actually creates the charge. The charge is not with reference to income tax payable but with reference to book profits. Charge under section 115JB is to be determined with reference to 7.5% of book profits. The process of determination of book profit is to be preceded with the comparison of liability for income tax under normal provisions of income tax which may be nil also. The income tax payable cannot be circumscribed by positive figure only. The purpose of comma after the term "Income-tax" and before the term 'less' is to qualify term "payable" by the term "less" and, therefore, to say that those companies, where Income tax payable being Rs.1/- would be covered and not the Zero tax companies, would not be correct. The term 'payable' used in the section cannot be limited only to the positive figure and if the income tax payable is zero still the requirements of

section would be met.

Interpretation of statutes - It is equally settled position of law that each general word appearing in a section should be given its full meaning having due regard to the context in which it is used. It should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it, and in interpreting the same it would not be reasonable to import any limitation on the same. It is also one of the cardinal principles of interpretation that a construction that will render a provision of an enactment wholly or partially meaningless or futile is not to be adopted by the court. The courts should endeavour to interpret the provisions of a statute in a manner that will achieve the object of provision, avoid mischief, advance the cause of justice, provide the remedy intended by the statute, make the law workable and enforceable instead of reducing it to a redundant or dead letter and best harmonize with and effectuate the object of legislation.

[2009-TIOL-497-ITAT-MUM](#)

ITO, Mumbai Vs M/s Juhu Construction Co Ltd (Dated: February 2, 2009)

Income Tax – Section 145 – Percentage Completion Method – assessee was executing projects in buildings named Mittal Park & Megh Apartments which were old projects while land for Ocean View was purchased previous year and construction commenced during the current year - In past the assessee had estimated profit at the rate of 20% in respect of the first two buildings - It estimated profit this year at the rate of 5% as against 20% estimated in past on the ground that there was crash in the real estate market and in respect of Ocean View project it had incurred heavy loss - AO passed the assessment order and relying upon BMC issued occupation certificate in respect of Megh Apartments and the assessee having given possession of three flats held that as the construction of Mittal Park and Megh Apartments was complete the profit from that project was required to be assessed on final basis. While estimating final profit the learned AO did not give any credit for the further expenditure which were claimed by the assessee as yet to be incurred in subsequent years – Held, that mere giving possession of few flats will not lead to a conclusion that the project had completed. Also held that, the AO's assertion that there was no mention of club-house in the agreements was not sufficient to disallow the expenditure. The facility of club-house was mentioned in the construction plans as approved by Bombay Municipal Corporation. The agreements of sale entered into between the assessee and its buyers had to be read with these plans. There was no material relied upon by revenue to show that expenditure on clubhouse was not wholly and exclusively for the purpose of business. It was not the case of revenue that the assessee had any ulterior motive for constructing the club-house. It is for the businessman to decide how to conduct his business and it was not for the assessing officer to advise the assessee as to what expenditure for the purpose of business should be incurred or not incurred – Held further that, the third project was to be assessed in isolation and the loss in that project will have to be allowed. The Assessing Officer himself accepted that there was heavy loss in that project – Also held, that in a case where profits before the completion of project have been and are being assessed, if there is loss it has to be assessed in the same manner.

[2009-TIOL-496-ITAT-BANG](#)

M/s United Breweries (Holdings) Ltd Vs ACIT, Bangalore (Dated: May 28, 2009)

Income tax - Sec 36(1)(vii) - Assessee company is created out of demerger of erstwhile UB Ltd along with UB Beer Ltd - Erstwhile UB Holdings Ltd gets into an agreement with a South African company National Sorghum Breweries Ltd for providing management services - a payment of five million rand is agreed to be paid for first four years of service, and thereafter 7.5% of profit before tax is to be paid for the services provided - Assessee enters into another agreement with United Breweries Ltd to provide the services on their behalf as they had no wherewithal to fulfill the obligation themselves - bad debt - assessee write off the fee receivable as bad debt after receiving a letter from the South African company that the South African Reserve Bank has not approved the payment - AO disallows the write off and asks assessee to prove that adequate efforts were made for recovery - CIT(A) allows the appeal - held, although from papers files it is not clear who is debtor for the payment and the same needs to be examined in de novo but once bad debt is written off in books of account, the assessee need not prove the same - Assessee's appeal allowed

[2009-TIOL-495-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Indian Plywood MFG Co Pvt Ltd (Dated: February 6, 2009)

Income tax – Penalty u/s 271(1)(c) – Held that as per the findings of the CIT (A) none of the additions made in search proceedings would have come out in case of no search proceedings were made and in absence of acceptable explanations from the assessee, penalty is correctly levied. Where the returned loss is reduced and the assessed amount is still a loss, levy of penalty u/s 271(1) is possible in view of decision of Apex court in Goldcoin Health Food Pvt. Ltd. Appeal of revenue is allowed.

Held - Penalty on additions set aside by the Tribunal to the file of AO would not survive and the AO is free to proceed in accordance with law if he finds for levy of penalty from facts after framing fresh orders.

[2009-TIOL-494-ITAT-MAD](#)

Shri R Yoogamoorthy Vs ACIT,Coimbatre (Dated: February 27, 2009)

Income tax - Sec. 158BD – Documents seized from the premises of the searched person shows receipt of unaccounted money by assessee in connection with transfer of a liquor shop – Assessee was confronted with the seized document as well as sworn statement of the searched person – After the assessee admitted that even the cheque payment received by him was not fully accounted, proceedings u/s 158BD was initiated – AO complied with the provisions contained in sec. 158BD – No time limit prescribed in the Act for issue of notice u/s 158BD – Appellate authorities cannot prescribe any time limit for initiation of such proceedings.

Assessee's contention that a part of the payment received was towards non-competee fee is devoid of any merits since it is only an afterthought and not supported by any written agreement for non-competition – Since the seized document showed both cheque and cash payments and since assessee admitted the receipt of cheque payment, he cannot deny the cash receipts.

[2009-TIOL-493-ITAT-MUM](#)

ITO, Mumbai Vs Grover Vineyars Ltd (Dated: March 05, 2009)

Income tax – deemed dividend – Sec 2(22)(e) – assessee company is manufacturer of wines from French variety of wine grapes – receives advance from other company – AO finds a common shareholder in both the companies holding 10% shares and considers the loan amount as deemed dividend – CIT (A) deletes the addition – Held that assessee is not a shareholder of the other company and deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of a person other than a shareholder following the decision of Rajasthan High Court in the case of Hotel Hill Top ([2008-TIOL-235-HC-RAJ-IT](#)) and ITAT Mumbai (SB) in the case of Bhaumik Colour (P)Ltd [2008-TIOL-641-ITAT-MUM-SB](#).

Disallowance of sundry balances written off – AO disallowed the claim in absence of the details – CIT (A) did not consider the details furnished before him at all and disallowed the claim – Held, CIT (A) is directed to consider the evidence filed by assessee and adjudicate the issue afresh.

[2009-TIOL-492-ITAT-MAD-TM](#)

ACIT, Chennai Vs Shri T N Gopal (Dated: June 26, 2009)

Income tax - Sec 54F - assessee is co-owner with his brother in a residential house - sells some shares in order to construct additional floor on existing house - claims exemption for capital gains u/s 54 - AO disallows the exemption on the ground that the assessee has only constructed additional floor on his existing house property but the exemption u/s 54F is available only for purchase or construction of a new property - CIT(A) albeit allows re-opening of assessment order u/s 147 but allows exemption to the assessee - Tribunal Members differ on the final view - Third Member goes with the Judicial Member who had based his view on the 'binding precedent' of the jurisdictional High Court, holding that mere extension of existing property does not entitle the assessee to claim the benefit of exemption u/s 54F - Revenue's appeal allowed

[Also see analysis of the Order](#)

[2009-TIOL-491-ITAT-MUM](#)

Variable Insurance Products Fund Vs ADIT, Mumbai (Dated: May 7, 2009)

Income tax - Indo-USA DTAA - Assessee is incorporated investment trusts in the USA - registered with SEBI as sub accounts of a Foreign Institutional Investor - make investments in shares and securities - file return declaring capital gains - revise return on the basis of an Advance Ruling in the case of a sister concern for treating the income as business income under DTAA - Revised returns held invalid by the A.O - Penalty u/s 271(1)(c) initiated for making false claim - whether penalty based on such invalid returns sustainable.

Assessee is American investor in stock markets - registered with SEBI as sub-accounts of M/s Fidelity Management Research Co - file returns, declaring short-term capital gains as well as dividend income - following an advance ruling, the assessee files revised return, claiming that their income be treated as business income on the

ground that the shares and securities held by them were business assets - And since the assessee has no PE, the business income is not taxable in India under the Indo-USA DTAA - AO asks for audit report and details of books maintained - Assessee reply to the AO that they do not maintain separate books for their Indian investments - AO invalidates the revised returns and initiates penalty u/s 271(1)(c) for making false claims of DTAA benefits - held, since the AO has found defects in the revised return and invalidated the same, initiating penalty on the basis of such invalid return cannot be sustained - besides, merely claiming a change in the nature of income, on the basis of a court ruling, cannot be equated to filing of false information - Assessee's appeal allowed

[Also see analysis of the Order](#)

[2009-TIOL-490-ITAT-BANG](#)

M/s Micro Labs Pvt Ltd Vs ITO, Bangalore (Dated: June 12, 2009)

Income tax - Sec 37 - Assessee is an incorporated company - passes Board Resolution to reimburse medical expenses of its Managing Director - AO treats it as perquisite liable to tax under section 40(c)(iii) - Assessee contends that it is business expenditure - held, since the assessee and the Managing Director having fiduciary relationship and not exactly an employee-employer relationship and the fact that the MD was instrumental in setting up a new factory and procuring orders for the products, taking care of his health was vital for the business of the assessee company and the decision to reimburse his medical expenses is to be treated as a business decision - such expenditure is allowable deduction u/s 37 - Assessee's appeal allowed

[2009-TIOL-489-ITAT-MUM](#)

Schnell Hans Beauty Clinic Pvt Ltd Vs DCIT, Mumbai (Dated: March 26, 2009)

Income Tax - Assessee is in the business of running a beauty parlour - AO makes addition on the basis of discrepancy in receipt as shown in the return and the one collected during search and seizure action u/s. 132 - CIT(A) upholds additions - Held, the contents of seized paper not disputed by the assessee, no infirmity in the order of the CIT(A) upholding the addition.

On the issue of CIT(A) confirming the addition on account of payment made to a service provider - Held, in the absence of any supporting evidence as to the purpose for which the payments have been made and the nature of services rendered. CIT(A) order upheld in sustaining the addition made by the AO. Assessee Appeal upheld.

[2009-TIOL-488-ITAT-DEL](#)

Sabre IncVs DCIT, International Taxation, New Delhi (Dated: July 10, 2009)

Income tax - Indo-USA DTAA - Assessee is a US-based company - maintains CRS system for booking airlines tickets, hotels etc - enters into contract with Air India and

Indian Airlines for distribution of its service - its agent installs computer, software and other hardware at subscriber's premises - pays certain percentage of income earned in India to its agent - business connection u/s 9(1)(i) - AO takes the view that the computer system installed at subscribers' premises is the service PE of the assessee under DTAA - held, the assessee has a service PE and follows the previous ruling of the Tribunal attributing 15% of global income to business generated in India but since the assessee paid more than the receipts to its agent, there is no income left to be charged to tax in India - Assessee's appeal allowed

[2009-TIOL-487-ITAT-MUM](#)

M/s Mahindra British Telecom Ltd Vs DCIT, Mumbai (Dated: March 20, 2009)

Income tax - Sec 263 – Assessee claims expenditure towards provision of Rs.8 crores representing management incentive/ variable performance – CIT considered this expenditure as being in the nature of bonus or commission covered u/s 43B of the Act – Held, that the order of the Income Tax Officer in respect which the CIT can exercise his power under section 263 should not only be erroneous but also prejudicial to the interest of the Revenue - CIT has not demonstrated as to how the prejudice has been caused to the Revenue - Even if it were to be held that the provision of Rs.8 crores was in the nature of bonus or commission and that section 43B was attracted, the disallowance was not warranted, as the assessee had made the entire payment before filing of the return - Directing the Assessing Officer to verify the claim could be given in exercise of power under section 263, but if the very jurisdiction of the CIT did not exist for the reason that there was no loss to the Revenue by the reason of non-application of mind of the Assessing Officer, then there is lack of jurisdiction.

Income tax - Sec 263 – CIT stated that AO while computing deduction u/s 10A has mistakenly taken into account the total turnover excluding expenses incurred for telecommunication charges and foreign exchange expenses in providing technical services outside India which was considered prejudicial to the interest of revenue – Held, that the view taken by the AO, supported by various decisions of the Tribunal, cannot be said to be erroneous.

[2009-TIOL-486-ITAT-BANG](#)

Shri Manoj Kumar Reddy Nare Vs ITO, Bangalore (Dated: April 3, 2009)

Income Tax – 'Non resident' status – computation of sixty days – first day to be excluded; If the word 'from' is used then the first in a series of days will stand excluded and if the word 'to' is used, then it will include the last day in a series of days or any other period of time. Thus there are two views in respect of ignoring the fraction of a day. When one has to compute the period for which an assessee is in India, one has to start the counting from a particular day and to end the same with specific day. The period is to be counted from the date of arrival of the assessee in India to the date he leaves India. Thus, the words 'from' 'to' are to be inevitably used for ascertaining the period though these words are not mentioned in the statute. As per General Clauses Act, the first in a series of a day is to be excluded if the word 'from' is used. Since for computation of the period, one has to necessarily import the word 'from' and therefore, accordingly, the first day is to be excluded. In the instant case, if the first day i.e. 31st January, 2005 is excluded then the period of stay will be 59 days. Since the period of stay will be less than 60 days, therefore, section 6(1)(c) will not be applicable and the status of the assessee will be non-resident.

Remuneration paid by an employer who is not a resident of USA will be taxable in India if the employee is resident of India: salary, wages and similar remuneration is taxable in the country on which the assessee is a resident in case the services are rendered in that country. If the employment is exercised in other country, then one has to see Article 16(2). The remuneration paid by an employer who is not a resident of USA will be taxable in India if the employee is resident of India. The DTAA does not provide exclusively that the salary or remuneration will be taxable only in USA.

[Also see analysis of the Order](#)

[2009-TIOL-485-ITAT-DEL](#)

DCIT , New Delhi Vs M/s Starion India (P) Ltd (Dated: May 22, 2009)

Income tax - Sec 92CA - Assessee is a South Korean FMCG company - enters into international transactions with its associated enterprise for manufacture of refrigerator, ACs and washing machines - TPO rejects computation of Arm's Length Price (ALP) - net operating margin shown by the assessee not accepted - TPO finds assessee has declared cost plus method in Form No 3CEB but the CA firm which computed the ALP has suggested TNMM - after pointing out many discrepancies in the computation of ALP, the TPO makes adjustment in the transfer price - CIT(A) disagrees with the TPO - held, no substance in the Revenue's appeal as CIT(A) has in great details discussed all the issues relating to most appropriate method for the instant case and selection of uncontrolled comparables - Revenue's appeal holds no water - dismissed

[2009-TIOL-484-ITAT-BANG](#)

DCIT, Bangalore Vs M/s Daimler Chrysler Research & Technology India Pvt Ltd (Dated: May 1, 2009)

Income tax - Sec 10A - Assessee is into development and export of computer software - avails simultaneous incentives of Sec 10A and Sec 80HHE - held, once Sec 10A deduction is availed, it ousts others deductions like Sec 80HHE and this issue is settled - CIT(A) order set aside and Revenue's appeal allowed

[2009-TIOL-483-ITAT-DEL](#)

M/s Chinatrust Commercial Bank Vs ADIT, Delhi (Dated: May 15, 2009)

Income Tax—Assessee, engaged in the business of international banking services, filed IT return asking for refund—AO allowed refund but no interest u/s 244A was given—CIT(A) upheld AO's order—Held, though it was contended by revenue that the refund was delayed due to assessee's default in filing a power of attorney but if without the power of attorney, the return could be processed and the assessment could be made, the refund could also be prepared and made to the assessee—Held, Sec 244A (2) provides for the non-granting of interest for the period of delay attributable to the assessee—Assessee's appeal allowed for statistical purposes.

[2009-TIOL-482-ITAT-DEL](#)

ACIT, New Delhi Vs M/s C J International Hotels Ltd (Dated: May 19, 2009)

Income tax - Sec 147 - Assessee is into hotel business - lets out space to various parties - Nil return filed - Reassessment initiated for a property sub-leased by the assessee but no income offered for assessment - treats this property u/s 22 as 'income from house property' - also disallows depreciation availed - held, since sub-leased owners further let out the property and income offered for taxation, the same property cannot be taxed in the hand of the assessee - there cannot be two owners of the same property - sub-licensees, real owners, are to be treated as deemed owner in view of the definition of ownership and transfer as given in see. 27(iii) read with section 269UA(f)(ii). Besides, the proviso to section 147 also comes into play and the assessment cannot be reopened in absence of any failure on the part of the assessee in disclosing the relevant particulars.

[2009-TIOL-481-ITAT-MUM](#)

M/s Raymond Ltd Vs ACIT, Mumbai (Dated: May 01, 2009)

Income Tax Act – Section 145A – Held, that adjustments on account of modvat are required to be made in respect of the purchases, sales and inventory in the closing stock. In view of the judgment of the Hon'ble High Court Of Delhi in case Mahavir Aluminium ([2007-TIOL-742-HC-DEL-IT](#)), adjustments on account of modvat is also required to be made to opening stock – matter set aside.

Income Tax Act – Section 14A – Held, in view of sub-section 2 and subsection 3 inserted by Finance Act 2006 w.e.f. 01.04.2007, the disallowance of expenses in relation to the exempt income is required to be made as per the guidelines framed by the government. Though the said amendment is effective from 01.04.2007, the Special Bench of the Tribunal in case of M/s. Daga Capital Management P. Ltd. (119 TTJ 289) = ([2008-TIOL-509-ITAT-MUM-SB](#)) has held that the said amendment is retrospective in nature and will apply to all pending proceedings. The government had in the meantime notified the Rule being Rule No. 8D giving the guidelines for disallowance of expenses. In view of the decision of the Special Bench (supra) the disallowance if any has to be made in terms of Rule 8D, which was not available at the time of passing the order by the AO. Matter set aside

Income Tax Act – Section 115JA – Held that there is no provisions in the Explanation to section 115JA for making any addition on account of prior period expenses which are ascertained liabilities.

Income Tax Act – Section 115JA – Held that since the profit and loss account for the purpose of book profit is to be computed as per the provisions of Companies Act, the provision for loss on account of foreign exchange fluctuation is required to be allowed as there is no express provision in the Explanation to 115JA(1) regarding any adjustments to be made on account of foreign exchange loss.

Income Tax Act – Section 94(7) - Held that provisions of section 94(7) are applicable from A.Y. 2002-2003 and it is therefore, not applicable in relation to transactions relating to the prior years

Income Tax Act – Business Expenditure – VRS – Held that, provisions of section 35DDA are not applicable to the facts of the cases as the said section is applicable

from assessment year 2001-02. The allow ability of such expenditure prior to insertion of section 35DDA had been considered by the Hon'ble High Court of Mumbai in case of Bhor Industries Ltd, ([2003-TIOL-176-HC-MUM-IT](#)) in which it has been held that expenditure on account of VRS liability is allowable as revenue expenditure.

Other issues were decided following earlier years ITAT orders in assessee's own case.

[2009-TIOL-480-ITAT-MUM](#)

Godavan Corpn Pvt Ltd Vs ITO, Mumbai (Dated: April 15, 2009)

Income Tax - Assessee claims depreciation on wind mill installed - albeit entitled to 100% depreciation but since it was used for less than 180 days during the year, 50% depreciation claimed - AO disallows and CIT(A) agree disallowance - Held, two requisites for depreciation allowance u/s 32 of the Act are that the depreciable asset is owned wholly or partly, by the assessee and "used for the purpose of the assessee's business" - even trial production of a machinery would fall within the ambit of "used for the purpose of business" - Assessee's appeal partly allowed.

[2009-TIOL-479-ITAT-DEL](#)

Steel Authority of India Ltd Vs ACIT, New Delhi (Dated: June 25, 2009)

Income tax - Sec 32 - Assessee is a PSU - is engaged in manufacturing of steel products - gets loans for modernisation and expansion - later Union Government grants waiver of loans and interest - Writtend down value (WDV) of capital assets - AO for reducing the cost of block of assets by the sum waived off - CIT(A) agrees - held, the actual cost may change prospectively as in the cases falling u/s 43A of Act. The waiver of loan by the Central Government would amount to meeting the cost of assets directly or indirectly on behalf of assessee in the year under consideration. Therefore the cost of assets has to be reduced by the amount of loan waived off during the year under consideration for the purposes of allowance of depreciation u/s 32 of the Act.

whether written down value of assets determined u/s 43(6)(c) can be can be disturbed in subsequent assessment year? - the actual cost of the asset is not permanent as determined in the year of acquisition - It is liable to change in subsequent year if the circumstances of the case so warrant.

[Also see analysis of the Order](#)

[2009-TIOL-478-ITAT-BANG](#)

M/s HMA Data Systems Pvt Ltd Vs DCIT, Bangalore(Dated: May 29, 2009)

Income Tax - Capital Gains - Assessee debits profit and loss account with the increase or decrease in the value of investments under the head 'revaluation of investments'

and this has not been dealt with separately in computation and treats it as business income - AO opines that the assessee has to declare income or loss without indexation and the head of income cannot be capital gains - CIT(A) finds that the AO had denied the benefit of long-term capital gains from the sale of investment on the ground that the assessee has been debiting the increase or decrease in value to the P & L A/c - he further finds that even if the assessee claimed the diminution or increase in the value of investments, it was not allowed by the AO - hence the AO was not justified in treating the profit on transfer of shares as income from business - on further appeal, held that in view of the categorial finding of facts by the CIT(A) Revenue's appeal is dismissed.

Assessee claims deduction for foreign travel - AO disallows - CIT(A) agrees - held, since the assessee has failed to substantiate the claim, the order of the CIT(A) does not call for interference

On the issue of CIT(A) confirming the disallowance on account of technical support charges as income of the assessee - Held, the mere fact that the assessee had a technical support agreement is not sufficient. There was no business activity in the year under consideration. The expenditure claimed in the absence of any proof of rendering services on the basis of that agreement cannot be allowed. On alternative plea of assessee matter remanded to AO to decide it on merit.

[2009-TIOL-477-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Shree Dhootapapeshwar Ltd (Dated: March 30, 2009)

Income Tax - Capital Gains - Assessee is a company - engaged in the business of manufacturing and trading in Ayurvedic medicines - Assessee raises fund through its surplus real estate by an agreement where the assessee has to get 50% of the constructed area in consideration of sale of the said land - Assessee declares profit arising out of said transaction as Capital Gains - AO considers it as income from business activity - CIT(A) allows assessee's Appeal - Held, on the terms of the agreement, it could not be said that it is a joint venture agreement and that, it is clear that what is received by the assessee company in terms of the constructed area, is part of the sale consideration against the sale of plot. CIT(A) order upheld - Revenue Appeal dismissed.

[2009-TIOL-476-ITAT-MUM](#)

M/s Chandulal Mohanlal & Sons Vs ITO, Mumbai (Dated: February 06, 2009)

Income Tax - Assessee claims deduction u/s 80HHC - Deduction reduced in assessment order after excluding 90% of gross interest, boiling charges and re-assortment charges from the profits of the business - CIT(A) dismisses assessee Appeal - Tribunal remands matter back to AO to decide the case on the basis of decision of the Bombay High Court in the case of CIT Vs. Bangalore Clothing Co.-In set aside proceedings AO rejects the explanation of the assessee and holds that the decision of Bombay High Court is not applicable - CIT(A) agrees with the AO order - Held, in view of the decision of Apex Court in CIT Vs. K. Ravindranathan Nair the order of the authorities below excluding 90% interest, valuation charges and re-assortment charges from the profits of the business for the purpose of computation of deduction u/s.80HHC is correct and in accordance with law - Assessee Appeal dismissed.

[2009-TIOL-475-ITAT-DEL](#)

DCIT, New Delhi Vs M/s U K Paints (India) Ltd (Dated: June 6, 2008)

Income Tax - Assessee company, using mercantile system of accounting, did not include interest accrued on inter corporate deposits - AO made addition to assessee's income holding that assessee was following accrual system - CIT(A) allowed assessee's appeal admitting additional evidences—Held, as per one of the conditions laid down in Rule 46A, the assessee is entitled to submit additional evidence if proper opportunity is not given by the AO during the course of assessment proceedings - Held, case where the interest free funds are available with the assessee which are sufficient to cover interest free loans advanced by the assessee, then disallowance u/s 36(1)(iii) is not justified - Revenue's appeal partly allowed.

[2009-TIOL-474-ITAT-MUM](#)

ITO, Mumbai Vs Maratha Mandir Co-Operative Bank Ltd (Dated: March 16, 2009)

Income Tax—Assessee, a co-operative bank, declared nil income in IT return—AO processed the return u/s 143(1) disallowing deduction u/s 80P(2)—CIT(A) held in favor of the assessee—Held, in the case of co-operative society, if the gross total income includes any income referred to in Sec 80P(2), the assessee is entitled to deduction in respect of the sums specified in sub-section (2) itself in computing the total income of the assessee—Held, word 'attributable' is used in section 80P in respect of banking business and the Assessing Officer has wrongly quoted the language of section 80P(2)(a) to give an impression as if the income qualifying exemption must be derived from the banking business—Held, the interest earned by the assessee in respect of advance rent of the premises utilized for the purpose of business is attributable to the banking business of the assessee—Revenue's appeal dismissed.

[2009-TIOL-473-ITAT-DEL](#)

Centurion Investment & International Vs ITO, New Delhi (Dated: May 15, 2009)

Income Tax—Assessee, an investment company, records certain entries in its books regarding sale and purchase of shares—AO, on the basis of the statement given by one Mr. Satish Chandra, held that the transaction was not genuine and party had no creditworthiness and it was a mere benami firm which is used to provide accommodation entries—CIT(A) upheld the AO's order—Held, assessee had not been allowed cross examination of the party whose statement has been used against him in making the assessment and the addition is thus in violation of principles of natural justice—Held, an addition made on the basis of a statement not tested by cross examination is invalid and vitiated, but the invalidity is not, however, of such a nature, which goes to the root of the proceedings—Held, AO can be directed to proceed further to examine the matter afresh on the basis of cross examined statement—Assessee's appeal allowed for statistical reasons.

2009-TIOL-472-ITAT-MUM
DCIT, Mumbai Vs OCS Services (India) Pvt Ltd (Dated: May 7, 2009)
Income Tax –cash payments in excess of Rs. 20,000/- made to employees working in rigs - covered by the exceptions provided in rule 6DD (j) and not liable to be disallowed under section 40A (3); As far as the other conditions stipulated in rule 6DD (j) are concerned, there is no dispute that all the employees in the present case were posted for a continuous period of 28 days on Rigs, which was more than the minimum period of 15 days stipulated in rule 6DD (j) and they were not maintaining any bank there. As such, considering all the facts of the case, the payments in question made by the assessee-company in cash in excess of Rs. 20,000 were duly covered by the exceptions provided in rule 6DD(j) and this being so, the same were not liable to be disallowed under section 40A(3).
Also see analysis of the Order
2009-TIOL-471-ITAT-MUM
M/s Goenka Papers & Synthetics Pvt Ltd Vs ITO, Mumbai (Dated: March 4, 2009)
Income Tax - Section 40A(3) - Assessee makes cash purchases from waste paper dealers known as raddiwalas - AO makes addition of 20% of the cash payment on the ground that the cash purchases so arranged to circumvent the mandate of the provisions of section 40A(3) - CIT(A) confirms it – Tribunal held that the assessee had not discharged its liability of providing the addresses or making the parties available and remanded issue back to AO with a specific direction to the assessee to render full assistance while providing the address of the parties or producing them. AO initiated proceeding but no evidence produced by assessee and hence AO stick to the earlier disallowance of 20% - Held, the assessee not having challenged the findings recorded in the earlier order of the Tribunal, the order has become final. AO was to take evidence from the assessee as directed by the Tribunal and decide the issue on the basis of such evidence. The assessee has admittedly not produced any evidence before the AO. Not a single person has been produced before the AO for verification. On facts the Order of the Revenue authorities upheld. Assessee's Appeal dismissed.
2009-TIOL-470-ITAT-MUM
M/s Sahara India Media Communication Ltd Vs ACIT, Mumbai (Dated: February 19, 2009)
Income Tax - Assessee claims deduction u/s 80HHF on the export turnover - AO rejects assessee's claim on the ground that the transactions claimed for export have taken place after close of financial year - CIT(A) agrees with AO - Held, since the consignments were sent and the same were telecast before the end of the previous year and the consideration on account of telecasting the serials were also received within the permissible time by the competent authority - the assessee is eligible for deduction u/s 80HHF as the conditions provided u/s 80HHF have been satisfied -

Assessee's appeal partly allowed.

[2009-TIOL-469-ITAT-MUM](#)

Shemaroo Video (P) Ltd Vs ITO, Mumbai (Dated: May 5, 2009)

Income tax - Sec 194C - Assessee is in the business of trading cassettes, VCDs and DVDs - Survey u/s 133A - Assessee is alleged to have not deducted tax at source on payments made to jobworkers for replication / manufacturing of DVDs and also on expenses towards packing material and designing - Assessee held to be in default - Order u/s 201(1) and u/s 201(1A) passed - CIT(A) agrees with the AO - held, since jobworkers manufacture DVDs in their own premises albeit as per technical specifications of the assessee but also incur the raw material costs and pay excise duty and sales tax and the the property is transferred to the assessee only when they are bought by the assessee, it is a contract for sale and not 'works contract' covered under Sec 194C - Assessee's appeal allowed

[2009-TIOL-468-ITAT-MUM](#)

M/s Zenith Fibres Ltd Vs ITO, Mumbai (Dated: February 9, 2009)

Income Tax - Assessee claims amount of sales tax exemption (incentive) as capital receipt - CIT(A) takes the view that the nature of such notional sales tax collected but exempted is nothing but sales proceed and therefore revenue in nature—Held, the incentive given in several instalments depends on the setting up and expansion of the industrial unit and object of the said subsidy is to fund the cost of setting up of an industry—Held, what is of vital significance is the purpose and object of the scheme and merely because the monies are received after production commences, it cannot be said, irrespective of the purpose and object of the scheme, that the receipt is of revenue nature—Assessee's appeal allowed.

[2009-TIOL-467-ITAT-DEL](#)

ACIT, New Delhi Vs Ravinder Behl (Dated: March 31, 2009)

Income tax - Assessee works as CEO of a non-resident company - employer company becomes subsidiary of an American company - contract terminated - compensation offered for truncating the contract period and also for services to be provided by the assessee to his successor by introducing the successor to key suppliers and clients - assessee claims the same as compensation for restrictive covenants - AO disagrees with the assessee and treats it as revenue receipt - CIT(A) holds part of the sum as payment towards restrictive covenants - held, since the compensation was for termination of the contract and the assessee was not prohibited from taking up fresh employment it was profits in lieu of salary u/s 17(3)(i) and is taxable as revenue receipt - Revenue's appeal allowed

[Also see analysis of the Order](#)

2009-TIOL-466-ITAT-MAD
ITO, Chennai Vs M/s Dhandapani Finance Ltd (Dated: March 31, 2009)
Bogus lease transactions – alternate plea raised by assessee that if lease transactions are treated as finance transactions, then only interest income to be assessed as income – alternate plea rejected since the transactions were sham – recent decision of apex Court in MCorp Global pvt. Ltd. Vs CIT followed
2009-TIOL-465-ITAT-MUM
M/s P V Constructions Vs ACIT, Mumbai (Dated: January 9, 2009)
Income Tax - Assessee made certain transfers to its sister concern on account of lease and reversionary interests - AO held that the said payment is gratuitous in nature without any legal obligation - CIT(A) confirmed AO's order - Held, to invoke the provisions of Sec 147, the AO must have "reasons to believe" and this expression cannot be considered in vacuum - Held, material may not be conclusive but must be sufficient for forming the prima-facie belief that income of the assessee had escaped assessment - Assessee's appeal allowed
2009-TIOL-464-ITAT-DEL
DCIT, New Delhi Vs M/s Sivalik Cellulose Ltd (Dated: April 09, 2009)
Income Tax - Assessee company was to be managed by HLL under the scheme of rehabilitation for which assessee company claimed misc expenses on account of cost paid to HLL for salaries of the managers, officers on deputation and other expenses - AO disallowed the same holding it not a business expenditure and it pertain to earlier years - CIT(A) allowed assessee's appeal - Held, since all these events took place during the relevant previous year, the liability has to be considered as pertaining to that year according to the mercantile principles of accounting and simply because the liability was related to the earlier period, its deduction cannot be disallowed - Revenue's appeal dismissed.
2009-TIOL-463-ITAT-HYD
Sri Mohanarami Reddy, Chittoor Dist Vs ITO, Chittoor (Dated: February 6, 2009)
Income tax - Delay in filing return due to sickness – Assessee could not have planned sickness – Penalty quashed: The Assessing Officer's contention is that the assessee should have got the accounts audited before he fell ill. It may be noted that it is for the assessee to plan his affairs. Had he anticipated sometime in April or May that he is going to fall ill in October, he may have thought of getting the accounts audited.

Perhaps, this thought also may not have materialized because he was dependent on the auditor as well. If the auditor was busy elsewhere, the assessee cannot be blamed.

[2009-TIOL-462-ITAT - BANG](#)

Mysore Urban Development Authority Vs ITO, Mysore (Dated: May 15, 2009)

Income Tax - Section 194A - The appellant is a body corporate constituted under the Act, and is charged with planned development of Mysore City - Funds made available by Asian Development Bank on behalf of the Govt. to MUDA, KUIDFC asked to act only as a nodal agency, a conduit through which funds for the project to be released - ITO treats the payment of interest made by MUDA as income of KUIDFC - He passed the order u/s 201 and demanded various sums being the TDS that ought to have been deducted and also levied interest u/s 201(1A) for the alleged default - CIT(A) allows appeal for few years, partly allows appeal for two years and dismisses appeal for two years - Held, the matter requires consideration afresh in the light of the provisions of section 194A read with section 197 as applicable to the assessee defined therein. Issue restored to the file of AO for bringing on record the facts which directly note it was the assessee as assessee in default for the impugned A.Y to establish that the provisions of section 194A be not applied to them. Assessee Appeal allowed

[2009-TIOL-461-ITAT - DEL](#)

M/s Consultancy Engineering Service India Pvt Ltd Vs ACIT, New Delhi (Dated: May 15, 2009)

Income Tax - Assessee engaged in engineering consultancy in India and abroad - AO disallows "profit sharing bonus" on the basis of earlier year decision of the revenue to challenge the Tribunal's decision in the High Court and makes addition - CIT(A) deletes addition on the basis of Tribunal's decision - Held, CIT(A) order upheld - Revenue ground dismissed.

[2009-TIOL-460-ITAT - BANG](#)

ITO, Bangalore Vs M/s Motorola India Pvt Ltd (Dated: May 01, 2009)

Income tax - Sec 10A - assessee is into development of embedded software - reduces foreign travel expenses and leased lines charges from total turnover before claiming benefits of Sec 10A - held, it is already settled law that what is deducted from export turnover is also to be deducted from total turnover - although such a decision was given in the case of Sec 10B but since the material statutory provisions are identical in section 10A, the ratio of the order would equally apply to the interpretation of section 10A also - applying the ratio of the order of the Special Bench, Revenue's appeal dismissed

[2009-TIOL-459-ITAT-MUM](#)

Dresser Valve India Pvt Ltd Vs ACIT, Mumbai (Dated: April 24, 2009)

Income tax - Sec 115JB - assessee is into the business of manufacturing and trading - makes provision for gratuity - adds back the same while computing total income - AO finds that the sum is not added back for purpose of Sec 115JB - disallows it - CIT (A) takes the view that the actuarial valuation was not applied while determining the liability on account of gratuity and it is in violation of Accounting Standard -15 (AS-15) - held, the actual quantification is not a legal necessity in matters of ascertainment of the gratuity. The provision of gratuity in the assessee's case is capable of being estimated with reasonable certainty and therefore, it is not a contingent or unascertained liability. Thus, it is a ascertained liability and the same is outside scope of the provisions of clause (c) of the Explanation 1 to section 115JB warranting no addition to the 'books profits'. Assessee's appeal allowed

[2009-TIOL-458-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Welspun India Pvt Ltd (Dated: April 03, 2009)

Income Tax - Assessee company filed a loss return but subsequently revised the loss return for 3 consecutive years—Special audit u/s 142(2A) was directed and based upon the report of special auditor, certain additions were made while completing the assessment u/s 143(3) - CIT(A) allowed assessee's appeal by quashing the assessment orders - Held, for assumption of jurisdiction to reassessment, it is the AO who has to assert on materials available to prove that he has 'reason to believe' that income chargeable to tax escaped assessment, an opinion of the third person (Special Auditor's report) cannot be "reason to believe" of the Assessing Officer - Revenue's appeal dismissed.

[2009-TIOL-457-ITAT-MUM](#)

M/s Veritas Properties Pvt Ltd Vs ITO, Mumbai (Dated: March 13, 2009)

Income tax - Sec 23(1) - assessee is into real estate business - buys a flat and gives the same to one of its Directors for residential purpose - A part of the flat is used for its sister concern for holding business meetings - receives a nominal rent from the sister concern - claims it as business income and deducts expenditure from the same - AO determines huge ALV on the basis of similar properties in the vicinity and disallows the same as business income - held, as per law the appropriate course for the AO will be to determine the ALV for that portion of the flat which is occupied by the Director on the basis of retable value determined by the municipal authorities and the income from the remaining portion used for commercial purpose be treated as business income and expenses related to the same be allowed - Assessee's appeal allowed

[2009-TIOL-456-ITAT-MUM](#)

Metro Exporters Ltd Vs ITO, Mumbai (Dated: February 20, 2009)

Income Tax - Section 36(1)(iii) - Assessee claims interests on the loan taken from sister/group concern but gives interest-free funds to the same sister/group concern - AO makes disallowance - CIT(A) confirms it - Held, if an assessee having sufficient interest free funds, in the form of capital reserves and other funds without interest bearing from relatives and friends not related to business, to cover funds given interest free or utilized other than for business purposes, no disallowance is warranted. If the own funds are not sufficient to cover interest free advances, a proportionate disallowance is warranted. While examining interest free funds available with assessee and interest free funds given a care is required to be taken that these funds were not related to business of the assessee. Capital and Reserves are certainly assessee's own interest funds. The commercial expediency is also required to be established by the assessee by furnishing relevant material based on which it can be said that interest free funds given to sister concern are in conformity with provisions of Companies Act and provisions of regulatory bodies. Before disallowing such interest the AO is duty bound to examine those material as enough power in this regard provided in IT Act. Matter remanded back to AO to decide the issue afresh in accordance with law keeping in above discussion & guidelines.

[2009-TIOL-455-ITAT-MUM](#)

Shree Durga Capitals Ltd Vs ACIT, Mumbai (Dated: March 25, 2009)

Income Tax - Assessee company raised money through share capital issue to 11 parties - During a search action u/s 132 blank share certificates were found and AO accordingly treated the money alleged to be raised as income of the assessee on the ground of confessional statement of a director - CIT(A) confirmed AO's order - Held, assessee issued share capital to 11 parties on receiving the money through proper banking channel and all the parties are assessed to tax and they have confirmed in having purchased shares of the assessee company, therefore, retraction or non disclosure of the amount was bonafide - Held, no direct confession was made as the assessee agreed because of compelling circumstances to pay tax on the amount of Rs 2 crores and thereafter, disclosure was not made in the return of income for simple reason that share capital raised by the assessee was genuine and all the entities to whom shares were allotted were identifiable - Assessee's appeal allowed.

[2009-TIOL-454-ITAT-MUM](#)

Raja Shreepal Co-Operative Housing Society Ltd Vs ITO, Mumbai (Dated: March 9, 2009)

Income Tax - Assessee, a housing society, was assessed by reopening u/s 148 - deduction u/s 80P was allowed - CIT(A) held the order of AO as erroneous and prejudicial to the interest of revenue and set aside the same u/s. 263 - also held that the interest income received on fixed deposit with Syndicate Bank and the bonds with ICICI Bank is chargeable to tax under the head 'Income from other sources' and not eligible for deduction u/s 80P - Held, interest income from fixed deposit and bonds / deposits were made out of the earmarked funds - Held, since no amount was received from any non-member, interest and dividend income from investments could not be treated as transactions with non-members so as to lose the benefit of the exemption on the basis of principles of mutuality - Held, an order cannot be revised on the ground that there is a possibility of prejudice to the interest of revenue - Assessee's appeal allowed.

[2009-TIOL-453-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Nufab India Ltd (Dated: April 13, 2009)

Income Tax - Assessee showed purchase of trading export through certain exporters of Tuticorin and claimed deduction u/s. 80HHC —AO found that exporters directly purchased and sold sea foods and concluded that the assessee company has not exported sea food but has only shown the purchase and sale in its profit and loss account - CIT(A) allowed assessee's appeal - Held, in order to show that the assessee had to carry out the transaction without any commercial benefit, the primary onus lays upon the assessee to bring material to that effect, which the assessee failed to discharge - Revenue's appeal partly allowed.

[2009-TIOL-452-ITAT-MUM](#)

M/s G M Breweries Ltd Vs ACIT, Mumbai (Dated: March 26, 2009)

Income tax - penalty u/s 271(1)(c) - assessee is into manufacture and sale of liquor - sells a flat - AO for short-term capital gains tax - CIT(A) and Tribunal confirm the AO's view - Penalty proceedings initiated - held, the explanation of the assessee is that it had purchased the properties for business but the same could not be used and no depreciation was claimed and when the properties were sold in part, the sale consideration was deducted from the block asset and in the year of full sale, the short term capital gain u/s 50 was offered for taxation and the same was accepted in assessment - since there was no intention to conceal any income as the assessee had ultimately paid taxes, penalty is not called for - assessee's appeal allowed

[2009-TIOL-451-ITAT-DEL](#)

GE Capital Services India Vs DCIT, New Delhi (Dated: July 3, 2009)

Income tax - Dividend income - exemption u/s 10(33) - Assessee is a NBFC - earns dividend income from its investments in securities - claims exemption - AO allows exemption on net dividend income - disallows 25% of gross dividend as expenditure being incurred as administrative and management costs - CIT(A) concurs with the AO - before Tribunal the assessee argues that if disallowance is calculated as per sub-section (2) and (3) of Sec 14A inserted vide Finance Act 2006 and Rule 8D notified in 2008 as upheld by the Special Bench in the case of Daga Capital Management, an absurd result emerges as disallowance of expenditure works out to be many times the dividend earned and it cannot be the intent of the legislature as it violates settled principles of law - Held, in view of the appeal against Daga Capital case being admitted by the Bombay High Court and also another appeal being admitted by the Delhi HC, referring the issue to the ITAT President for setting up five -member larger bench will not serve any practical purpose - plea of the assessee dismissed but the hearing in the instant case blocked for six months to wait for HC decision

[Also see analysis of the Order](#)

[2009-TIOL-450-ITAT-BANG](#)

M/s Intimate Clothing Pvt Ltd Vs Addl.CIT, Bangalore (Dated: May 22, 2009)

Income tax - Penalty u/s 271(1)(c) - Assessee is into the business of clothing - deducts TDS but fails to deposit the same due to change in the management of the company - AO passes an order u/s 201(1) and 201(1A) - Assessee deposits the tax with interest - Penalty proceedings initiated - held, the penalty u/s 271C is impossible only if the assessee fails to deduct tax at source and not for failure to deposit the same with delays - Assessee's appeal allowed

[2009-TIOL-449-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Maharashtra Steel Rolling Mills Pvt Ltd (Dated: May 11, 2009)

Income Tax - Assessee, a company engaged in the manufacturing business, paid commission on purchases to a company on account of import of billets purchased from another company and debited this claim of commission to purchase account - AO disallowed the commission holding that assessee failed to substantiate the transaction - CIT(A) partially allowed assessee's appeal - Held, to allow the claim of deduction on account of commission it is necessary for the assessee to establish that the payment has been made for the services rendered - Held, when there is sufficient evidence on the one hand and on the other hand there is mere suspicion, the scales of balance of justice will tilt in favour of the evidence - Revenue's appeal dismissed.

[2009-TIOL-448-ITAT-MAD](#)

ACIT, Chennai Vs TVS Motors Company Ltd (Dated: April 09, 2009)

Income Tax—Assessee Company, claimed R&D expenditure through a letter which was disallowed to the tune of amount in excess of what was stated in the accounts—CIT(A) allowed the expenditure—Held, when the Assessee has already made a claim in respect of a particular deduction and when it was noted during assessment proceedings, it is clear that the particular claim was not properly quantified, the Assessee would have the right to correct the right figure and it cannot be said that it is a fresh case—Held, w.r.t. expenditure incurred on Dyes & Moulds, dies and moulds cannot be classified as plant and machinery because they themselves cannot be employed independently in manufacturing in an industrial undertaking and, therefore, amounts to revenue expenditure—Held, whenever Sales tax is received the same would be credited and if there is excess liability the same has to be paid to the concerned State Govt., and if there is excessive credit then the same is required to be taxed—Revenue's appeal dismissed.

[2009-TIOL-447-ITAT-BANG](#)

M/s United Breweries Ltd Vs DCIT, Bangalore (Dated: April 01, 2009)

Income Tax—Assessee Company gave certain advances to another company which was declared to be a sick company by BIFR and assessee claimed the same to be business loss u/s 28—AO disallowed the same—CIT(A) confirmed AO's order—Held, it may be that the sick company is controlled and managed by the assessee but for that reason alone it cannot be said that the amount standing to the debit of that company can be allowed as business loss—Held, the loss cannot be allowed as business loss u/s.28—Assessee's appeal dismissed.

[2009-TIOL-446-ITAT-MUM](#)

M/s West Coast Industries Vs ACIT, Mumbai (Dated: April 17, 2009)

Income Tax – penalty - where an assessee *bona fide* believes a sum as not chargeable to tax and subsequent orders of the appellant authority show that such a stand was a justifiable one, it cannot be deemed as a case of concealment or furnishing inaccurate particulars - No doubt, as per law laid down by the Apex Court in *Dharmendra Textile Processors* case levy of penalty is a culmination of civil proceedings and such penalty is only compensatory in nature, and there is no question of any element of *mens rea*. But where an assessee *bona fide* believes a sum as not chargeable to tax and subsequent orders of the appellant authority show that such a stand was a justifiable one, it cannot be deemed as a case of concealment or furnishing inaccurate particulars. Just because an assessee could not offer explanation referring to the concerned case laws in an exact manner, it would not make any significant difference in the state of law as it existed at the time of filing the return.

[Also see analysis of the Order](#)

[2009-TIOL-445-ITAT-MAD](#)

DCIT, Chennai Vs M/s Seshasayee Paper & Boards Ltd (Dated: March 18, 2009)

Income tax - Interest granted by I.T. Department u/s 244A – Taxable in the year of receipt – Income accrued to the assessee since an enforceable debt in the form of order granting refund, was passed – When such interest is granted as refund, the requirements of sec. 4 & 5 are satisfied – Such right was not contingent – Upheld the action of AO in assessing such interest in the year of receipt.

[2009-TIOL-444-ITAT-DEL](#)

ACIT, New Delhi Vs M/s TAJ International Jewellers (Dated: February 6, 2009)

Income Tax - Assessee, engaged in Jewellery export business, deducted Interest paid on loans borrowed for obtaining letter of credit for import of gold from interest received on FDRs and net interest was disclosed in the return - AO disallowed the netting of interest holding that there was no nexus between earning of interest and

expenditure of interest - CIT(A) allowed netting of interest - Held, on facts of the case, the interest earned and paid appears to be part of business carried on by the assessee as borrowed funds were utilised for purchase of FDRs—Held, interest paid has to be allowed u/s 57(iii) as amount was borrowed for making and earning income - Held, taxes cannot be levied in total disregard of prevailing factual situation and by considering intention only - Revenue's appeal dismissed.

[2009-TIOL-443-ITAT-MUM](#)

First Securities Pvt Ltd Vs ACIT, Bangalore (Dated: May 22, 2009)

Income tax - Sec 43(5) - Assessee is into sale and purchase of shares - suffers loss and carries the same forward and sets off the same against profit of the next fiscal - AO disallows the same as speculation business loss which can be set off only against speculation business profit - AO invokes Sec 73(1) - assessee pleads the transactions were in the nature of jobbing charges - CIT(A) agrees with the AO - held, as per proviso (c) to Sec 43(5) the transactions in nature of jobbing not to be treated as speculative transaction and once a transaction is not speculative, any loss arising out of such transactions is business loss which can be set off against business profits - Assessee's appeal allowed

[2009-TIOL-442-ITAT-MUM](#)

M/s Meher Foundation & Civil Engineering Pvt Ltd Vs DCIT, Mumbai (Dated: May 12, 2009)

Income Tax - Assessee company, working as contractor in construction business, sub contracted certain works and made payment to them on that account - AO disallowed the payments on the ground that the notices issued to the sub contractors returned undelivered and assessee failed to furnish evidence or the fresh addresses of such sub contractors - CIT(A) rejected the application filed by the assessee u/s 46A to admit additional evidence in support of the claim of the genuineness of expenses - Held, principles of natural justice warrants that the assessee be allowed an opportunity to produce evidence to support the claim of deduction - Held, the difficulty of the assessee in collecting the evidence from small contractors, who do not have permanent addresses, has got to be appreciated and it would be in the interest of justice to entertain the evidence - Assessee's appeal allowed for statistical purposes.

[2009-TIOL-441-ITAT-BANG](#)

M/s Amco Power Systems Ltd Vs ITO, Bangalore (Dated: June 13, 2009)

Set off of carry forward loss - 51% of the voting power is to be beneficially held during the year: To see the applicability of sec. 79 of the Income-tax Act, we have to see that 51% of the voting power is beneficially held during the year under reference by the persons who held such voting right during the year in which loss was incurred. Since, the Board of Directors of M/s APIL are controlled by M/s ABL, being a holding company, hence the voting power of M/s APIL is controlled by M/s ABL and

hence such voting power is beneficially held by M/s ABL.

Expenditure on Know-how: Section 35AB is applicable when the amount paid is not consideration as revenue expenditure but a capital expenditure: looking to the definition of the word paid given in sec. 43(2) of the Income-tax Act, ITAT held that the CIT(A) was justified in allowing the deduction. Section 35AB is applicable when the amount paid is not consideration as revenue expenditure but a capital expenditure. It is also useful to note that in case the assessee is not given deduction under sec. 35AB then, it will be entitled to depreciation under sec. 32 of the Act.

[Also see analysis of the Order](#)

[2009-TIOL-440-ITAT-BANG](#)

ACIT, Bangalore Vs M/s Kshema Technologies Ltd (Dated: May 29, 2009)

Income Tax - Assessee, claimed that the exchange fluctuation loss should be considered for reduction from the 'total turnover' - AO rejected the contention and held that expenses incurred in foreign currency for providing software development services outside India could be excluded from the 'export turnover' - CIT(A) partly allowed assessee's appeal - Held, expenses incurred, in foreign exchange in providing technical services outside India reduced from the declared export turnover is also to be reduced from the declared total turnover in computing the deduction u/s 10A - Held, expenses incurred in foreign currency for providing software development outside India from the export turnover should not be excluded for the purposes of Sec. 10A—Revenue's appeal dismissed.

[2009-TIOL-439-ITAT-MUM](#)

M/s Rumans Industrial Chemical Corpn Vs ACIT, Mumbai (Dated: March 20, 2009)

Income Tax - Section 50C(2) - AO adopts market value for the valuation of the property where as the sale consideration being less than the market value - CIT(A) confirms it - Held, in case assessing officer does not agree with the explanation of the assessee with regard to lower consideration disclosed by him, he should refer the matter back to DVO for getting some market rate established as on date of sale. Matter remanded back to the file of AO with a direction that he should refer the matter of valuation in the light of section 50C(2) to DVO for determining the correct consideration - Assessee Appeal allowed.

[2009-TIOL-438-ITAT-COCHIN](#)

Arun Sunny Vs DCIT, Ernakulam (Dated: April 28, 2009)

Income tax - Ss 45, 48 & 55 - Assessee is an individual - buys a piece of marshy agricultural land for Rs 9000 in 1975 - sells the same for over Rs 11 Crore in 2006 - long-term capital gains - calculates Fair Market Value (FMV) from date of conversion

of land as capital assets in 1994 - AO for FMV from 1.4.1981 - held, for calculation of FMV the date of conversion of land into capital assets is irrelevant as it only changes the character of the land from agricultural to capital asset - for determining capital gains tax, the law is very clear as the date for calculating FMV is embedded in the law itself as 1.4.1981 - law further makes it clear that all properties acquired prior to 1981, the FMV is to be calculated from 1.4.1981 and conversion of land into capital assets only decides exigibility of asset for the levy of tax - Assessee's appeal dismissed

[Also see analysis of the Order](#)

[2009-TIOL-437-ITAT-DEL](#)

Ranjit Singh Vs ITO, Sirsa (Dated: June 26, 2009)

Income Tax - Assessee was issued a notice u/s 148 and an addition was made to his income by AO on account of certain land leased to a bank - Assessee denied stating that the land belongs to HUF - Held, since AO himself has accepted the assessee's claim that rental income is not assessable in the hands of assessee as an individual, the reason recorded for issuing notice u/s 148 does not survive - Held, if the additions made are unconnected and totally alien to the item in respect of which reasons were recorded u/s 148 then the additions made which came to his notice during the reassessment' proceedings after initiating reassessment proceedings are bad in law - Assessee's appeal allowed.

[2009-TIOL-436-ITAT-DEL](#)

Delhi Metro Rail Corpn Ltd Vs JCIT, New Delhi (Dated: May 15, 2009)

Dispute between State PSUs and Central Departments – Delhi Metro is hybrid PSU - COD clearance required: The decision of Delhi High Court is that such approval is required when there is a dispute between the Income-tax Department and the undertaking of the State Government. However, the assessee is a joint venture, wherein Central Government and the State Government hold equal shares. Thus, it is what we may call a hybrid PSU. The question is whether in case of disputes between the Income-tax Department and the hybrid PSU, the previous approval of the COD is required? Such permission is required in case of a PSU of the Central Government or the undertaking of the State Government. Therefore, there is no reason to come to a conclusion that such an approval is not required in case of a hybrid PSU.

[Also see analysis of the Order](#)

[2009-TIOL-435-ITAT-MAD](#)

M/s Saura Trade Credits Pvt Ltd Vs ITO, Coimbatore (Dated: November 04, 2008)

Profit on sale of shares / mutual funds – whether Business income or capital gains.

Assessee treated the surplus arising from transfer of shares and mutual funds as long term capital gains on the ground that they were holding such assets as investments. AO analysed the holding pattern, period of holding, frequency of transactions etc. and held it as business activity. On appeal, Tribunal held that the only activity carried on by the assessee is purchase and sale of shares and mutual funds and they have not carried out any other activity. The proportion of the dividend income received by the assessee was so negligible when compared to the quantum of profit earned out of purchase and sale of shares / mutual funds and those dividends were only incidental to the holding of such assets at the time of declaring the dividends. Action of the AO upheld

Appeal by assessee dismissed.

[2009-TIOL-434-ITAT-MAD](#)

DCIT, Chennai Vs M/s A V Thomas Leather & Allied Products Ltd (Dated: March 20, 2009)

Income tax - Whether loss suffered in 10A unit can be set off against profit earned in non-10A units – According to Tribunal, the amended provisions of sec. 10A w.e.f. 1.4.2001 provides for a deduction from total income and not exemption – Loss from a 10A eligible unit is available for set off u/s 70 and 71.

[2009-TIOL-433-ITAT-BANG](#)

State Bank of Mysore Vs DCIT, Bangalore (Dated: May 29, 2009)

Once the Revenue is accepting that profit arising on the maturity of investment is business income, then it cannot take the stand that it is not stock-in-trade: the assessee is entitled to value all the investment at cost prices or market value whichever is lower by treating such investment as stock in trade.

Bad debts recovered – when no deduction claimed for bad debts, recovery cannot be taxed: if such bad debts exceed the reserve, the excess amount alone can be charged to P&L account as per 36(1)(vii) of the Act, in such event section 41(4) comes to play, when the excess amount so charged to P&L account u/s. 36(1)(vii) of the Act is subsequently recovered from bad debts. In this given case, the assessee asserts that the actual amount of Rs.39,38,25,324 is adjusted against the reserve created by virtue of section 36(1)(vii) of the Act and had not exceeded the reserve account. Therefore, the assessee claims no amount was charged to P&L account by invoking section 36(1)(vii) of the Act. Since the assessee has not claimed bad debts u/s.36(1)(vii) of the Act, but purely adjusted the amount against the reserve created u/s. 36(1)(vii) of the Act, section 41(4) cannot be invoked.

[Also see analysis of the Order](#)

[2009-TIOL-432-ITAT-MUM](#)

M/s Excel Industries Ltd Vs JCIT, Mumbai (Dated: January 12, 2009)

Income Tax - Section 80HH - Assessee claims that the deduction u/s 80HH ought to be allowed in respect of the profits of the concerned units before deducting admissible depreciation in respect of profits and gains of newly established undertakings in backward areas - AO determines the deduction u/s 80HH at nil after making the adjustments - CIT(A) upholds the action of AO in excluding other income, except income from sale of scrap - Held, *On the issue of depreciation and rent recovery*, in view of decision of Apex court in case of *Pandian Chemicals Co. Ltd*, assessee's claim dismissed. *CIT (A) order upheld and Assessee's Appeal dismissed.*

Section 35AB, 35AB - On the issue of CIT(A) upholding the action of the JCIT in treating expenditure as incurred on technical know-how and holding it allowable u/s 35AB instead of as revenue expenditure allowable under section 37 of the Act - Held, in the view of Tribunal decision in assessee own case of earlier year. Assessee Appeal allowed.

[2009-TIOL-431-ITAT-MAD](#)

Mrs G V Vidhya Vs ITO, Erode (Dated: January 30, 2009)

Income tax - Interest u/s 234B can be levied in re-assessment proceedings even when no such interest was levied in the original proceedings.

In waiver petition, CCIT held that interest u/s 234B is leviable – consequent proceedings by AO to give effect to such an order is not appealable.

Rectification order substitutes the original order only on matters dealt with therein – Time limit for filing rectification to be considered on the basis of date of order in which subject matter of rectification application was last dealt with – Since the present rectification sought by the assessee is with reference to matters in original assessment order passed more than four years back, the present rectification application is beyond time.

[2009-TIOL-430-ITAT-MUM](#)

M/s Kishorekumar B Zaveri Pvt Ltd Vs CIT, Mumbai (Dated: March 19, 2009)

Income Tax - Section 263 - Assessee is a manufacturer and dealer of gold and silver jewellery - owns certain properties which had been let out on rent to banks and other establishments - In earlier years AO has assessed the income as business income. But in assessment year 1991-92, the assessment had been reopened following the judgment of Apex Court in case of *S.G. Mercantile* and the rental income assessed as house property income. The said assessment are disputed and finally the Tribunal held that income from property had to be assessed as income under the head "house property" - CIT after taking note of the decision of the Tribunal in assessee's own case for A.Y 1991-92 sets aside the assessment order to be made afresh.

The assessee in this appeal has challenged the decision of CIT u/s. 263 - Held, The decision of Tribunal in assessee's own case is binding on the lower authorities and in absence of any contrary judgment of the jurisdictional High Court or the Apex Court on the same issue not following the decision of the Tribunal could constitute an error which had definitely caused prejudice to the interest of revenue - no infirmity in the order of CIT(A) - Assessee Appeal dismissed.

[2009-TIOL-429-ITAT-MUM](#)

Campbell Knitwear Ltd Vs ITO, Mumbai (Dated: April 13, 2009)

Income tax - assessee is into exports business - pays commission to foreign agents - AO finds it excessive in relation to sales in the current year and makes disallowance of part of commission paid - held, if sales were down and the assessee had to pay more commission to promote sales, it should furnish all the details of the parties whom sales were made and the details of commission paid on them - matter remanded for fresh examination

[2009-TIOL-428-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Godfrey Phillips India Ltd (Dated: March 6, 2009)

Income Tax - deduction u/s 80HHC - CIT(A) directs AO to exclude excise duty and sales tax paid from total turnover for the purpose of deduction u/s 80 HHC - Held, in view of Apex Court decisions the issue is no-longer res-integra. Ground dismissed.

Assessee engaged in the manufacturing and trading of tobacco products - gives certain quantities as samples and writes off the same - AO makes addition on the ground that assessee fails to discharge his onus by proper explanation and fails to produce documentary evidence - CIT(A) deletes the said addition with observation that the claim of the assessee in comparison to the preceding year is not excessive and the distribution of free samples is quite common in this line of business - Held, CIT(A) deletes the above addition without appreciating the fact and without verifying the record - CIT(A) directed to decide the issue afresh - Revenue Ground allowed.

[2009-TIOL-427-ITAT-DEL](#)

M/s Noida Toll Bridge Co Ltd Vs DCIT, New Delhi (Dated: April 20, 2009)

Income Tax - Assessee engaged in business of construction of toll bridge roads under "Build-own-operate-transfer" scheme - For the guarantee of an exit option on deep discount bonds assessee pays take-out assistance fees to the company taking the guarantee on behalf of the assessee - Assessee claims this fee as revenue expenditure - AO disallows the claim on the ground that payment which is connected with redemption of DDBs cannot be claimed as a revenue expense - CIT(A) upheld disallowance - Held, no capital asset can be said to have been acquired by the assessee in the payment of take out assistance fee - In view of decision of Apex court in CIT Vs. Kinetic Engineering Ltd. revenue authorities not right in treating payment of fees paid to financial company as expenditure of capital nature. Assessee Appeal

allowed.

[2009-TIOL-426-ITAT-MAD](#)

M/s Rayala Corporation Pvt Ltd Vs ACIT, Chennai (Dated: May 29, 2009)

Income Tax - Assessee company derived income from leasing property - AO brought to tax interest waived by Bank as income chargeable to tax in terms of the provisions of Section 41(1) - Assessee challenged the order on the ground that the return in which the interest income was claimed to be deducted was treated as non est by the revenue - CIT(A) rejected the contention and upheld the order - Held, when the return has been treated as defective by the Assessing Officer and despite giving an opportunity the assessee has not rectified the defect, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return - Held, unless an allowance or deduction has been made in an earlier year in respect of loss, expenditure or trading liability, there can be no addition u/s 41(1) - Assessee's appeal partly allowed.

[2009-TIOL-425-ITAT-DEL](#)

ACIT, New Delhi Vs Mr Scott R Bayman (Dated: May 14, 2009)

Income tax - Sec 17 - perquisite - Assessee is a foreign national - hired to work in India - employer as per agreement pays to the US Federal Insurance Authorities to obtain social security benefits for the employee - AO treats it as perquisite - CIT(A) deletes the addition - held, it is settled law that since the contribution made by the employer to various welfare schemes which entitles the assessee to receive certain benefits only upon a contingency, is not a taxable perquisite - Revenue's appeal dismissed

Hypo tax - Sec 15 - employer pays for hypo tax and the AO brings the same under the definition of salary u/s 15 - CIT(A) deletes the addition - held, it is also settled in favour of the assessee by a decision of the Mumbai Bench of the Tribunal

[2009-TIOL-424-ITAT-DEL](#)

Customer Services India (P) Ltd Vs ACIT, New Delhi (Dated: March 20, 2009)

Income tax - Sec 92C - Transfer Pricing - assessee is a subsidiary of USA-based holding company - provides IT-enabled services to customers of its holding company - AO refers the case to TPO for determining arm's length price - TPO relies on two previous years' data and ignores the financial year data, for determining ALP - makes adjustment in final income returned - CIT(A) disagrees with the TPO as no justification is recorded for overlooking pertinent financial year data - held, TPO can invoke proviso to Rule 10B(4) for using prior years' data provided such data influences determination of transfer price - otherwise, it is mandatory for TPO not to ignore data relating to pertinent financial year in which transactions with associated enterprise

take place - Assessee's appeal allowed

Sec 92C(2) - 5% margin allowed to the assessee for determining ALP - Revenue disallows the benefit of 5% margin of arithmetical mean as allowed by the law - held, it is settled law that for making adjustment the assessee is entitled to avail 5% margin and it cannot be denied - Assessee's appeal allowed

[Also see analysis of the Order](#)

[2009-TIOL-423-ITAT-BANG](#)

DCIT, Bangalore Vs M/s United Racing & Bloodstock Breeders Pvt Ltd (Dated: March 31, 2009)

Income tax - assessee is into horse racing business - files loss return - AO reduces losses by adopting value of import of horses declared to the Customs - Directorate of Revenue Intelligence had made a case for higher value and the assessee had settled the dispute through Settlement Commission - Since the assessee had paid Customs Duty on higher value before the Commission, the AO made addition of the value declared to the Commission and the one declared in its return - held, as decided earlier in the assessee's own case the value declared for the Customs purpose cannot be imported into the income tax act and may lead to formation of opinion that the assessee did not declare correct value of import - Revenue's appeal dismissed

[2009-TIOL-422-ITAT-DEL](#)

M/s Microsoft Regional Sales Corpn Vs ADIT, New Delhi (Dated: April 30, 2009)

Indo-USA DTAA - Assessee is a non-resident company - 100% subsidiary of Microsoft Corp - undertakes distribution of computer software in Asia, including India - files return of income - claims business profits but since it has no PE in India, it is not taxable - AO issues intimation u/s 143(1) and proceeds to assessee the income - treats the income as royalty under Article 12(7) in place of business profit under Article 7 and raises demand with interest - CIT(A) agrees with the AO - held, while acting under Sec 143(1) the AO is not vested with power to change the character of the income from business profits to royalty - such a change can be done only during the course of regular assessment u/s 143(3) - since the creation of demand by amending the nature of income is beyond the scope of Sec 143(1), both the orders are set aside - Assessee's appeals allowed

[Also see analysis of the Order](#)

[2009-TIOL-421-ITAT-BANG](#)

M/s Techvac Engineering Pvt Ltd Vs ITO, Mysore (Dated: April 30, 2009)

Income tax - return filed with audit report u/s 44AB - xeroxed copy of audit report certified by Director in absence of the CA - AO objects to photocopy of audit report not signed by CA - initiates penalty u/s 271B - held, since there was reasonable and bona fide cause for failure to comply with the provisions u/s 273B and the AO fails to find any difference between the photocopy and the original later furnished by the CA, the AO should have issued a defect memo rather than initiating penalty - Assessee's appeal allowed

[2009-TIOL-420-ITAT-MAD](#)

Harvey Heart Hospitals Ltd Vs ACIT, Chennai (Dated: January 30, 2009)

Sec. 153C – Both regular and undisclosed income to be assessed – No requirement that assessment to be completed to be on the basis of incriminating materials found during the course of search.

Sec. 32(2) - Unabsorbed depreciation relating to A.Y. 1997-98 to 2000-01 could be carried forward and set off only against business income and that too for a limited period of 8 years from the end of the A.Y.

Profit on sale of depreciable assets – To be assessed as Short-term Capital Gains u/s 50 and not as Business income u/s 41(2).

Bad debts and advances written off – issue remitted to AO to given an opportunity to assessee to prove that the decision to write off these amounts was a honest one.

[2009-TIOL-419-ITAT-MAD](#)

F L Smidth Limited Vs ACIT, Chennai (Dated: May 11, 2009)

Income Tax - Powers of CIT u/s 263 - Assessment order passed without any enquiry on the issue of allowability of deduction u/s 80IB on duty drawback receipts – CIT can regard the order as erroneous on the ground that AO should have made further enquiries before accepting the statements made by assessee in the return – AO cannot remain passive in the face of a return which is apparently in order but calls for further enquiry – When AO fails to make enquiries, it is an erroneous order.

[2009-TIOL-418-ITAT-BANG](#)

M/s Excelpoint Systems Pte Ltd Vs Addl. DIT , Bangalore (Dated: May 28, 2009)

India-Singapore DTAA - Assessee is a LO of parent company based in Singapore - is engaged in trading of goods manufactured worldwide - LO liaises with Indian customers - LO has offices in many cities in India - Survey u/s 133A conducted - assessee furnishes return on cost plus 5% basis - AO takes statements of sales manager of the assessee on oath - after allowing deduction for expenses of LO and HO in Singapore AO determines income for seven AYs by attributing 45% of global

profits as profit for the LO - CIT(A) reduces it to 35% - assessee argues that since its transactions are international transactions it should be determined at arm's length price and be determined as per transfer pricing regulations - Held, since the assessee seeks more time for completing transfer pricing study and the fact that AO has failed to examine in details where the LO can be treated as a PE of the assessee, it is a fit case to be remanded to the AO - Assessee's appeal partly allowed

[2009-TIOL-417-ITAT-MUM](#)

DDIT, Mumbai Vs M/s Stork Engineers & Contractors B V India Project Office (Dated: June 16, 2009)

Income tax - Assessee is a non-resident company, incorporated in Netherland - gets engineering procurement and construction contract in India - claims deduction for HO expenses incurred for setting up project office in India even before the RBI approval is granted - AO disallows it - CIT(A) allows it - held, since the genuineness of expenses is not refuted and the fact that they were incurred in relation to setting up the project office in India and also during the same accounting year it is wrong to term it as prior period expenditure - allowable deduction

AO's main objection in allowing prior period expenditure is non-filing of return - every person, including a company, is liable to file return if its total income assessable under the Act during the previous year exceeds the maximum amount which is not chargeable to income tax. Thus the requirement for filing the return is activated only when there is some income chargeable to tax. If there is no income, then the law does not cast a duty upon a person to file the return of income.

Assessee follows percentage completion - As per Accounting Standard 7, no income need to be offered for taxation if work is not completed upto 25% of project; If there is no income the law does not cast a duty upon a person to file return of income - Revenue's appeal dismissed

[Also see analysis of the Order](#)

[2009-TIOL-416-ITAT-PUNE](#)

ACIT, Nashik Vs India Pvt Ltd (Dated: May 19, 2009)

Income Tax – Transfer Pricing – ALP adjustments - it is immaterial as to whether or not the income of the assessee was exempt from income tax. Special Bench decision in Aztec Software [which was stayed by Karnataka HC] followed: a Division Bench cannot even disregard decision of another Division Bench, let alone that of a Larger Bench. Five Member Special Bench decision in the case of Aztech Software Technology followed and the conclusion of the CIT(A) to the effect that the transfer pricing provisions could not have been invoked on the facts of this case, as the assessee did not have any tax avoidance motive, is vacated. Interestingly in this case, the Special Bench decision relied upon by the Revenue and respectfully followed by the Tribunal, had been stayed by the Karnataka High Court [2009-TIOL-170-HC-KAR-IT](#) and apparently this fact was not brought to the notice of the Tribunal by either parties. So in effect after a scholarly discussion on judicial discipline, what the Tribunal followed was a non-existing judgement!

Arms Length Price: In a situation in which the revenue authorities seek to disturb the method of determining the arms length price, as adopted by the assessee, it is necessary for them to demonstrate that, on the given facts of the case, a particular method will be more appropriate vis -à-vis the method adopted by the assessee, and such an appropriateness of method must be shown on the touchstone of the factors set out in Rule 10C(2) above. The ALP adjustments are counter measures to ensure that the prices at which international transactions are entered into by the associated enterprises are not so contrived as to adversely affect the domestic tax base, and, therefore, most appropriate method should be decided in the light of this basic governing principle alone.

In a situation in which the assessee has followed one of the standard methods of determining ALP, such a method cannot be discarded in preference over transactional profit methods unless the revenue authorities are able to demonstrate the fallacies in application of standard methods. In any event, any preference of one method over the other method must be justified by the Transfer Pricing Officer on the basis of cogent material and sound reasoning.

[Also see analysis of the Order](#)

[2009-TIOL-415-ITAT-MAD](#)

ITO, Chennai Vs M/s Sicgil India Pvt Ltd (Dated: April 30, 2009)

Income Tax - Assessee Company claimed deduction u/s 80IB, before set off of carry forward losses relating to the immediately preceding assessment year, in respect of Goa unit from the profits of business - AO allowed it after setting off the losses - CIT(A) allowed assessee's appeal - Held, the specific provisions of Sec 80IA(5) provides that the profit from the eligible business for the purpose of determination of the quantum of deduction u/s 80IA has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years - Held, Sec. 80IB envisages that "the provisions contained in sub-section (5) and sub-sections (7) to (12) of Section 80IA shall, so far as may be, apply to the eligible business under this section", so what has to be done under section 80IA(5) has to be done in the context of 80IB - Held, eligible deduction under section 80IB for the assessment year under consideration has to be computed after setting of the loss of the Goa unit for the earlier assessment year - Revenue's appeal allowed.

[2009-TIOL-414-ITAT-MAD](#)

M/s Shah Yarn Tax Private Limited Vs ACIT, Coimbatore (Dated: May 6, 2009)

Income tax - Sec 50C – Assessee did not claim before AO that the amount received as sale consideration and mentioned in the conveyance deed is the fair market value of the property – The preliminary burden of the assessee under subsection (2) of sec. 50C not discharged – hence AO was not required to make any reference to the Valuation Officer.

During the year assessee sold shares of four companies – Claimed taxation at 10% u/s 112 without indexation in respect of shares of two companies and declared long term capital loss with respect to the shares of the other two companies after

indexation – On appeal it was held that though the assessee has option to claim either the concessional rate of tax u/s 112 or indexation while computing the capital gains, it cannot apply different yardsticks for computing the capital gains in the very same A.Y.

[2009-TIOL-413-ITAT-BANG](#)

Sri M Balakrishna Hegde Vs DCIT, Mangalore (Dated: January 02, 2009)

Income Tax - Assessee, engaged in money lending business was served a notice 158BC pursuant to a search u/s 132 - AO made additions under various heads - CIT(A) confirmed the order of AO - Held, principles of natural justice was followed as assessee was given an opportunity of being heard—Held, w.r.t unexplained unsecured loans, onus was on the revenue to have brought some material on record to establish that credit in the name of a person is not genuine - Held, w.r.t. addition on account of undisclosed income, AO afforded appropriate opportunity to the assessee to prove the creditworthiness of the donor as well as the genuineness of the transaction but no material has been placed before the lower authorities to establish the same and therefore, AO justified in treating the sum as undisclosed income—Held, w.r.t addition on account of insufficiency in drawings, considering the statement of the assessee and his wife and the fact that club expenses exceeded the withdrawal, it is a case where some estimation is required to be made for determining the undisclosed income utilized for meeting the household expenses - Assessee's appeal partly allowed.

[2009-TIOL-412-ITAT-MUM](#)

Dy.CIT, Mumbai Vs M/s Inditravel Pvt Ltd (Dated: March 18, 2009)

Income Tax - penalty u/s 271 (1)(c) - Assessee is in the business of travel related services, professional services and printing - AO makes two disallowance first related to retrenchment compensation paid to the employees on closure of units and the other being disallowance on account of write off of sundry advances – CIT(A) deletes the disallowance relating to payment of the retrenchment compensation but upheld disallowance relating to write off of sundry advances - AO also imposes penalty on the issue of disallowance of write off of sundry advances on the ground that the assessee has furnished inaccurate particulars of income - CIT(A) holds that the penalty, if any, should be levied only to the extent of tax effect on the income which is the positive income available with the assessee. He also observes that no penalty is leviable when the assessee's income is a loss and reduces the quantum of penalty – Held, mere disallowance of claim, on a difference of opinion between the AO and the assessee, does not by itself justify levy of penalty. The Explanation given by the assessee is bona fide and the AO has not proved that it is false. The penalty levied in this case is not justified. Assessee's Appeal allowed.

[2009-TIOL-411-ITAT-BANG](#)

Mcdowell & Co Ltd Vs ACIT, Bangalore (Dated: April 03, 2009)

Income Tax – Reopening of assessment - It is no responsibility of the assessee to advise the AO with regard to the inference which he should draw from the primary

facts – mere change of opinion, no justification – It is for the AO to draw the correct inference from the primary facts. If an AO draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment. The Assessing Officer in the reasons recorded has clearly referred to the assessment for the asst. year 2004-05 and the entire facts, which were disclosed by the assessee, were before him. There is no inkling in the reasons recorded that the assessee's case is not covered by CBDT Circular and therefore it cannot be said that there were reasons to believe that income has escaped assessment.

Sales tax collected is to be deemed to have been paid once such sales tax deferred is converted into a loan liability- From the Circular of the Board as well as from the provisions of Bombay Sales Tax Act, it is clear that the sales tax collected is to be deemed to have been paid once such sales tax deferred is converted into a loan liability.

Reasonable Opportunity to the Assessee: The AO has not afforded reasonable opportunity to the appellant. After rejection of objections, the AO should have given a reasonable opportunity to the assessee for putting his case. On this ground, the assessment order is to be set aside. Since it is already held that reopening is bad in law, therefore, such setting aside is only academic in character

[Also see analysis of the Order](#)

[2009-TIOL-410-ITAT-MAD](#)

ITO, Coimbatore Vs M/s Amutham Enterprises (Dated: February 27, 2009)

Income tax - Sec 271(1)(c) - penalty – Cash credits added in assessment – On enquiry AO proved that creditors does not have creditworthiness – Though firm's books of accounts show such credits received by way of cheques from the creditors, on enquiry it was proved that such cheques were in fact issued from the bank account of the managing partner of assessee firm – CIT(A) deleted penalty - On further appeal, tribunal found that it was a case of gross falsification of records and levy of penalty u/s 271(1)(c) upheld, but reduced to minimum penalty.

[2009-TIOL-409-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Akasaka Electronics Ltd (Dated: February 3, 2009)

Income Tax - Section 145A - AO makes additions for adjustment of closing stock on account of unutilized Modvat credit by invoking provisions of Sec 145A - CIT(A) deletes the addition by holding that there is no impact on the profits by following the inclusive method - Held, issue remanded for giving an opportunity to the assessee to prepare trading account as per the decision of the Tribunal in the case of M/s. Cyanamid Agro Ltd. and to see if any addition is warranted. Revenue Appeal allowed.

[2009-TIOL-408-ITAT-HYD](#)

Speck Systems Ltd Vs DCIT, Hyderabad (Dated: February 13, 2009)

Extension of time for FE remittance – CIT's order not appealed against – Fresh appeal not valid – What the AO could not do, the CIT(A) or Tribunal cannot do: Against this order, the assessee did not file any appeal. The obvious presumption is that the assessee was not aggrieved by the above order. In the process, the order of the Assessing Officer got merged with the order of the CIT(A). Once it got merged with the order of the CIT (A), the Assessing Officer became functus officio so far as his original order is concerned.

[Also see analysis of the Order](#)

[2009-TIOL-407-ITAT-BANG](#)

ITO, Bangalore Vs M/s ITC Hotels Ltd (Dated: May 01, 2009)

Income tax - Indo-USA DTAA - Assessee is a reputed hotel group - receives certain services from US-based hotel group and makes payment without TDS - Revenue treats it as royalty or fees for technical services u/s 9(1)(vi) or (vii) and also under Article 12(3) of the DTAA - CIT(A) goes by the Delhi HC decision in the assessee's case and treats it as business income and since the non-resident has no PE in India, the payment received is held to be non-taxable - Revenue refers to the Explanation inserted at the end of section 9 by the Finance Act, 2007 with retrospective effect from 1.6.1976 which states that TDS to be deducted under clauses (v), (vi) and (vii) of sub-section (1) of Sec 9 even if there is no PE - held, since the income of the non-resident is held to be business income, this Explanation has no applicability to this case - Revenue's appeal dismissed

[2009-TIOL-406-ITAT-MUM](#)

ITO, Mumbai Vs M/s Gold Rock World Trade Ltd (Dated: February 2, 2009)

Income tax - Sec 28(iv) - Assessee is an exporter - shows certain payment as 'advance rice account' - AO for taxing the same - Assessee argues since their contract has a provision by which any dispute can be referred for arbitration within 15 years, they cannot write off the entry - held, since an arbitration clause exists in the contract and the liability has not ceased and the issue was scrutinised in the past by the Revenue, no addition can be made and income be treated as business income u/s 28(iv) - Revenue's appeal dismissed

[2009-TIOL-405-ITAT-DEL-SB](#)

ACIT, Moradabad Vs M/s Hindustan Mint & Agro Products Pvt Ltd Chandausi (Dated: June 23, 2009)

Where deduction u/s 80HHC as also u/s 80-IA are claimed relief allowed u/s 80-IA is to be deducted from profits and gains on which relief u/s 80HHC of the Act is to be computed – Special Bench order in *Rogini Garments* upheld

There is absolutely no justification for allowing repeated deductions on profit and gain on which deduction has been allowed u/s 80-IA or 80-IB of the Act. The Special Bench in the case of *Rogini Garments* rightly held that repeated deductions of same profit and gains of undertaking were not intended to be disallowed. Above conclusion was rightly arrived at and is confirmed.

[Also see analysis of the Order](#)

[2009-TIOL-404-ITAT-MAD](#)

ITO, Chennai Vs M/s Data Software Research Company (International) Pvt Ltd (Dated: April 16, 2009)

Minimum Alternative Tax (MAT) - carry forward is available for a total of six (1+5) years: There is no ambiguity in the language of sub-section (3) of 115JAA . The carry forward is available for a total of six (1+5) years. It appears that the confusion has arisen because of the language used in the CBDT Circular No.763 dated 18.2.1998.

It is trite law that statutory provisions prevail over a Circular in case of a contradiction between the two: The period of 'five assessment years', mentioned in sub-paragraph (2) contradicts with what is stated in sub-section (3) of section 115JAA . It is trite law that statutory provisions prevail over a Circular in case of a contradiction between the two. This position was reiterated by the Supreme Court in the case of Commissioner of Central Excise vs. Ratan Melting & Wire Industries ([2008-TIOL-194-SC- CX -CB](#)) .

[Also see analysis of the Order](#)

[2009-TIOL-403-ITAT -DEL](#)

M/s Surya Foods & Agro Ltd Vs Addl.CIT, New Delhi (Dated: April 30, 2009)

Income Tax - Section 37(1) - AO after invoking the provisions of Explanation to section 37(1) disallows commission on sales paid to stockiest - CIT(A) confirms it - Held, just because the assessee has made payment of commission to persons who have assisted the assessee in obtaining information in regard to the requirement and for the lack of evidence by the revenue that such payment of commission, as made by the assessee, were against public policy or were not permitted by law, it cannot be said that the payment of commission is illegal payment - Assessee's appeal allowed

[2009-TIOL-402-ITAT -MUM](#)

Mr Y M Shetty Vs ITO, Mumbai (Dated: March 20, 2009)

Income Tax - exemption u/s 54(1) - AO rejects the claim of the assessee in respect of the exemption u/s. 54 with the observation that the assessee has not invested the

entire amount of capital gains arising out of sale of flat in the new house property acquired - The CIT(A) upheld the order of AO - Held, there is no requirement in law to suggest that only the sale consideration of the asset if utilized for the purchase of the new asset can avail the benefit of exemption u/s 54 (1) - Assessee's Appeal allowed.

[2009-TIOL-401-ITAT-MUM](#)

IA & IC Pvt Ltd Vs ITO, Mumbai (Dated: February 17, 2009)

Income Tax - Section 36(1)(iii) - Assessee pays interest on an amount borrowed in the earlier year - also receives interest income - AO disallows interest expenses (net claimed by the assessee company) and adds the same to total income - CIT(A) dismisses appeal by holding that it cannot be said that the interest has been paid for the running of the business and it has been paid only for holding the shares in other companies - Held, in view of the additional evidence matter remitted to AO to reconsider the disallowance of interest - Assessee's Appeal allowed.

[2009-TIOL-400-ITAT-DEL](#)

M/s Hyundai Heavy Industries Co Ltd Vs DCIT, Dehradun (Dated: May 29, 2009)

Income tax - India-Korea DTAA - Article 25 - Assessee is a Korean company, having a PE in India - AO applies higher tax rate applicable to foreign companies - Assessee pleads since Article 25 of the tax treaty is about non-discrimination, the tax rate applicable to domestic companies be applied to its case - CIT(A) disagrees with the assessee - held, in view of the Explanation to Sec 90(2) of the I-T Act, inserted vide Finance Act, 2001 w.e.f 1.4.1862, whereby it is clarified that a lower tax rate applicable to a cooperative society cannot be allowed to a foreign bank and a higher tax rate not to be construed as less favourable by foreign companies, and also the Tribunal's earlier decision against the assessee, the appeal of the assessee has no legs to stand on - Assessee's appeal dismissed

[2009-TIOL-399-ITAT-DEL](#)

ACIT, Dehradun Vs M/s Halliburton Offshore Services Inc (Dated: May 13, 2009)

Income tax - Sec 44BB - assessee is a non-resident company incorporated in Cayman Island - provides oil rigs, various services and facilities to exploration and extraction of oil to ONGC - loss of equipment in hole - ONGC reimburses the cost as per the agreement - AO for taxing the same as taxable receipts - held, Sec 44BB is a Special Provision but it is for taxing all receipts relating to provisions for services and facilities provided for oil extraction and cannot be stretched to include capital receipts under its ambit - since the reimbursement by ONGC and Insurance company is for loss of capital equipment, capital receipts are not taxable u/s 44BB

However, reimbursement of service tax and repair of machinery are receipts taxable under this Section

[Also see analysis of the Order](#)

[2009-TIOL-398-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Citizen Hotels Pvt Ltd (Dated: January 30, 2009)

Income Tax - Assessee receives dividend income which is exempt under the Act. The AO makes the disallowance u/s 14A by holding that the interest expenditure could not be attributed to the earning of taxable income - CIT(A) allows part relief - Held, CIT(A) order set aside, direction to AO to calculate disallowable amount as per the guidelines laid down by the Special Bench in the case of ITO Vs. Daga Capital Management Pvt. Ltd.

On the issue of deletion of addition being 10% of repairs and maintenance expenses - AO held that 10% of such expenses as capital in nature - CIT(A), following his own order for assessment year 1998-99, deleted this addition.-Held, in view of Tribunal decision in assessee own case CIT(A) order upheld. Revenue Appeal dismissed.

[2009-TIOL-397-ITAT-MAD](#)

ITO, Chennai Vs M/s Chemmencherry Estates Co (Dated: November 28, 2008)

Penalty u/s 271(1)© - Did not offer income from sale of land claiming it as agricultural land – Claim not bonafide – penalty upheld.

Assessee did not offer income from sale of land on the reasoning that the land was agricultural land. Detailed analysis of the issue right from purchase of land as well as various developmental activities done by assessee proved that the real intention in this transaction is doing real estate business and assessee had no bonafide reason in not disclosing the income. Decision of Apex Court in Dharmendra Textile Processors & ors. (306 ITR 277) followed.

Appeal by Revenue allowed.

[2009-TIOL-396-ITAT-DEL](#)

M/s Adwel Advertising Pvt Ltd Vs DCIT, New Delhi (Dated: March 05, 2009)

Income tax - Assessee claims deduction for bank guarantee charges - Since part of the charges pertained to previous year, AO disallows it - held, Revenue has a valid ground to do so as liability to pay does not arise only on the basis of bank certificate but the assessee is right in claiming it as a business expenditure for earlier years which the Revenue may allow after examinign the issue

[2009-TIOL-395-ITAT-MUM](#)

ACIT, Mumbai Vs M/s AP Art Printers Pvt Ltd (Dated: March 2, 2009)

Income Tax - Section 145A - Appeal on the ground that CIT(A) erred in deleting the AO's addition being adjustment u/s 145 - Assessee contends that similar ground has been disposed of by the Tribunal in assessee's own case for earlier assessment year - Held, Tribunal has not considered the amended provisions of section 145A, in deciding the issue. In view of decision of the Tribunal in the case of M/s Cynamid Agro Ltd the AO directed to follow the directions and see if any addition is warranted in case. In case the AO finds that any addition is warranted, he may make the same subject to maximum being the relief allowed by the CIT(A). Revenue Appeal allowed for statistical purposes.

On the issue of CIT(A) erred in directing the AO to delete the disallowance of expenses on factory premises renovation and replacement - Held, Whether any expenditure incurred by the assessee on account of repairs and renovation is permissible as capital or revenue expenditure even in respect of rented premises is a question of fact to be determined on the facts and in the circumstances of each case. Matter remanded to AO for a fresh decision on the issue.

[2009-TIOL-394-ITAT-DEL](#)

DCIT, Dehradun Vs M/s Hyundai Heavy Industries Co Ltd (Dated: May 29, 2009)

Indo-Korea DTAA - assessee is a non-resident company incorporated in Korea - has a project office in Mumbai for several years - gets multiple contracts from oil companies in India - works on the projects and wrap up its assignments in less than nine months - does not offer income to tax - AO treats Project Office as PE and taxes income @ 10 % and foreign income @ 1% - CIT (A) disagrees with the AO - held, the project office cannot be held as Permanent Establishment as a PE begins to exist only when an enterprise commences business through a fixed place - Provisions of Article 5(3) override provisions of Article 5(1) and 5(2) of tax treaty

[Also see analysis of the Order](#)

[2009-TIOL-393-ITAT-BANG](#)

M/s Elind Computers Pvt Ltd Vs ACIT, Bangalore (Dated: May 28, 2009)

Income Tax - Section 144 - Assessee engaged in the development and export of computer software to its clients across the world. All the exports are from STPI unit owned by the assessee. The assessee also owns domestic unit in which services are rendered to customers in India. Assessee's profits are eligible for exemption u/s 10A for income earned out of STPI division. Assessee files its return declaring loss. Loss pertained to both STPI undertaking and domestic undertaking. In respect of loss from STIP assessee does not claim any exemption u/s 10A. AO completes best judgment assessment adding income from sub-letting of property under the head 'income from other sources'. AO also disallows 50% of business loss and allows assessee to carry forward depreciation - CIT(A) dismisses the appeal of the assessee in toto - Held, the matter remitted to AO to consider it afresh, since assessment has been completed

u/s 144 and the assessee could not produce necessary details before the AO. .
Assessee Appeal allowed.

[2009-TIOL-392-ITAT-MAD](#)

DCIT, Chennai Vs M/s Dewa Properties Ltd (Dated: January 22, 2009)

Income from House Property – Claim of deduction of interest paid to tenants / lessees on refundable deposit obtained from them disallowed since such deposits were not utilized for the construction of the said property.

Assessee borrowed funds and paid interest on such borrowals – Out of such borrowed funds, advances made to subsidiary companies without charging interest – No evidence to show that such interest free advances were for commercial purposes. Disallowance on account of interest on diverted funds, upheld.

[2009-TIOL-391-ITAT-MAD](#)

ACIT, Chennai Vs M/s Deccan Distributors (Dated: April 09, 2009)

Income tax - Huge claim of agricultural income from land taken on lease – Lessors not produced before AO – No evidence regarding quantum of agricultural produce, expenditure incurred for agricultural operations, sale of agricultural produce, books of accounts maintained for the purpose etc. produced – Mere production of land revenue records, VAO's certificate and copy of lease deed not sufficient for discharging the onus of claiming exemption – Claim of earning agricultural income rejected.

[2009-TIOL-390-ITAT-MUM](#)

Cartini India Ltd Vs ITO, Mumbai (Dated: May 19, 2009)

Income Tax - Sec 41(1) - Assessee avails remission under State Govt 'Prepayment of sales tax deferral scheme 2003' - AO considers remission of the liability assessable u/s 41(1) - CIT(A) confirms AO order - Held, if the assessee has been allowed a deduction in respect of the sales tax liability, in the year the same was allowed to be converted into a loan, then the amount remitted out of that would be liable to tax in the year of remission. The issue restored to the file of the AO, for the limited purpose of verification in so far as the assessee might have claimed the benefit of exemption or deduction on account of the establishment of industrial unit in the year of liability. The condition of grant of deduction to the assessee in respect of sum in earlier year deserves to be verified. In case it is found that no deduction was allowed to the assessee u/s 43B in earlier year(s), the addition shall stand deleted. Assessee Appeal allowed.

[2009-TIOL-389-ITAT-DEL](#)

M/s Goetze (India) Ltd Vs CIT, New Delhi (Dated: May 20, 2009)

Creation of reserve had no implication and even it did not alter in any manner the computation of the total income: in so far as computation of adjusted book profit is concerned, the creation of reserve had no implication and even it did not alter in any manner the computation of the total income. This provision remained on the statute book for assessment years 1997-98 to 2000-01. Since the reserve was not created in these years, there was no question of any adjustment in the book profit in these years at the time of its creation. Accordingly, there could have been no implication of withdrawing certain amount from this reserve and crediting it to the profit and loss account. Therefore, the case of the CIT is based on erroneous interpretation of law that the reduction could not be made in respect of amount withdrawn from this reserve as it had been credited to profit and loss account.

The decision of the AO was one possible view in the matter. CIT' review not correct: the order cannot be said to be erroneous and prejudicial to the interest of revenue. In view of the fact that the decision of the AO was one possible view in the matter, the other cases relied upon by the Id. DR regarding lack of enquiry etc. cease to have any implication.

[Also see analysis of the Order](#)

[2009-TIOL-388-ITAT-DEL](#)

DCIT, New Delhi Vs M/s FAB India Overseas Pvt Ltd (Dated: January 14, 2009)

Income Tax - Assessee engaged in the business of purchase and sale of garments, including export of garments, incurs expenses on renovation of the showroom and claim revenue expenditure – AO considers it as Capital Expenditure and allows Depreciation @ 10% - CIT(A) considers it as revenue expenditure on the ground that none of the disallowed expenditure has led to an enduring benefit to the appellant but it is an expenditure which has been incurred by a businessman in the normal course of trade - Held, for lack of clear details, issue cannot be determined. CIT(A) order set aside and learned CIT (A) is directed to re-examine the details of expenditure incurred and give clear basis for working them out into revenue and capital expenditure. Revenue appeal allowed for statistical purposes.

[2009-TIOL-387-ITAT-DEL](#)

BJ Services Co Middle East Ltd Vs ACIT, Dehradun (Dated: March 27, 2009)

Income tax - India -UK DTAA - interest on income tax refund u/s 244A - Revenue for 40% tax against 15% claimed by the assessee in representative capacity of its employees - excess payment of tax was made by expat employees of the assessee - interest income on refund in dispute - CIT(A) holds since such a receipt is not related to the receipt u/s 44BB, and the income has been earned by the non-resident employees through a PE, such income to be treated as business income under Article 12 of the tax treaty - held, since the issue was earlier decided in favour of the

Revenue, the assessee's appeal dismissed

[2009-TIOL-386-ITAT-MAD](#)

ACIT, Coimbatore Vs M/s Elgitread (India) Ltd (Dated: February 20, 2009)

Income Tax - Sec 80HHC – Applicability of Cl. (baa) to Expl. - Assessee engaged in the business of manufacturing reclaimed rubber – Also undertook to manufacture reclaimed rubber from raw materials supplied by third parties on job-work basis – All receipts which have no nexus with exports come within the ambit of cl. (baa) of the Expl. – Decision of Apex Court in CIT Vs K. Ravindranathan Nair ([2007-TIOL-202-SC-IT](#)) followed – When a point of law is settled by a decision of the Supreme Court, no Court in India can seek to avoid that decision by discovering supposed conflicts and illogicalities.

[2009-TIOL-385-ITAT-MUM](#)

M/s GSL India Ltd Vs ACIT, Mumbai (Dated: April 17, 2009)

Income Tax - assessee is no more required to prove that debt had become bad before claiming allowance for bad debt: there is no onus cast on an assessee to prove that a debt had indeed become bad, and what is required is that assessee should have made a write off bad debts in its books.

Modvat Credit and Closing Stock: adjustments for excise duty and modvat credit while giving effect to Section 145A, has to be done on every component mentioned in Section 145A i.e. value of purchases, sale of goods and inventory. It was held by their Lordship that if there was a change in valuation of closing stock, there needed to be a corresponding adjustment in the opening stock also. Section 145A uses the term 'inventory' and there is no reason why the application of the said section should be limited to closing inventory and not opening inventory.

Deemed accrual of interest on loan/advance- Recovery of the principal amount itself being doubtful there cannot be any accrual of interest. That there was accrual of interest on loan, can only be considered as a presumption unless and until it is shown that there was an agreement which made the debtor liable to pay such interest. When the financial condition of a debtor is bad, prudence would not allow a business-man to claim interest on the principal. This is because the recovery of the principal amount itself being doubtful there cannot be any accrual of interest. Recognition of the revenue can be done only when there is reasonable certainty of recovery of such income. When, assessee itself is not sure of its recoveries it cannot be fastened with an income which was not real simply for the reason that it was following mercantile system of accounting.

[Also see analysis of the Order](#)

[2009-TIOL-384-ITAT-MUM](#)

IA & IC Pvt Ltd Vs ITO, Mumbai (Dated: February 17, 2009)

Income Tax - Section 36(1)(iii) - Assessee pays interest on an amount borrowed in the earlier year - also receives interest income - AO disallows interest expenses (net claimed by the assessee company) and adds the same to total income – CIT(A) dismisses appeal by holding that it cannot be said that the interest has been paid for the running of the business and it has been paid only for holding the shares in other companies - Held, in view of the additional evidence matter remitted to AO to reconsider the disallowance of interest - Assessee's Appeal allowed.

[2009-TIOL-383-ITAT-MUM](#)

Kotak Mahindra Bank Ltd Vs ACIT, Mumbai (Dated: February 2, 2009)

Income tax - long term capital gains - Sec 48 - assessee acquires certain shares of a company - after holding it for few years it transfers the shares to its subsidiary - later subsidiary transfers the same back to the assessee - capital loss - AO allows the same but later invokes Sec 147 - makes additions on the ground that the benefit of cost indexation to be allowed from the year when the shares were transferred back to the assessee - held, the cost indexation to be allowed to the assessee from the date the shares were originally acquired by the assessee company and the transfer from the assessee to the 100% subsidiary company and retransfer from the said company has got to be ignored, as provided under Section 49(1)(e) read with proviso to Section 48 - Revenue's appeal dismissed

[2009-TIOL-382-ITAT-MUM](#)

ACIT ,Mumbai Vs M/s Mafco Ltd (Dated: February 19, 2009)

Income Tax - exemption u/s 10(29) - Assessee is a fully owned State undertaking and is engaged in the business of marketing of dairy products, processing of fruits, vegetable, meat, poultry, warehousing, cold storage etc - Assessee claims exemption u/s. 10(29) in respect of its income from the warehousing - Assessee files the return of income declaring loss and at the same time claims exemption u/s. 10(29) - AO considers assessee not to be entitled for claiming any exemption as there is overall loss projected by the assessee and rejects the claim of the assessee in respect of exemption u/s 10(29) by applying the provisions of section 14A - CIT(A) directs the AO to adopt the net profit @ 22% in respect of the total warehousing / cold storage receipts and to compute the exempt income u/s. 10(29) - Held, the CIT(A) has not admitted any evidence, but only appreciated the statement of accounts filed before the AO. The CIT(A) has considered the allocation of the head office expenses and, worked out the net profit ratio attributable to the cold storage / warehousing and directed the AO to adopt the same. Revenue Appeal dismissed

[2009-TIOL-381-ITAT-MAD](#)

M/s D C Johar & Sons Pvt Ltd Vs ACIT, Coimbatore (Dated : March 31, 2009)

Assessee, marketing agent of a distillery – Turnover tax payable by the distillery was claimed as deduction by the assessee – AO rejected the claim since assessee is receiving only commission from sales and it was not the liability of assessee to pay turnover tax on sales made by the distillery – According to the assessee, it was sharing profits with the distillery and the turnover tax was payable as per the mutual agreement entered into with the distillery – On appeal, Tribunal held that even if such liability pertains to the assessee, it is only contractual in nature and it accrues only when the basis of quantification is settled.

Interest on funds diverted to sister concerns – Tribunal followed decision of Supreme Court in S.A. Builders Vs CIT (288 ITR 1) = ([2006-TIOL-179-SC-IT](#)) and held that only if the assessee proves commercial expediency for making such advances, the disallowance can be deleted – Assessee failed to prove the business necessity – Disallowance upheld.

Sale of shares whether business income or capital gains – According to the assessee company, since one of its business activities as per its Memorandum of Association was to carry on trading in shares, it is business income – CIT(A) negative the claim since no Board Resolution was passed by the company to carry on such business – On appeal Tribunal held that assessee being a private limited company need not pass any Board resolution for carrying out any objects – Matter remitted to AO to verify whether the shares were purchased in trading account or investment account.

Difference in commission received as per TDS certificates and as per P&L a/c treated as income – Initially assessee took a stand that part of the commission pertains to sister concerns – Later on assessee shifted the stand and claimed that part of the commission was offered for tax in earlier years – Assessee failed to substantiate any of the claims made, with supporting evidence – Action of AO in treating the difference as income, upheld.

Appeal by assessee partly allowed.

[2009-TIOL-380-ITAT-MUM](#)

M/s Amit Petroleum Pvt Ltd Vs ACIT, Mumbai (Dated: February 11, 2009)

Income tax - Search and seizure u/s 132(4) - Revenue finds some loose papers during the search on the premises of the assessee's sister concern - notice u/s 158BD issued - assessee does not respond to the notice - AO makes additions on six counts - CIT(A) deletes four additions and upholds them on two counts - held, addition made for certain goods returned to the supplier and the AO not accepting the credit note issued in this regard, the assessee needs to be given more opportunity to produce more evidence - matter remanded

As regards the last addition the allegation is about bogus purchases and since the Directors have also admitted lack of information about the funds arranged for the same and the fact that a parallel proceeding is going on for making addition of the same in the hands of Directors, such addition is upheld in the hands of the assessee and the Directors may seek relief in their own proceedings

[2009-TIOL-379-ITAT-MUM](#)

M/s MBK Enterprises Vs ITO, Mumbai (Dated: March 24, 2009)

Income Tax - Section 27(iib) - Assessee takes godown on lease rent for a period of 60 years - godown is sublet to various associate concerns and rental income earned - Against the total receipt assessee claims deduction on various heads of expenditure - AO considers the income from letting out of the godown as assessable under the head "Income from house property" - CIT(A) confirms the view of the AO - Held, if the provisions of the Act have been ignored and the law laid down by the Supreme Court has not been considered, the earlier years assessments will not come in the way of the AO making an assessment in accordance with law in any subsequent assessment year. No infirmity in the orders of the Revenue authorities in assessing the rental income under the head "Income from house property" - Assessee Appeal dismissed.

[2009-TIOL-378-ITAT-DEL](#)

P C Jain (HUF) Vs DCIT, New Delhi (Dated: April 22, 2009)

Income tax - Search u/s 132 - Assessee alleges since the search warrant authorisation was issued by Addl Director of Income Tax (Inv) it was without jurisdiction - held, in view of the decisions of the Delhi HC that Addl Director has no jurisdiction to issue warrant of authorisation for search, assessment done as a consequence to such a search is invalid and set aside - Assessee's appeal allowed and Revenue's appeal dismissed

[2009-TIOL-377-ITAT-MAD](#)

M/s Poppys Knit Wear Pvt Ltd Vs ITO, Tirupur (Dated: January 28, 2009)

Income tax - Computation of deduction u/s 80HHC for the purpose of computing book profits u/s 115JB - provisions of sec. 80A(2) will not apply - Deduction to be computed on the basis of book profits - Restrictions contained in sub-section (1B) to sec. 80HHC to be applied.

[2009-TIOL-376-ITAT-DEL](#)

Schefenacker Motherson Ltd Vs ITO, New Delhi (Dated: June 11, 2009)

Transfer Pricing - Arm's Length Price is the price which will be paid or charged by unrelated parties for a similar transaction in similar circumstances as are prevailing between related parties carrying international transaction. Under provisions of Section 92(1) of the Act and Rule 10B, income of international transaction between associated concern is to be computed having regard to arm's length price. Arm's Length Price, in turn, is the price which will be paid or charged by unrelated parties for

a similar transaction in similar circumstances as are prevailing between related parties carrying international transaction. So an exercise is required to be carried to compare price charged or paid in a controlled transaction with price charged or paid in a similar uncontrolled transaction (i.e. a transaction between unrelated parties). In other words, controlled activities are compared with uncontrolled activities of independent parties. But comparison would serve its purpose only if transaction or entities under comparison are found to be similar or almost similar and this "almost" representing differences are evaluated and adjustments are made to bring transaction or enterprises to the same level. If a similar uncontrolled transactions is available for comparison, then arm's length price is determined by taking such price of similar uncontrolled transaction carried in similar circumstances. As similar transactions are not easy to find, and, therefore, an attempt is made to find entities carrying similar functions and their profit margin or mean of such margin from a range of entities, is taken into account and compared with profit margin of entity involved in International transaction called tested party.

TP - Depreciation - It is nowhere provided that deduction of depreciation is a must . . . In the present appeal, arm's length price of transactions carried was to be determined by comparing net profit of the taxpayer (tested party) with mean net profit of comparables. Only receipts and expenditure, having connection with international transactions, were required to be taken into account. Any receipt or expenditure having no bearing on price or margin of profit could not be taken into consideration. It is nowhere provided that deduction of depreciation is a must. Depreciation can be taken into account or disregarded in computing profit depending upon the context and purpose for which profit is to be computed. There is no formula which would be applicable universally and in all circumstances. "Net profit" used in Rule 10B can be taken to mean commercial profit as held by the TPO and confirmed on appeal by the CIT(A).

[Also see analysis of the Order](#)

[2009-TIOL-375-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Voltas Ltd (Dated: January 14, 2009)

Income Tax—Assessee made provisions for expenses to be incurred during the warrantee period in respect of sale and supply of various items—AO disallowed the expenditure—CIT(A) allowed assessee's appeal—Held, the same issue has already been decided in favour of the assessee in its own case and the tribunals have allowed the deduction claimed on account of provisions made for expenses to be incurred during the warrantee period—Held, it is the profit eligible for deduction u/s. 80HHC is allowed as deduction not the actual quantum of deduction—Held, provisions of section 91 will be applicable even if the income in India is charged under the deeming provision under section 115JB which deems the book profit as total income but the conditions mentioned under section 91 are required to be fulfilled for availing relief under that section—Revenue's appeal dismissed.

[2009-TIOL-374-ITAT-BANG](#)

M/s Sartorius India Pvt Ltd Vs ACIT, Bangalore (Dated: April 30, 2009)

Income Tax - Section 80HHC - AO allows the claim of the assessee - CIT invokes powers u/s 263, directing the AO that Expln. (baa) to section 80HHC is applicable to a) shared income and other services, b) service income and c) retention money as items not covered by the Explanation - Held, arithmetical correctness has to be followed when the law specifies that 10% of the expenses are allocable and allowable from the business profits for which the ratio of export turnover to the total turnover has to be applied. AO idirected to compute the deduction u/s 80HHC and comply the direction of the CIT in framing the consequential order in accordance with the provisions of the Act - Assessee's Appeal partly allowed.

[2009-TIOL-373-ITAT-BANG](#)

M/s Praxair India Pvt Ltd Vs ACIT, Bangalore (Dated: April 08, 2009)

Income tax - Sec 147 - Assessee is into supply of gas cylinders - claims depreciation @ 100% - loss return filed - AO processes return u/s 143(1) and grants refund - Notice u/s 148 - AO allows depreciation on cylinders only at the rate of 25% - CIT(A) allows assessee's appeal against reduction in depreciation - held, since Sec 147 jurisdiction is assumed on the basis of an audit objection and the facts in the revised return are the same which were furnished in the original return and no other evidence being collected by the AO, invocation of re-assessment jurisdiction is not sustainable - Assessee's appeal allowed

[2009-TIOL-372-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Ganon Dunkerley & Co Ltd (Dated: March 06, 2009)

Income tax - AO makes additions for retention money - Assessee argues that retention money cannot be taxed and included in income unless a proper verification of execution of contract is done and satisfied - held, based on Tribunal's order in earlier years in favour of assessee, the assessee has a valid ground and the Revenue's appeal is dismissed

[2009-TIOL-371-ITAT-DEL](#)

ACIT, New Delhi Vs M/s Cincom System India Pvt Ltd (Dated: April 13, 2009)

Income tax - revenue vs capital expenditures - assessee is into software development for its international affiliates - incures expenditure relating to legal and professional charges - AO holds the same as capital expenditure - CIT(A) allows assessee's appeal - held, the basic test for determining the nature of an expenditure is that if it is incurred for enhancing efficiency and no asset is created, it is revenue expenditure - legal and professional charges are not capital expenditure - Assessee's appeal allowed

Depreciation on computer peripherals and accessories - Assessee claims @ 60% - AO allows @ 25% - held, CIT(A) is right in holding that a 'Router' which transfers data packets in LAN and WAN is an integral part of computer system for facilitating high

speed internet connectivity and depreciation at the rate of 60% is allowable - Assessee's appeal allowed

[Also see analysis of the Order](#)

[2009-TIOL-370-ITAT-BANG](#)

M/s D V Steel Corpn Vs ITO, Bangalore (Dated: April 30, 2009)

Income tax - Penalty u/s 272B - Assessee files quarterly TDS statement in Form No 26Q but fails to give PAN of some deductees - Revenue levies penalty u/s sec 272B(1) for failure to comply with Sec 139A - held, no penalty is called for as deductees fail to furnish PAN and the law provides no mechanism to the assessee to compel the deductees to provide PAN - Assessee's appeal allowed

[2009-TIOL-369-ITAT-BANG](#)

Flowserve Microfinish Pumps Pvt Ltd Vs DCIT, Hubli (Dated: April 30, 2009)

Income tax - Expln 2 to Sec 10B(iii) - export turnover - exclusion of expenses like packing charges, freight charges and C & F charges - since the assessee had its hub in Hubli and goods were airlifted from Bangalore after being brought from Hubli, AO takes the view that the freight for transporting goods from Hubli to Customs station in Bangalore is not excluded - held, the freight expenses from Hubli to Bangalore cannot be excluded. since packing charges are not included in the items mentioned in the export turnover and therefore, packing charges cannot be excluded from the export turnover - matter remanded for fresh reworking

[2009-TIOL-368-ITAT-MAD](#)

M/s Limitex Vs ACIT, Tirupur (Dated: February 2, 2009)

Income tax - Powers of CIT u/s 263 - Assessment order passed without any enquiry on the issue of allowability of deduction u/s 80IB on duty drawback receipts - CIT can regard the order as erroneous on the ground that AO should have made further enquiries before accepting the statements made by assessee in the return - AO cannot remain passive in the face of a return which is apparently in order but calls for further enquiry - When AO fails to make enquiries, it is an erroneous order.

[2009-TIOL-367-ITAT-MUM](#)

Lokpriya Housing Development Pvt Ltd Vs ITO, Mumbai (Dated: February 11, 2009)

Income Tax - Section 143(3) r.w.s. 147 - Assessee is in the business of development of real estate - claims to be following project completion method of accounting since its inception - challenges the reopening of assessments on the ground that no reasons have been recorded before issuing notice u/s 148 - the reopening is made beyond the statutory time limit - prior approval from the higher authority u/s 151 required to be mandatorily obtained and such approval was not obtained - Held, on the facts for the A.Y 1990-91 and 1991-92 the reopening is bad in law for the reasons that the revenue could not produce the exact reasons for reopening despite repeated opportunity given by the bench and has ultimately come out with a letter stating that the records for AY 1989-90 are not traced.

For the A.Y 1990-91 and 1991-92 the reasons recorded are not available on record, no permission as required is stated to have been obtained by the AO prior to issue of notice u/s 148 for the A.Y 1990-91 and 1991-92 in terms of section 151 and the addition itself is made on protective basis, so the question of coming to a conclusion that income escaped assessment does not arise, for permitting reopening. The AO cannot frame an opinion that the income chargeable to tax has escaped assessment as he had no information of the return filed by the assessee for the A.Y 1989-90. Such action and belief of the AO is not only arbitrary but also not based on facts. Such reason, if any, will be untenable in law. It is well settled that there should be reasonable belief and it should be based on record, for coming to a conclusion that income has escaped assessment when the reasons cannot be produced adverse inference can be drawn. The reopening of assessments of all the assessment years under appeals is bad in law.

[2009-TIOL-366-ITAT-MAD](#)

ACIT, Chennai Vs M/s ICL Securities Ltd (Dated: April 28, 2009)

Non-compete fee paid to promoters of company from whom assessee purchased shares not eligible for deduction while computing capital gains.

Assessee, an investment company acquired shares of SVCL as part of agreement to take over Rasi cements Ltd. And their associated company – By a separate agreement, non-compete fee of Rs. 24.24 crores paid to three promoters of SVCL for not doing business in cement – AO held that payment of such non-compete fee cannot be treated as part of cost of acquisition of shares and hence not eligible for deduction while computing capital gains. On appeal, CIT(A) also observed that payment of such non-compete fee will only help the business of SVCL and can have some indirect benefit alone to the shares held by assessee and since the payment was in no way connected with the acquisition of shares, he agreed with the AO.

On appeal before Tribunal, assessee argued it to be a payment made on account of commercial expediency and hence allowable. According to the assessee since it had acquired substantial investment in SVCL, in order to safeguard its interest and to enhance the value of shares it asked the promoters of SVCL who were pioneers in the field not to undertake any competing business. On this basis it was contended that the value of shares got increased on account of promoters agreeing not to start competing business and hence the payment of non-compete fee was for preservation of value of shares.

Though the Accountant member accepted the arguments advanced by the assessee, the Judicial member did not agree with the same. On reference to Third member, it

was held that the purchase of shares of SVCL was independent of the transaction of payment of non-compete fee to three promoters. Improvement of a capital asset arises when it has some defect in its title or there is some impediment in its transfer or use or there is encumbrance attached to it. Further the rights acquired through non-compete agreement was not transferred to Zuari Ltd. to whom the shares were transferred which indicate that these rights are not part of the shares or even part of the business acquired by Zuari Ltd..

Shares of a limited company are distinct from assets of business of the company. Cost of improvement of business of the company is not equivalent to cost of acquisition / improvement of shares of such company. Claim of assessee for deduction of such sum while computing capital gains was rejected agreeing with the stand taken by Judicial Member.

Appeal by assessee dismissed.

[Also see analysis of the Order](#)

[2009-TIOL-365-ITAT-MUM](#)

M/s UBS Securities India Pvt Ltd Vs DCIT, Mumbai (Dated: February 26, 2009)

Income tax - Assessee deals in securities - claims deduction for legal fees paid to non-resident agency and also claim deduction for depository charges paid - AO disallows - held, since it is a settled law that merely because an expenditure is incurred in the previous year it cannot be allowed - a payment made only after it is approved by a government agency or RBI in this case, the liability crystallises and it is an allowable deduction

As regards the payment of depository charges since it took time for disputed transactions to settle and such charges also include payment to SEBI, it is covered by deduction u/s 43B - Assessee's appeal allowed

[2009-TIOL-364-ITAT-BANG](#)

ACIT Bangalore Vs M/s Tata Coffee Ltd (Dated: April 09, 2009)

Income tax - Sec 115JA - AO disallows provision for bad and doubtful debts for determining the book profit u/s 115JA and charges interest u/s 234B - held, both these issues are settled by the Special Bench decisions of the Tribunal in assessee's favour - CIT(A) order upheld and Revenue's appeal dismissed

[2009-TIOL-363-ITAT-BANG](#)

ACIT, Bangalore Vs M/s Encore Software Ltd (Dated: April 17, 2009)

Income tax - Assessee is into software development and design - claims deduction for diminution in the value of semi-finished goods - AO disallows the write-off as he finds it based on estimate basis - held, it has already been held to be correct method of accounting by the Tribunal in the earlier year in the assessee's own case and there is no flaw in the CIT(A) order allowing the assessee's claim - Revenue's appeal rejected

[2009-TIOL-362-ITAT-DEL](#)

M/s Allied Nippon (India) Ltd Vs JCIT, New Delhi (Dated: March 31, 2009)

Income tax - Assessee claims deduction for expenditure related to registration of Trade Mark - AO treats it as capital expenditure - CIT(A) agrees with the AO on the ground that the advantages derived from Trade Marke is of enduring nature - held, it is settled law that the trade mark is neither an asset nor an advantage but only helps the assessee in defending his title to the goods and saves the assessee from trouble of leading evidence in case of a suit filed in a court of law - it is an incidental facility to the owner and it is revenue expenditure - Assessee's appeal allowed

[2009-TIOL-361-ITAT-MUM](#)

Pam Pac Machines Pvt Ltd Vs DCIT, Mumbai (Dated: February 11, 2009)

Income Tax - Section 35(1)(ii) & relief u/s 80HHC - Assessee is in the business of manufacturing pharmaceutical and allied machinery - AO makes addition after re-computing the claim for relief u/s 80HHC and also disallowed weighted deduction @ 125% on the assets employed in research and development expenses as per provisions of section 35(1)(ii) - CIT(A) grants part relief on the issue of disallowance of part of research and development expenses - Held, in view of Tribunal decision in the case of Universal Capsules Pvt. Ltd Vs ACIT issue is set aside to the file of the AO for fresh adjudication.

Deduction u/s 80HHC - on the issue as to whether scrap sales is to be included in the total turnover of the assessee for the purpose of computation of relief u/s 80HHC and on the issue of not including freight recovered, insurance charges recovered and packing charges recovered as part of total turnover for the purpose of computing deduction u/s 80HHC - Held, the issues are covered in favour of the assessee and against the revenue by the decision of this bench of the Tribunal in the assessee's own case for earlier year. Assessee grounds allowed.

[2009-TIOL-360-ITAT-MUM](#)

M/s Galaxy Multimedia Ltd Vs ACIT, Mumbai (Dated: March 16, 2009)

Income tax - Sec 36(1)(vii) - bad debts - held, once bad debts are written off in the books of account, assessee not required to prove the same - Assessee's appeal allowed

[2009-TIOL-359-ITAT-MUM](#)

ACIT, Mumbai Vs M/s Trans Marketing Pvt Ltd (Dated: February 23, 2009)

Income tax - capital gains - assessee company enters into tenancy agreement with a person who holds major stake in the company - later sells the flat at a loss - AO writes to the Registrar and fixed higher market value and makes additions for capital gains - CIT(A) disagrees - held, as per settled law the AO is to be guided by the price mentioned in the Conveyance Deed and the stamp duty accepted by the Registrar and the Registrar cannot furnish any other price later - Revenue's appeal dismissed

[2009-TIOL-358-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Chemolink Industries (Dated: March 25, 2009)

Income Tax - Assessee disclosed long term capital gain (LTCG) in respect of sale land and factory shed - AO bifurcated the sale consideration into two parts, i.e. one for the factory shed and another for the land underneath and beneath thereto and calculated STCG and LTCG respectively - CIT(A) disapproved the bifurcation - Held, assessee had disclosed LTCG in respect of the factory shed and the land and the claim of the assessee that no value was fixed or agreed for factory shed separately has not been rebutted by any evidence - Held, when on enquiry, AO found that the creditor was not existing at the given address and the assessee had been given an opportunity to establish the genuineness of the credit, it is for the assessee to establish the genuineness of the same - Revenues appeal partly allowed.

[2009-TIOL-357-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Gujarat Ambuja Cements Ltd (Dated: February 11, 2009)

Income tax - Penalty u/s 271(1)(c) - assessee is into manufacture of cement - claims deduction for guest house expenses and payments made to SEB for providing power connectivity - AO disallows both and the same is confirmed by the CIT(A) and Tribunal - AO initiates penalty proceedings - CIT(A) does not find mens rea and deletes the penalty - held, in view of the Apex Court decision in the case of Dharmendra Textile case, CIT(A) order is not sustainable but since the issue of guest house expenses and payment made to SEB being claimed as revenue expenditure were not settled at the time of filing return, no penalty is called for in the totality of facts of the case - Revenue's appeal dismissed

[2009-TIOL-356-ITAT-DEL](#)

ACIT, New Delhi Vs M/s Eicher Ltd (Dated: March 16, 2009)

Income Tax - Section 14A - CIT(A) deletes disallowance made by the A.O. u/s 14A on account of interest payment - Held, disallowance u/s 14A stands decided by the Special Bench in the case of Daga Capital Management. The issue is set aside to the

file of the AO to decide the matter afresh after taking into consideration the aforesaid Special Bench decision of the Tribunal.

On the issue of disallowance being the expenses incurred for the purchase of software disallowed by the AO as capital expenditure - Held, in view of the Special Bench decision in the case of Amway India Enterprises the matter is to be decided on the basis of the functional test. The issue is set aside to the file of the AO to decide the issue afresh after taking into consideration the Special Bench decision of the Tribunal. Appeals partly allowed

[2009-TIOL-355-ITAT-BANG](#)

ITO, Bangalore Vs M/s Intel Tech India Pvt Ltd (Dated: April 09, 2009)

The deductor cannot make an assessment of income in the hands of the deductee : in section 195(2), it is mentioned that where a person responsible for paying any such sum chargeable under this Act considers that the whole of such sum would not be income chargeable in the case of recipient, he may make application to the Assessing Officer to determine the appropriate proportion of such sum so chargeable. The words 'such sum' mentioned in section 195(2) of the I T Act refers to the sum mentioned in section 195(1) of the IT Act.

It is clear that a deduction of tax at source is to be considered at the time of each credit or payment. As per section 195(1) of the I T Act, the person responsible for payment to non-resident is required to deduct income tax at the time of credit of such income to the account of the payee or at the time of payment. In the instant case, the third buy back is resulting into an income to the non-resident. The Legislature has used the word 'such' before income in section 195(1) of the IT Act Hence, section 195(1) is applicable in respect of each credit of income or each payment of income. The words 'such income' will refer to the income in respect of the payment or of the credit.

Hence from section 195(1), it is clear that a deduction of tax at source is to be considered at the time of each credit or payment.

The default will end on the date when the deductee has filed the return. Hence, in the instant case, the deductor was required to deduct the tax at source and therefore, the deductor was an assessee in default since a deductee has filed the return and has disclosed the transaction in the return of income and that shows no tax was payable on such transaction. Therefore, the default will end on the date when the deductee has filed the return. Hence, the deductor will be liable to interest u/s 201(1A) up to 1st November, 2004. However, there will be no deduction u/s 201 since the deductee has filed the return and has disclosed the transaction and no tax is payable as per the return on such transaction by the deductee . Hence, order of the CIT(A) in cancelling the demand u/s 201 is upheld. However, it is held that the deductor will be liable to pay interest on the amount of tax to be deducted from the date of deduction till November 1, 2004.

[Also see analysis of the Order](#)

[2009-TIOL-354-ITAT-HYD](#)

BPL Power Projects (Ap) Pvt Ltd Vs ACIT, Hyderabad (Dated: December 23, 2008)

Income tax - If the CIT(A) did not want to admit the additional evidence, he should not have commenced upon the same without hearing the assessee - In fact, by doing so, he not only closed his own mind on the issue but shut the assessee as well. This is purely in violation of the principles of natural justice. Therefore, in the interest of justice, we direct the CIT(A) to admit the additional evidence and reconsider the issue after giving due opportunity of being heard to the assessee.

[2009-TIOL-353-ITAT-MUM](#)

Radheshyam Agarwal Vs DCIT, Mumbai (Dated: January 21, 2009)

Income Tax - Assessee challenged the block assessment made by AO u/s 264 by filing a writ petition and CIT directed AO to make fresh assessment after allowing reasonable opportunity of being heard to the assessee—Fresh assessment order was challenged for being time barred u/s 153(2A) as amended by Finance Act 2001 - Held, amendment was made to restrict the period of limitation to one year from the earlier period of two years - Assessment order made beyond the expiry of one year is barred by limitation - Assessee's appeal allowed.

[2009-TIOL-352-ITAT-MUM](#)

ATOS Origin (India) Pvt Ltd, Mumbai Vs ACIT, Mumbai (Dated: January 6, 2009)

Income tax - Penalty u/s 271(1)(c) - Assessee claims deductions under Ss 10A and 10B - revises return u/s 139(5) to claim deduction u/s 80HHE - AO ignores the revised return and makes additions - penalty also initiated - assessee alleges that first, the AO has not given effect to its order that the revised return be considered and secondly, penalty is wrongly calculated by allowing deduction u/s 80HHE - held, assessee is right that the AO has made a serious error in calculating the penalty by taking into account the additions made and then deduction u/s 80HHE being allowed on the overall calculation of export turnover and total turnover - CIT(A) order set aside and matter remanded to the AO for fresh calculation and consideration of the revised return - Assessee's appeal allowed

[2009-TIOL-351-ITAT-MUM](#)

M/s Star Cruises (India) Travel Services P Ltd Vs DDIT, Mumbai (Dated: March 24, 2009)

Income tax - Interest u/s 244A - Assessee is into cruise shipping business - sends remittances abroad without deduction of tax at source u/s 195 - AO holds it as assessee in default and issues orders under Ss 201(1) and 201(1A) - Assessee deposits tax with interest - CIT(A) orders refund - interest u/s 244A denied - held, if TDS is deposited involuntarily by the assessee and refund is ordered, interest is payable - Assessee's appeal allowed

[Also see analysis of the Order](#)

[2009-TIOL-350-ITAT-HYD](#)

Shv Energy India Pvt Ltd Vs ACIT, Hyderabad (Dated: December 14, 2008)

Income tax - In the rapidly changing technological environment, nothing is of enduring nature and more so in the field of software – maintenance of software is not capital expenditure - Assessee's appeal allowed

[2009-TIOL-349-ITAT-MAD](#)

Shriram Transport Finance Co Ltd Vs ITO, Chennai (Dated: February 06, 2009)

Income Tax - Assessee, an NBFC, claimed deduction on the amount transferred to a statutory reserve u/s 45 IC of the RBI Act - AO disallowed the deduction - CIT(A) upheld AO's order - Held, transfer to reserve is only an appropriation of the profits which cannot be considered as a charge to the profits - Held, transfer to Reserve Fund can certainly not be called a diversion of income by overriding charge since RBI has not attached any obligation that the fund be kept in any earmarked security nor the purpose of utilization of the fund has been specified - Assessee's appeal dismissed.

[2009-TIOL-348-ITAT-MUM](#)

DCIT, Mumbai Vs M/s Procter & Gamble Home Products Ltd (Dated: January 19, 2009)

Income Tax - Assessee claimed deduction of expenditure incurred on approved Voluntary Retirement Scheme which was disallowed by AO - CIT(A) restored the matter back to AO to consider the provisions of Rule 6B - AO held the expenditure disallowable not under rule 6B but on the ground that the same was of capital nature - CIT(A) held in favor of assessee - Held, payment of compensation to induce the workmen to retire prematurely was an item of expenditure incurred by the company on the ground of commercial expense in order to facilitate carrying on of the business and it was an expenditure allowable under section 37(1) - Revenue's appeal dismissed.

[2009-TIOL-347-ITAT-BANG](#)

ACIT, Bangalore Vs M/s Novell Software Development India Pvt Ltd (Dated: April 30, 2009)

Income tax - Sec 10A - Assessee incurs expenses in foreign currency towards telecom connectivity for providing technical services from total turnover - AO disallows - held, it is a settled law now that if such expenses are deducted from export turnover it will also be deducted from the total turnover - Revenue's appeal dismissed

[2009-TIOL-346-ITAT-HYD](#)

ACIT, Hyderabad Vs Andhra Pradesh Power Generation Corporation Ltd (Dated: December 19, 2008)

Income tax - India-China DTAA - Assessee is a State Government undertaking - enters into contracts with non-resident company for supply of power generators and also erection and commissioning of the project - TDS u/s 195 - Assessee writes to Revenue for rate at which TDS to be deducted only service component of the contract - AO holds that it is a composite contract and although the title of goods is transferred outside India the assessee exercises control over it during commissioning and since the non-resident has hired warehouses from the assessee and also constructed colony for its staff, it becomes its PE and the entire income is business income as per Article 7(1) of the DTAA - CIT(A) agrees with the AO that it is a composite contract but holds TDS is liable for only that part of income which is attributed to execution of commissioning in India - held, the AO is right in holding that it is a composite contract but it has, however, two identifiable segments and the supply of equipment is on FOB basis and such a contract cannot be rewritten by the AO. Since the title of goods was passed on to the buyer outside India and TDS is applicable only to the income arising from the service contract carried out in India. There is no wrong in CIT(A) order that even if there is a PE in India, since the goods were manufactured outside India, no income can be attributed to the PE as business income - TDS to be paid only on income attributable to the service component of the contract as rightly offered by the assessee on its own - Revenue's appeal dismissed

[Also see analysis of the Order](#)

[2009-TIOL-345-ITAT-MUM](#)

ITO, Mumbai Vs M/s Matraco India Ltd (Dated: February 04, 2009)

Income Tax - Section 68 - Assessee raises unsecured loan against securities pledged with the Banks being in the name of two persons in the form of FCNRs and RIBs - AO holds it to be unaccounted money of the assessee company and its Directors which are being channelised and circulated through the RIBs and determines the amount held in FCNRs/RIBs as income of the assessee u/s 68 - CIT(A) remands the issue back to the AO for affording an opportunity to the assessee to present the comments on information provided by the Banks and holds that the explanation given by the assessee company to counter the allegation made by the AO as logical and based on material evidence and as the AO is not able to disprove the claim - Held, in view of ratio laid down by Apex Court in CIT Vs Daulatram Rawatmull and in the facts and circumstances of the case, no merit in the addition made by the AO. CIT(A) order confirmed. Revenue Ground dismissed.

Section 69B - On issue of allowance of Long Term Capital Loss & against the allowance on account of unexplained investment - Held, no merit in treating the transaction of sale of shares as ingenuine and there is no merit in making the addition on account of unexplained investment in the said shares as appearing in the books of account of the assessee even after the date of sale. CIT(A) order affirmed. Revenue

Ground dismissed.

[2009-TIOL-344-ITAT-MUM](#)

Mr Niraj Mehta Vs ACIT, Mumbai (Dated: January 30, 2009)

Income Tax - Notice u/s 158BC - block return filed – AO finds discrepancies in stocks of loose diamonds and gold and same were not offered for taxation in return - makes additions for undisclosed amount - CIT(A) agrees with the AO - held, only the profit element of such stocks can be brought to tax and not the entire shortage of gold - the sale proceeds of the gold and the undisclosed income declared in the block return explain the source of acquisition of loose diamonds - Assessee's appeal allowed.

[2009-TIOL-343-ITAT-MUM](#)

M/s Raymond Ltd Vs Addl.CIT, Mumbai (Dated: February 25, 2009)

Income tax - Trial run expenses - assessee is into manufacture of steel - expands capacity for cold rolled steel - incurs trial run expenses - initially capitalises the same but since production commences during the FY, such expenses are claimed as revenue expenditure - AO and CIT(A) disallow - held, since it is expansion of existing capacity, and similar allowance was made in the case of assessee in earlier years, it is allowable - assessee's appeal allowed

Sec 35AB - Assessee enters into agreement with three foreign companies for transfer of technical knowhow fee - Fees are paid in instalments over a period of time - assessee claims since the payments are made in instalment and not lump sum Sec 35AB is not applicable and it is allowable u/s 37 - AO allows one-sixth of the gross amount in the relevant year - held, since the issue is settled in favour of Revenue in earlier years, only one-sixth of the gross sum is to be allowed u/s 35AB - Assessee's appeal dismissed

[2009-TIOL-342-ITAT-BANG](#)

M/s Intel Technology India Pvt Ltd Vs ACIT, Bangalore (Dated: April 17, 2009)

Assessment after merger with another company - Company no longer in existence cannot be an assessee by any stretch of imagination: The Scheme of Amalgamation was in effect from 1st April, 2004. The AO was duly informed by the assessee vide its letter dated 29/6/2004 addressed to the ACIT, Circle 12(2), Bangalore which has been duly acknowledged by the latter. This goes to prove beyond doubt that the AO was well aware of the fact that the assessee was in non-existence as on the dates on which the assessment proceedings have taken place and subsequent order passed. The company which was no longer in existence cannot be an assessee in any stretch of imagination.

[Also see analysis of the Order](#)

[2009-TIOL-341-ITAT-MUM](#)

M/s Foseco India Ltd Vs ACIT, Mumbai (Dated: April 6, 2009)

Income tax - Sec 254(2) - Assessee manufactures foundry related items - runs five plants - due to technological advancement assessee goes for restructuring of the company - decides to close down two units - offers VRS and incures expenses in this respect - claims the same as revenue expenditure of the ongoing company as there was unity of control and the closure of some plants was the decision of the existing company - Revenue disallows - held, assessee's contention has merit as the Tribunal has not applied its mind to the question whether it is capital expenditure or revenue expenditure as the company is a functional entity - notice issued - Assessee's appeal allowed

[2009-TIOL-340-ITAT-BANG](#)

ITO, Bangalore Vs M/s Lenovo (India) Pvt Ltd (Dated: April 9, 2009)

Income tax - Sec 9(1)(vi) and Article 12 of Indo-USA DTAA - assessee is an IT company - buys software bundled with hardware - AO for TDS u/s 195 as it considers payment for software as royalty - CIT(A) allows assessee's appeal - held, it is settled law that the payment made for shrink wrapped or off the shelf packaged softare on principle of principle basis is not royalty and cannot be subjected to rigours of Sec 195 as it is outright purchase - Assessee's appeal allowed

[2009-TIOL-339-ITAT-BANG](#)

ACIT, Bangalore Vs M/s State Bank Of Mysore (Dated: April 17, 2009)

Income tax - broken period interest - interest on securities - AO for taxing broken period interest which has accrued but not fallen due - CIT(A) disagrees with the AO - held, Section 5 is the charging section while the section 145 is the computation provision. The computation provisions cannot enlarge or restrict the content of taxable income. Broken period interest which has not fallen due but a book entry has been made is only a hypothetical income - CIT(A) order upheld and Revenue's appeal dismissed

[2009-TIOL-338-ITAT-MUM](#)

ACIT, Mumbai Vs M/s H P Shah & Co (Dated: January 15, 2009)

Income Tax - Assessee claimed interest expenditure u/s. 36(1)(iii) on amount invested in Mutual Funds - AO disallowed expenditure holding that borrowed funds were not for the purpose of assessee's business - CIT(A) allowed assessee's appeal - Held, where borrowed as well as own funds are used for both business and other than business purposes, there is no presumption that moneys used for other purposes came out of borrowed funds - Held, if an assessee having sufficient interest free funds, in the form of capital reserves and other funds without interest bearing from relatives and friends not related to business, to cover funds given interest free or utilized other than for business purposes, no disallowance is warranted, however, if the own funds are not sufficient to cover interest free advances, a proportionate disallowance is warranted - Revenue's appeal allowed and proportionate disallowance was made.

[2009-TIOL-337-ITAT-DEL](#)

M/s Exxon Mobil Lubricants Pvt Ltd Vs CIT, New Delhi (Dated: April 2, 2009)

Income Tax - Sec 263 - assessee claims deduction of expenditure on account of advertisement and publicity - makes provision for two accounts of expenses - The claim of the advertisement accepted by the AO in the original assessment order though without any discussion in the assessment order - The CIT thought that the provision towards advertisement and publicity expenses to be unascertained liability being in the nature of contingent liability which is not deductible and held assessment order to be erroneous and prejudicial to the interests of revenue and consider that to take a final view on the issue further examination of the assessment records are necessary which can be conducted only by the AO and no conclusive findings on the issue at this stage -Held, on the one hand, the CIT says that it was a contingent liability not allowable as deduction and on the other hand, he records a finding that it was not possible for him to record conclusive findings on this issue at this stage. The two things are contradictory. It cannot be said that these are unascertained liabilities. The provision was made on the basis of purchases made by the parties who have earned the points on that purchases and as per the scheme, it was an allowable expenditure - CIT order set aside and AO order restored.

[2009-TIOL-336-ITAT-DEL](#)

DCIT, Dehradun Vs M/s Mcdermott International Inc (Dated: April 30, 2009)

Interest Income (from foreign company) cannot be treated as Fee for Technical Services, taxable at 20%, not 30%: The Tribunal referred to several decided cases and noted that none of the decisions cited by the DR supports the claim of the Revenue in the present case that the interest income as per arbitration award is to be treated as FTS . This receipt is on account of interest as per arbitration award in connection with debt owned by the Indian Company i.e. M/s BSCL in foreign currency. So the ITAT held that such interest income is to be taxed as per the provisions of section 115A (1) and since CIT (A) has decided this issue on similar line, ITAT found no reason to interfere in the order of the CIT (A). This ground of the Revenue is rejected.

In re-assessment proceedings u/s 147, the income-tax Officer's jurisdiction is confined to only such income which has escaped tax – assessee cannot be permitted to re-agitate questions which had been decided in the original assessment : in proceedings under section 147 of the Act, the Income tax Officer may bring to charge items of income which had escaped assessment other than or in

addition to that item or items which have led to the issuance of the notice under section 148 and where reassessment is made under section 147 in respect of income which has escaped tax, the income-tax Officer's jurisdiction is confined to only such income which has escaped tax or has been under assessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reargue questions which had been decided in the original assessment proceedings. It is only the underassessment which is set aside and not the entire assessment when reassessment proceedings are initiated. The Income-tax Officer cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which was not the subject matter of proceedings under section 147. An assessee cannot resist validly initiated reassessment proceedings under this section merely by showing that other income which had been assessed originally was at too high a figure except in cases under section 152(2). The words "such income" in section 147 clearly refers to the income which is chargeable to tax but has "escaped assessment" and the Income-tax Officer's jurisdiction under the section is confined only to such income which has escaped assessment. It does not extend to reconsidering generally the concluded earlier assessment. Claims which has been disallowed in the original assessment proceeding cannot be permitted to be reargued on the assessment being reopened for bringing to tax certain income which had escaped assessment because the controversy on reassessment is confined to matters which are relevant only in respect of the income which had not been brought to tax during the course of the original assessment. A matter not agitated in the concluded original assessment proceedings also cannot be permitted to be agitated in the reassessment proceedings unless relating to the item sought to be taxed as "escaped income".

[Also see analysis of the Order](#)