SUMMARY OF NEWS OF PROFESSIONAL INTEREST ON VOICE OF CHARTERED ACCOUNTANTS FOR THE PERIOD OCTOBER TO DECEMBER 2011

DATE	S.NO.	TOPIC	RELEVANT SEC. (IF ANY)	JUDGMENT PASSED BY
3/10/11	125	CIT Vs. SHANKAR KRISHNAN, ITA No. 3516 of 2010, Dated: 6th September 2011, Whether when the employer provides security deposit to the landlord in order to cater rent-free accommodation to the employee, notional interest is to be taken into consideration for computing fair rental value and thus the perquisite value is to be enhanced. The contention of the revenue cannot be accepted in view of the express words used in Rule 3 of the Income Tax Rules, 1962 as amended w.e.f. 1.4.01; in the present case, admittedly, the actual amount of lease rent paid by the employer is less than 10% of the salary of the Assessee and therefore, the decision of the ITAT cannot be faulted.	Rule 3 of the Income Tax Rules, 1962	HIGH COURT OF BOMBAY
	126	CIT Vs. SHRI JYOTINDRA B. MODY, ITA NO. 3741 OF 2010, DATE : 21ST SEPTEMBER 2011, Whether the ITAT was justified in holding that the seized cash amounting to Rs. 18,00,000/and the amount of Rs.1.98 Crores deposited by the Assessee on 31st January, 2007 could be adjusted against the AdvanceTax liability while computing the interest under sections 234B and 234C of the Income Tax Act, 1961? Once the assessee offers to tax the undisclosed income including the amount seized during the search, then the liability to pay advance tax in respect of that amount arises even before the completion of the assessment. Section 132B(1)(i) of the Act does not prohibit utilization of the amount seized during the course of search towards the advance tax payable on the amount of undisclosed income declared during the course of search. In the present case, the assessee, prior to the last date for payment of last installment of advance tax, had in fact by his letter dated 14th March, 2007 requested the assessing officer to adjust the amounts towards the existing advance tax liability. Since advance tax liability is to be computed and paid in accordance with the provisions of the Act even before the completion of the assessment, no fault can be found with the decision of the ITAT in holding that in the facts of the present case, the amounts in question were liable to be adjusted towards the existing advance tax liability.	234B &234C	HIGH COURT OF BOMBAY

5/10/11	127	Om Prakash v. UOI (Dated Sep, 30, 2011) WRIT PETITION (CRL.) NO. 66 OF 2011 Held: "43. The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable."	Sec.9A of the Central Excise Act and Sec. 104(4) of the Customs Act, 1962	Supreme Court of India
	128	CIT Vs. M/S NATIONAL TRAVEL SERVICES, ITA NO. 223 OF 2010, DATE OF ORDER 11/07/2011 Section 2(22)(e) is attracted if the payment is made by a company by way of advance or loan "to a shareholder, being a person who is the beneficial owner of shares". While it is correct that the person to whom the payment is made should not only be a registered shareholder but a beneficial share holder, the argument that a firm cannot be treated as a "shareholder" only because the shares are held in the names of its partners is not acceptable. If this contention is accepted, in no case a partnership firm can come within the mischief of s. 2 (22)(e) because the shares would always be held in the names of the partners and never in the name of the firm. This would frustrate the object of s. 2(22)(e) and lead to absurd results. Accordingly, for s. 2(22)(e), a firm has to be treated as the "shareholder" even though it is not the "registered shareholder".	2(22)(e)	HIGH COURT OF DELHI

	129	**CIT Vs. M/S. KIRTI STATIONERS PVT. LTD., ITA NO. 4925 OF 2010, DATED : 26TH SEPTEMBER, 2011,** **ITAT was justified in holding that the activity of producing sharpener blades and Glue & lead amounts to manufacture and accordingly the assessee is entitled to deduction under Section 80IA of the Income Tax Act, is the question raised in these appeals Counsel for the assessee has tendered an affidavit dated 24/9/2011 of the Director of the assessee Company wherein it is stated that the products in question produced by the assessee constitute manufacture under the Central Excise Act and accordingly the assessee has obtained necessary Central Excise Registration. The fact that the excisable products are exempt from the payment of excise duty cannot be a ground to hold that the products in question are not manufactured by the assessee. In these circumstances, the decision of the ITAT in holding that the products in question are manufactured by the assessee and accordingly entitled to the deduction under Section 80IA of the Income Tax Act, 1961 cannot be faulted. In the result, the appeals are dismissed with no order as to costs**	**80IA**	**HIGH COURT AT BOMBAY**
8/10/11	**130**	**THE COMMISSIONER OF INCOME TAX Vs. NAISHADH V. VACHHARAJANI, INCOME TAX APPEAL (L) NO. 1042 OF 2011, DATE : 22ND SEPTEMBER 2011, HIGH COURT AT BOMBAY** **Whether the Income Tax Appellate Tribunal was justified in holding that the income arising on transfer of shares were liable to be assessed as short term capital gains / long term capital gains instead of assessing the same as business income, is the question raised in this appeal** **This Court in the case of Commissioner of Income Tax V/s. Gopal Purohit reported in 228 ITR 582 (Bom) has held that it is open to an assessee to trade in the shares and also to invest in shares and wherever, the shares are held as investment, then the income arising on sale of those shares are liable to be assessed as long term / short term capital gains. In these circumstances, in the facts of the present case, the decision of the Income Tax Appellate Tribunal in holding that the income arising on sale of the shares held as investment were liable to be assessed as long term capital gain / short term capsital gain cannot be faulted.**	**2(47)**	**HIGH COURT AT BOMBAY**

	131	**COMMISSIONER OF INCOME TAX, CENTRAL-1 Vs. M/S SARABAI PIRAMAL PHARMACEUTICALS LTD, INCOME TAX APPEAL NO. 466 OF 2007, DATED: 14 SEPTEMBER 2011, HIGH COURT OF BOMBAY** **Deduction u/s 35AB would be allowable, where the assessee uses the technical knowhow to get the goods manufactured through a third party under its direct supervision and control. In this view of the matter, no fault can be found with the decision of the ITAT; as regards to the borrowed funds utilized for acquisition of capital assets - The counsel for the parties state that the said question stands answered against the revenue by the decision of the Apex Court in the case of DCIT V/s. Core Health Care Ltd. Hence the question cannot be entertained.**	**35AB**	**HIGH COURT OF BOMBAY**
11/10/11	**132**	**HARISH P. MASHRUWALA, MUMBAI Vs. THE ASSISTANT COMMISSIONER OF INCOME TAX, INCOME TAX APPEAL NO. 5195 of 2010, Date : 22nd SEPTEMBER 2011, HIGH COURT AT BOMBAY** **The penalty is imposed not because the amount offered by the assessee has been assessed under a heading other than the heading declared by the assessee, but the penalty has been levied on account of the fact that the declaration made by the assessee regarding the source from which the income and Rs.17,00,000/has been earned has been found to be incorrect. In this view of the matter, once the declaration made in the return of income itself is found to be incorrect, it would obviously amount to furnishing inaccurate particulars of income and consequently the provisions of Section 271(1)(c) of the Act would be attracted.**	**271(1)(c.)**	**HIGH COURT AT BOMBAY**

	133	**M/S TALLY SOLUTIONS PVT. LTD. Vs. THE DEPUTY COMMISSIONER OF INCOME TAX, ITA NO. 1235/BANG/2010, (ASSESSMENT YEAR 2006-07), Date : 26th SEPTEMBER 2011, ITAT – BANGLORE** **There is nothing in s.92CA that requires the AO to first form a "considered opinion" before making a reference to the TPO. It is sufficient if he forms a prima facie opinion that it is necessary and expedient to make such a reference. The making of the reference is a step in the collection of material for making the assessment and does not visit the assessee with civil consequences. There is a safeguard of seeking prior approval of the CIT. Moreover, by virtue of CBDT's Instruction No.3 of 2003 dated 20.5.2003 it is mandatory for the AO to refer cases with aggregate value of international transactions more than Rs.5 crores to the TPO (Sony India 288 ITR 52 (Del) & Ranbaxy Laboratories 299 ITR 175 (AT) (Del) followed);** **(ii) The argument that the "Excess Earning Method" adopted by the TPO is not a prescribed method is not acceptable. A sale of IPR is not a routine transaction involving regular purchase and sale. There are no comparables available. The "Excess Earning Method" is an established method of valuation which is upheld by the U.S Courts in the context of software products. The "Excess Earning Method" method supplements the CUP method and is used to arrive at the CUP price i.e. the price at which the assessee would have sold in an uncontrolled condition (method explained, Intel Asia Electronics Inc followed);**	**92CA**	**ITAT – BANGLORE**

13/10/2011	**134**	**GUPTA & GUPTA CHARTERED ACCOUNTANTS & ANR VERSUS RESERVE BANK OF INDIA & ORS., W.P. (C) 10672/2009, DECISION ON: OCTOBER 10, 2011, HIGH COURT OF DELHI** **The judgment is a landmark judgment for the profession. The court held that the removal of auditors without communication is illegal and agaimst principles of natural Justice.** **Relevant Extracts from the Judgment:** **Where a complaint is made against an SCA by a public sector bank, it would be the duty of the RBI to examine such complaint carefully. In the audit of large public sector banks, there are bound to be queries raised by the SCAs about the accounts of the large account holders of the bank. If there are complaints by the bank, like in the present case, that the audit is getting delayed on account of the bank having to answer such queries, the RBI will have to examine the tenability of such claim after seeking an explanation from the SCA. In the present case, the PNB first wrote to the RBI on 24th April 2009 blaming the Petitioner for the delay in the finalization of the accounts.** **The Petitioner's comments on the said letter were sought by the RBI. The Petitioner then submitted a reply dated 7th May 2009 explaining that there was no delay on its part. This reply was furnished to the PNB by the RBI for its response. In response thereto, on 27th May 2009 the PNB made several allegations questioning the Petitioner's professional competence and integrity. In other words, the tenor of the allegations by PNB against the Petitioner in the letter dated 27th May 2009 was not confined to the issue of delay. Specifically, PNB alleged that the intention of the Petitioner was "to malign the reputation and image of the bank"; that the Petitioner was "abrasive ab initio and uncooperative in**		**HIGH COURT OF DELHI**
15/10/2011	**135**	**ACIT vs. M/s Punjab State Coop & Marketing Fed.Ltd., ITA No.548/Chd/2011 & ITA No.579/Chd/2011 (ITAT- Chd. Bench)** **Held where there is nothing to indicate that investment in purchase of shares was made out of borrowed funds, no disallowance was warranted u/s 14A of the Income Tax Act. Further , S. 14A disallowance cannot exceed exempt income**	**14A**	**(ITAT- Chd. Bench)**

136	**BENNETT COLEMAN & CO. LTD. Vs. THE ADDL. COMMISSIONER OF I.T., I.T.A.NO. 3013/MUM/2007 – A.Y 2002-03, DATE OF PRONOUNCEMENT: 30-09-2011, ITAT – MUMBAI** **Loss on pro-rata reduction of share capital is "Notional". In absence of consideration, capital gains provisions do not apply** **(i) First the face value of each share was reduced from Rs. 10 to Rs. 5 and then two shares of Rs. 5 each were consolidated into one share of Rs. 10 each. If the argument is that earlier shares were replaced or substituted by new shares, then there is no "transfer" but it is merely a case of substitution of one kind of share with another kind of share.** **(ii) Assuming that a reduction of shares in the manner done by the assessee amounts to a "transfer", s. 45 is not attracted because there is no "consideration" received by the assessee for the transfer. Unless and until a particular transaction leads to "computation" of capital gains or loss as contemplated by s. 45 & 48, it cannot attract capital gain tax.** **(iii) Further, by the reduction, the assessee's rights had not been extinguished because it continued to hold the same percentage in the holding of Times Guarentee as it did before the reduction. There was no change in the intrinsic value of his shares and even his rights vis-à-vis other shareholders as well as vis-à-vis company remained the same.**	**45**	**ITAT – MUMBAI**

	137	**COMMISSIONER OF INCOME TAX, KOLKATA-III Vs. M/S DATAWARE PRIVATE LIMITED, ITAT NO. 263 OF 2011, DATE : 21ST SEPTEMBER, 2011, HIGH COURT AT CALCUTTA** **In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.**	**S. 68**	**HIGH COURT AT CALCUTTA**
18/10/2011	138	**THE DY. COMMISSIONER OF INCOME TAX Vs. M/S. JINDAL PHOTO LIMITED, ITA NO. 814(DEL)2011, ASSESSMENT YEAR: 2008-09, DATED: 23.09.2011, ITAT DELHI** **It is a pre-requisite that before invoking Rule 8D, the AO must record his satisfaction on how the assessee's calculation is incorrect. The AO cannot apply Rule 8D without pointing out any inaccuracy in the method of apportionment or allocation of expenses. Further, the onus is on the AO to show that expenditure has been incurred by the assessee for earning tax-free income. Without discharging the onus, the AO is not entitled to make an ad hoc disallowance. A clear finding of incurring of expenditure is necessary. No disallowance can be made on the basis of presumptions.**	**RULE 8D**	**ITAT DELHI**

	139	**GROWTH AVENUES LTD Vs. JOINT COMMISSIONER OF INCOME TAX, DATED: 19.05.2011, ITA NO. 1939-1940/AHD/2009, ASSESSMENT YEAR: 2003-2004, ITAT – AHEMDABAD** **Whether the penalty can be levied u/s 271D / 271E for the amount received and repaid in cash in the hands of the assessee company though as per the statement of the lender the amount was given to and repaid by the directors in their individual capacity** **KKS' has categorically stated in the cross examination proceedings that he had given loan to the directors of the company for which promissory notes were obtained. The promissory notes were in the name of individuals and not in the name of assessee-company. The loan was also repaid by the directors. It is clear from this that assessee-company neither took any loan from 'KKS' nor repaid any amount to him in cash. Penalty u/s. 271D / 271E can be levied against the person who has received / repaid any loan or deposit referred to in Section 269SS / 269T otherwise than in accordance with the provisions of that Section. Since in this case there is no such violation on the part of assessee-company the penalty cannot be levied against it. If at all there is any violation of the provisions of Section 269SS / 269T, it was on the part of the directors.**	**271D/271E**	**ITAT – AHEMDABAD**
20/10/2011	**140**	***DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE-3 KOLKATA Vs. M/s BIHARIJI ISPAT UDYOG LTD. ITA Nos. 1982 & 1983/Kol/2010 Assessment Years: 2001-02 & 2006-07, DATE: 06.09.2011, ITAT – Kolkata*** ***Whether any addition under section 68 is permissible when the advances are received by account payee cheques and interest and shares have been paid and allotted against these advances.*** ***Keeping in view of the fact that the aforesaid transactions were duly recorded by assessee and the transactions are made by account payee cheques and the interest on the said transactions have been paid after deduction of TDS and that AO should have enucleated or brought on record unassailable, concrete and incontrovertible facts that could have clinched the issue in the Departmental favour.***	**68**	**ITAT – Kolkata**

	141	**COMMISSIONER OF INCOME TAX Vs. H P MARKETING BOARD, I.T.A. NO.1 OF 2007, DATED: 24.06.2011, HIGH COURT OF HIMACHAL PRADESH** **Whether a marketing board is a local authority within the meaning of section 10(20) prior to the amendment made in section 10(20) when the word 'local authority' was not defined in the Income tax Act and the definition of 'local authority' as defined in section 3(31) of the General Clause Act was applicable.** **The question whether the Marketing Board is a local authority or not is a question based more on law than on facts. There being no res judicata in income tax proceedings the Department cannot be tied down with a view which it may have once taken. Thus, the question of law raised is held in favour of the Revenue by holding that H.P. Marketing Board is not a local authority within the meaning of Section 10(20) of the Income Tax Act, 1961 or 3(31) of the General Clauses Act, 1897.**	**10(20)**	**HIGH COURT OF HIMACHAL PRADESH**
22/10/2011	142	**THE A.C.I.T., Vs. M/S PUNJAB STATE COOP & MARKETING FED.LTD., ITA NO. 548/CHD/2011, ASSESSMENT YEAR : 2007-08, DATE OF PRONOUNCEMENT : 30.09.2011, ITAT – CHANDIGARH** **No S. 14A disallowance in absence of nexus between investment in tax-free securities & borrowed funds. S. 14A disallowance cannot exceed exempt income.** **In AY 2007-08, the assessee received dividend of Rs. 4 lakhs in respect of investment in shares made in earlier years. No investments were made during the year. It was claimed that the investment in the earlier years was made out of reserves & surplus and that there was no expenditure incurred during the year to earn the dividend. The AO held that as in the earlier years, the assessee had borrowed funds, s. 14A applied. He applied the rate of interest paid on the borrowings and disallowed Rs. 12.73 lakhs. This was deleted by the CIT (A). On appeal by the department, HELD dismissing the appeal, if there is no nexus between borrowed funds and investments made in purchase of shares, disallowance u/s 14A is not warranted**	**14A**	**ITAT – CHANDIGARH**

	143	**COMMISSIONER OF INCOME TAX Vs. MOHAIR INVESTMENT AND TRADING CO. P. LTD, ITA NO. 511/2011, DATE OF DECISION: 30TH SEPTEMBER 2011, HIGH COURT OF NEW DELHI** **The period of six months provided for imposition of penalty u/s 275(1)(a) starts running after the successive appeals from an assessment order have been finally decided by the CIT(A) or the ITAT. The proviso to s. 275(1)(a) extends the period for imposing penalty from six months to one year of the receipt of the CIT (A)'s order after 1.6.2003. The proviso carves out an exception from the main section inasmuch as in cases where no appeal is filed before the ITAT the AO must impose penalty within a period of one year of the date of receipt of the CIT (A)'s order. To read the provision as suggested by the assessee would obliterate the main provision itself. A proviso is merely a subsidiary to the main section and must be construed harmoniously with the main provision. The proviso to s. 275(1)(a) does not nullify the availability to the AO of the period of limitation of six months from the end of the month when the order of the ITAT is received.**	**275(1)(a)**	**HIGH COURT OF NEW DELHI**
31/10/2011	**144**	**DCIT Vs. MS. LEROY SOMER & CONTROLS (INDIA) (P) LTD., ITA NO. 1330/DEL/2011, ASSESSMENT YEAR: 2005-06, DATE OF PRONOUNCEMENT: 30/09/2011 ITAT – DELHI** **S. 271G authorizes the levy of penalty if the information/ documents prescribed by s. 92D (3) are not furnished. Rule 10D prescribes a voluminous list of information and documents required to be maintained and it is only in rare cases that all clauses would be attracted. Some of the documents may not be necessary in case of some assessees. Before issuing a notice u/s 92D(3), the AO has to apply his mind to what information and documents are relevant and necessary for determining ALP. A notice u/s 92D(3) is not routine and cannot be casually issued but requires application of mind to consider the material on record and what further information on specific points is required.** **The notice cannot be vague or call for un-prescribed information. On facts, the TPO issued a notice calling for "information and documents maintained as prescribed u/s 92D r.w. Rule 10D" without specifying any particular information under any clause of Rule 10D. The notice was "omnibus", issued in a casual manner, without examining records nor nature or details of international transactions and showed total lack of application of mind as to what information was required in this case. Even in the penalty order, the exact nature of default was not brought out.**	**271G**	**ITAT – DELHI**

	145	**THE METAL ROLLING WORKS LTD. Vs. COMMISSIONER OF INCOME TAX, INCOME TAX APPEAL (LOD) NO. 966 OF 2011, DATE OF PRONOUNCEMENT: 11TH OCTOBER 2011, BOMBAY HIGH COURT** **The development agreement did contain a clause to that effect and, therefore, since the last instalment was not received in AY 2002-03, the assessee was justified in not offering the capital gains to tax in AY 2002-03 in the original return of income filed on 31/10/2002. Although Rs.6 crores received initially was not offered to tax in the original return filed for AY 2002-03, it is not in dispute that in the original returns filed for AY 2002-03 the assessee did disclose receipt of Rs.6 crores as advance on account of development agreement entered into with a developer in respect of its land. Once the receipt of Rs.6 crores was disclosed in the original return of income as advance receipt under the development agreement entered into with the developer, the assessee cannot be said to have concealed income or furnished inaccurate particulars of income.**	**271(1)(C.)**	**BOMBAY HIGH COURT**
04/11/11	**146**	**DEPUTY COMMISSIONER OF INCOME-TAX Vs. M/S. S. K. TEKRIWAL, I.T.A NO. 1135/KOL/2010, ASSESSMENT YEAR: 2007-08, DATE OF PRONOUNCEMENT: 21.10.2011, ITAT – KOLKATA** **S. 40(a)(ia) provides for a disallowance if amounts towards rent etc have been paid without deducting tax at source. It does not apply to a case of short-deduction of tax at source. As the assessee had deducted u/s 194C, it was not a case of "non-deduction" of TDS. If there is a shortfall due to difference of opinion as to which TDS provision would apply, the assessee may be treated as a defaulter u/s 201 but no disallowance can be made u/s 40(a) (ia).**	**40(a)(ia)**	**ITAT – KOLKATA**

	147	**MR. FAISAL ABBAS Vs. DY. COMMR.OF INCOME-TAX, I.T.A.NOS. 3485 & 3487/MUM/2010, A.YS. 2002-03 & 2007-08, DATE OF PRONOUNCEMENT: 25.10.2011, ITAT- MUMBAI** **In our considered opinion, the authorities below were not justified in not granting the set off of the brought forward business loss for the reason that the requirement to file return within the time prescribed u/s.139(1) is for carrying forward the loss. Once loss is determined in the return file u/s.139(3), the assessee becomes eligible for set off against the income of the subsequent years irrespective of the fact whether the returns of such later years are filed u/s.139(1) or not. Sec. 80 read with sec. 139(3) requires the submission of return for loss before the due date. There is no such requirement that the subsequent years, in which the set off is claimed, must also fulfill the requirement of furnishing the returns within the time required u/s.139(1).** **It is further important to note that sec. 153A dealing with assessment in case of search provides for the issuance of notice to the assessee in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted. Sec. 153A(1)(a) clearly provides that "the provisions of this Act shall, so far as may be, apply accordingly as if such return were a**	**158BB (4) read with 153A**	**ITAT-MUMBAI**
08/11/11	**148**	**ASST COMMISSIONER OF INCOME TAX Vs. M/S BHARAT OMAN REFINERIES LTD., ITA NO. 530/IND/2010, ASSESSMENT YEAR: 2007-08, DATED: 14TH SEPTEMBER 2011, ITAT – INDORE** **Whether the receipts and payments on account of tender form and recovery of house accommodation and furniture & fixture provided with house accommodation are liable to tax when the business has not been fully set up.** **Receipts on account of tender form and recovery of house accommodation and furniture & fixture provided with house accommodation are of capital nature.**	**S. 28**	**ITAT-INDORE**

	149	M/S MAA VAISHNO DEVI GINNING PRESSING UDHYOG DHAMNOD VS. DEPUTY COMMISSIONER OF INCOME TAX, ITA NO. 538/IND/2010, ASSESSMENT YEAR: 2007-08, DATED: 25TH SEPTEMBER 2011, ITAT – INDORE The assessee has charged separately from weighment (from weighbridge), therefore, it cannot be treated to be income generated from ginning business of the assessee because the income should be "derived from" the ginning business of assessee/industrial undertaking. Even otherwise, it can be said that the income which has been "derived from" the business of ginning and pressing of cotton can only be considered for deduction u/s 80- IB of the Act and the income which has been either acquired out of income from undisclosed sources are from different business cannot be allowed to be claimed as deduction u/s 80-IB of the Act.	80-IB	ITAT-INDORE
11/11/2011	150	CIT Vs. M/s YOKOGAWA INDIA LTD, ITA NO. 78 OF 2011, DATE OF ORDER : 09/08/2011, HIGH COURT OF KARNATAKA S. 10A is in the nature of an "exemption" provision and the profits of the eligible unit have to be deducted at source level and do not enter into the computation of income. Consequently, the losses suffered by non-eligible units cannot be set-off against the eligible profits. As the income of the 10A unit has to be excluded at source itself before arriving at the gross total income, the question of setting off the loss of the current year's or the brought forward business loss (and unabsorbed depreciation) against the s. 10A profits does not arise.	10A &10B	HIGH COURT OF KARNATAKA

	151	**COMMISSIONER OF INCOME TAX Vs. M/S ASAHI INDIA SAFETY GLASS LTD., ITA NOS. 1110/2006 & 1111/2006, JUDGMENT DELIVERED ON: 04.11.2011, HIGH COURT OF DELHI** **The test of enduring benefit is not a certain or a conclusive test which the courts can apply almost by rote. What is required to be seen is the real intent and purpose of the expenditure and whether the expenditure results in creation of fixed capital for the assessee.** **Expenditure incurred which enables the profit making structure to work more efficiently leaving the source of the profit making structure untouched is expense in the nature of revenue expenditure. Fine tuning business operations to enable the management to run its business effectively, efficiently and profitably; leaving the fixed assets untouched is of revenue expenditure even though the advantage may last for an indefinite period. Test of enduring benefit or advantage collapses in such like cases especially in cases which deal with technology and software application which do not in any manner supplant the source of income or added to the fixed capital of the assessee.** **(ii) The software was "application software" which enabled it to execute tasks in the field of accounting, purchases and inventory maintenance more efficiently;** **(iii) The fact that the expenditure was not written off in the books/ treated as 'deferred revenue' is irrelevant.**	**S. 37**	**HIGH COURT OF DELHI**
16-11-2011	**152**	**M/s. Kotak Securities Limited Vs. CIT, INCOME TAX APPEAL NO. 3111 OF 2009, Date: 21.10.2011, Bombay high court** **Held: plain reading of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act clearly shows that the expression 'fees for technical services' includes rendering of any managerial services.** **A stock exchange manages the entire trading activity carried on by its members and accordingly renders "managerial services". Consequently, the transaction charges constituted "fees for technical services" u/s 194-J and the assessee ought to have deducted TDS. However, since both the revenue and the assessee were under the bonafide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question and consequently disallowance made by the assessing officer under Section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained**	**194J read with 40(a)(ia)**	**BOMBAY HIGH COURT**

	153	**Asstt. DIT (Intl. Tax.) v. M/s.Neo Sports Broadcast Private Limited Nimbus Centre , ITA No. 99/Mum/2009 : Asst.Year 2008-2009, Date: 09.11.2011, ITAT mumbai.** **Payment made by M/s.Neo Sports Broadcast Private Limited, Mumbai (assessee) to NIMBUS SPORTS INTERNATIONAL PTE. LTD. (Singapore) (NSI) towards "live feed" for broadcasting cricket matches in India is different from that made for the purpose of broadcast of "recorded feed" and hence is not in the nature of "Royalty payment" and therefore, there was no requirement of deduction of tax under section 195 of the Income-tax Act, 1961.**	**195**	**ITAT MUMBAI**
	154	**CIT v. M/s State Urban Development Society Date of Decision: 19.10.2011, ITA No. 210 of 2011, Date: P&H High Court** **It has been held that reflection in the profit and loss account towards the income is not determinative. The entries in the books of account do not decide the nature of receipts. Since, the grants have been received by the assessee for disbursement and keeping in view the fact that the same cannot be utilized for any other purpose such as distribution for the poverty in furtherance to the object of the Schemes, it cannot be treated as income of the assessee.**	**S. 11 & 12**	**P&H High Court**

19-11-2011	**155**	**ASSTT COMMISSIONER OF INCOME TAX Vs. MODI REVLON PVT LTD, ITA NO. 3738 (DEL)/2011, ASSESSMENT YEAR: 2008-09, DATED: 21 OCTOBER 2011, ITAT – DELHI** **The assessee does not obtained benefit of enduring nature against the payments of royalty. As per various clauses of know-how license agreement vis-à-vis supplement agreement dated 16.9.2003, the royalty payable as net sales of taxes the know-how has been provided by the contract manufacturer in terms of clause 4.01 of the agreement for limited purpose of manufacturing Revlon products only when passing on any property in the sale to the assessee. Obligations of the contract manufacturer were clearly defined in the agreement between the assessee company and the contract manufacturer, according to which obligation relating to royalty payment has not been passed on to the contract manufacturer. The entire benefit of the know-how was meant for manufacturing of the products to be supplied to the company and there was no obligation of contracting manufacturer to pay royalty to the licensor. Since the assessee company was enjoying the complete benefit of the know-how to run its business, the expenditure incurred every year on payment of royalty was revenue in nature and is very much business expenditure. These expenditure cannot be classified as capital expenditure.**	**S. 11 & 12**	**ITAT - DELHI**
	156	**DEPUTY COMMISSIONER OF INCOME TAX Vs. M/S CMR DESIGN AUTOMATION PVT LTD, ITA NO. 493/DEL/2011 A.Y. 2006-07, DATED: 21 JULY 2011, ITAT – DELHI** **It was clear that the commission and bonus was paid to the assessee company's director as an incentive and was directly related to the profitability of the assessee company whereby section 36(1)(ii) could not be invoked. The cases followed by the CIT(A) supported the case of the assessee and the CIT(A) had given a correct finding that payments were reward to give the employee an incentive for the good work being done by him. Thus, these expenses were incurred for the purpose of business expediency and for improving the working of the assessee.**	**36(1)(ii)**	**ITAT-DELHI**

23-11-2011	**157**	**C.I.T. Vs. M/S BHARI INFORMATION TECH. SYS. P. LTD., SPECIAL LEAVE TO APPEAL (CIVIL) NO(S). 33750/2009, DATE OF ORDER : 20/10/2011, SUPREME COURT OF INDIA** **The deduction is to be worked out not on the basis of regular income tax profits but it has to be worked out on the basis of the adjusted book profits in a case where s. 115JA is applicable. The dichotomy between regular income tax profits and adjusted book profits u/s 115JA is clear, in s. 115JA relief has to be computed u/s 80HHC(3)/(3A). Once the law itself declares that the adjusted book profit is amenable for further deductions on specified grounds, in a case where s. 80HHC (80HHE in the present case) is operational, it becomes clear that computation for the deduction under those sections needs to be worked out on the basis of the adjusted book profit. Accordingly, the deduction claimed by the assessee u/s 80HHC & 80HHE has to be worked out on the basis of adjusted book profit u/s 115JA and not on the basis of the profits computed under regular provisions of law applicable to computation of profits and gains of business.**	**115JA**	**SUPREME COURT OF INDIA**
	158	**C.I.T. Vs. M/S DATAWARE PRIVATE LIMITED, ITAT NO. 263 OF 2011 & GA NO. 2856 OF 2011, DATE: 21/09/2011, THE HIGH COURT AT CALCUTTA** **If the creditor discloses his PAN and claims to be an assessee, the AO cannot himself examine the return and P&L A/c of the creditor and brand the same as unworthy of credence. Instead, he should enquire from the creditor's AO as to the genuineness of the transaction and whether such transaction has been accepted by the creditor's AO. So long it is not established that the return submitted by the creditor has been rejected by the creditor's AO, the assessee's AO is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.**	**S. 68**	**HIGH COURT AT CALCUTTA**

25-11-2011	**159**	**M/s. SKIL Infrastructure Ltd. Vs. Income Tax Officer - TDS 3(3), ITA No. 3419 & 3420/Mum/2010, (A.Y. 2007-08 & 2008-09), Date: 31.10.2011, ITAT "E" Bench - Mumbai** **Held: the contract for transportation in respect of chartering a helicopter/aircrafts do not attract provisions of TDS u/s 194I. Respectfully following the views expressed in Tata AIG General Insurance Co. Ltd. vs. ITO 43 SOT 215 (Mum) and Ahmedabad Urban Development Authority vs. ACIT ITA No. 1637/Ahd/2010 dated 10.03.2011, it is held that assessee has correctly deducted tax under section 194C and there is no liability to deduct tax under section 194 I as the said provisions are not applicable to the hire charges paid for utilisation of transport services from the respective service providers. In view of this, impugned orders of the A.O. levying tax under section 201(1) and interest under section 201(1A) are hereby set aside.**	**194 I**	**MUMBAI**
	160	**ACIT Vs. M/s. Smith & Newphew Healthcare (P) Ltd., ITA NO. 5779/MUM/07 (A.Y. 2003-04), Date: 09.11.2011, ITAT "L" Bench - Mumbai** **Held: As rightly held by the CIT(A), the requirement of law is that the Assessee has to "keep and maintain" information and documents in respect of international transaction entered into with AE. Rule 10D(4) of the Rules envisages that the information and documents specified under sub-rules (1) and (2) should, as far as possible, be contemporaneous and should exist latest by the specified date referred to in clause (iv) of section 92F, which is due date for filing return of income u/s.139(1) of the Act. The Assessment order and the order imposing penalty u/s.271AA of the Act, does not specify what was the failure on the part of the Assessee under Sec.92D read with Rule 10D of the Rules. The Assessee has in the course of assessment proceedings furnished all details required by the AO and the international transaction with the AE has been accepted to be one confirming to the Arm's Length Price.**	**271AA**	**ITAT-MUMBAI**

28-11-2011	**161**	**COMMISSIONER OF INCOME TAX Vs. DELHI PUBLIC SCHOOL, ITA NO. 345/2009, DATED: 31st OCTOBER 2011, HIGH COURT OF DELHI** **Whether where unless the inference, that the income of the employees has not been calculated correctly while deducting the tax at source, can be reasonably raised against an employer, it cannot be held that he has not deducted tax on the estimated income of the employee and cannot be treated as an assessee in default.** **It is seen that TDS has been deducted on "estimated income" of the employee, and the employer was not expected to step into the shoes of the AO and determine the actual income. AO without application of mind proceeded with the determination of the value of the perquisite based on the survey operations in many other schools without reference to the "cost" of such education in a similar institution in or near the locality. CIT(A) held that on the basis of the accounts maintained by the Assessee, the cost of education was less than Rs 1,000/- per month per child and, therefore, the Assessee was also entitled to the benefit of the proviso to Rule3(5) of the Rules, 1962. Thus, the case was not fit for passing orders u/s 201(1) and consequently levying interest u/s 201(1A) of the Act.**	**201(1)**	**HIGH COURT OF DELHI**

	162	**COMMISSIONER OF INCOME TAX Vs. HARNARAIN, ITA NO. 2072/2010, DATE OF DECISION: 31ST OCTOBER 2011, HIGH COURT OF DELHI** **In the present case it is observed that the AO included the amount of gift in the total income of the Assessee merely on the basis of the Assessee's declaration. Also, the AO did not point out or refer to any evidence or material to show and establish that the gift received by the Assessee was either bogus or sham. Admittedly, the Assessee had offered the gift for taxation voluntarily and it was not the case of the Revenue that the same was done after its detection by the Department. Further, it was also not the case of the Revenue that material was found during the search indicating that the gift transaction was an arranged affair to accommodate the Assessee's unaccounted money. In this respect it is evident that the ITAT correctly came to the conclusion that the AO did not possess any piece of information that the gift was not genuine and was part of the undisclosed of the Assessee. In the questionnaire dated 10th October, 2005 the AO had simply raised a query for the relevant assessment year in the following manner:-** **"Had you taken/given any loan/gift during the F.Y. under consideration? If yes, please furnish details". In response to this query the Assessee had furnished the details of gift received in the relevant year from NRI's and had also furnished the copy of gift deed along with reply. Apart from this, simultaneously the Assessee made it clear that aforesaid amount was received by the Assessee as gift, but to buy peace and to avoid any dispute the**	**271(1)(C.)**	**HIGH COURT OF DELHI**

30-11-2011	**163**	**THE COMMISSIONER OF INCOME TAX Vs. M/S BABA DEEP SINGH EDUCATIONAL SOCIETY, INCOME-TAX APPEAL NO. 881 OF 2010, DATE OF DECISION: 13.10.2011, HIGH COURT OF PUNJAB AND HARYANA** **The jurisdiction of the Commissioner at the stage of processing application under Section 12AA of the Act is limited regarding whether the activities are genuine and in consonance with the objects of the trust or institution and where education is being imparted as per the rules and the factum of the establishment and running of schools is not disputed the same was a genuine activity and the enquiry regarding genuineness of the activities cannot be stretched beyond this.** **That the respondent-society which was admittedly running a Polytechnic College and the activities were interwoven for furthering the projects and activities pertaining to education, the Tribunal rightly directed that registration should be granted to the respondent-society with the rider that the same could always be cancelled if it came to the notice of the CIT that the society was not carrying on the activities as per its objects. The Commissioner while processing the application under Section 12AA of the Act was not to act as an Assessing Authority.**	**12AA**	**HIGH COURT OF PUNJAB AND HARYANA**
	164	**COMMISSIONER OF INCOME TAX Vs. M/S STATE URBAN DEVELOPMENT SOCIETY, DATE OF DECISION: 19.10.2011, ITA NO. 210 OF 2011, HIGH COURT OF PUNJAB AND HARYANA** **Learned counsel for the appellant vehemently argued that the Society itself has reflected the grants received from Central and State Governments as income. Therefore, it is not open to the assessee to take a stand that such grants are not the income. The said aspect has been considered by the Tribunal, wherein, it has been held that reflection in the profit and loss account towards the income is not determinative. The entries in the books of account do not decide the nature of receipts. Since, the grants have been received by the assessee for disbursement and keeping in view the fact that the same cannot be utilized for any other purpose such as distribution for the poverty in furtherance to the object of the Schemes, it cannot be treated as income of the assessee. As per the finding of fact recorded by the Tribunal, no substantial question of law arises in the present petition**	**28**	**HIGH COURT OF PUNJAB AND HARYANA**

1/12/2011	**165**	**THE COMMISSIONER OF INCOME TAX CENTRAL REVENUE BUILDING, NEW DELHI Vs. GOLD LEAF CAPITAL CORPORATION LTD., ITA NO. 798 OF 2009, DATE OF ORDER : 02.09. 2011, HIGH COURT OF DELHI** **Where the Tribunal noticed that there were two coursed open to it. First course was to draw an adverse inference against the assessee and second course was to restore the matter back to the AO. It chose second course only on the ground that the quantum of amount involved was high, that is hardly a ground or justification for restoring and giving premium to the assessee for its negligence. In fact, it is a clear case where adverse inference should have been drawn. When the Tribunal itself concluded that the assessee was non-cooperative, it can naturally be safely concluded that the assessee did not want to produce evidence, as it would have exposed that the transactions in question were not genuine and fraudulent. Therefore, we are of the opinion that there is a legal error committed by the Tribunal, as in a case like this, only one course of action is presumed, viz., to draw adverse inference.**	**S. 68 read with S. 254**	**HIGH COURT OF DELHI**
	166	**COMMISSIONER OF INCOME TAX (CENTRAL)-I Vs. MANISH BUILD WELL PVT. LTD, INCOME TAX APPEAL NO. 928/2011, Date of Decision: 15.11. 2011, HIGH COURT OF DELHI** A distinction should be recognized and maintained between a case where the assessee invokes Rule 46A to adduce additional evidence before the CIT (A) and a case where the CIT (A), without being prompted by the assessee, while dealing with the appeal, considers it fit to cause or make a further enquiry by virtue of the powers vested in him under sub-Section (4) of Section 250. It is only when he exercises his statutory suo moto power under the above sub-section that the requirements of Rule 46A need not be followed.	**Rule 46A read with S. 250**	**HIGH COURT OF DELHI**

3/12/2011	167	C&C CONSTRUCTION PVT. LTD. Vs. COMMISSIONER OF INCOME TAX, ITA NO. 1118/2011, DECIDED ON : 25.11.2011, HIGH COURT OF DELHI An appeal under Section 260A of the Act is maintainable against every order passed by the Tribunal, where High Court is satisfied that a substantial question of law is involved. A contention/ issue, which is not raised, dealt with or answered by the Tribunal, cannot be raised before the High Court for the first time in an appeal under Section 260A of the Act A contention/question raised and answered by the Tribunal or dealt with by the tribunal suo motu and a question/issue which was raised, but not answered/decided by the Tribunal, can be made subject matter of an appeal under Section 260A of the Act. Therefore, a contention/issue, which is not raised and not decided by the Tribunal, cannot form subject matter of an appeal before the High Court. It may be noticed that an appeal under Section 260A of the Act is the fourth tier of appeal in most of the cases and a third tier of appeal in a few cases. In the present case, what is urged by the counsel for the appellant is that though the issue was not raised and argued before the Tribunal, but the Tribunal should have examined the issue whether the expenditure was on revenue account. The aforesaid contention is not acceptable and has to be rejected. The appeal is accordingly	S. 260A	HIGH COURT OF DELHI
	168	MARUTI SUZUKI INDIA LIMITED Vs. DEPUTY COMMISSIONER OF INCOME TAX, WRIT PETITION (CIVIL) NO. 2252/2011, DATE OF DECISION : 25.11.2011, HIGH COURT OF DELHI It will be specious & illogical for the Revenue to contend that if an issue is decided in favor of the assessee giving rise to a refund in an earlier year, that refund can be adjusted u/s 245, on account of the demand on the same issue in a subsequent year. While the AO can made an addition on the ground that the appellate order for an earlier year has not been accepted, he cannot make an adjustment towards a demand on an issue decided in favour of the assessee.	245	HIGH COURT OF DELHI

6/12/2011	**169**	**INDIAN NEWSPAPER SOCIETY V. Vs. INCOME TAX OFFICER (TDS) (3) 4 & ANR, WRIT PETITION NO. 1504 OF 2011, DATE : 09.11.2011, BOMBAY HIGH COURT** **The assessee, based & assessed in Delhi, was allotted land by MMRDA at Bandra Kurla Complex, Mumbai, on lease for 80 years. The lease premium of Rs.88.52 crores was paid without deduction of tax at source. The ITO (TDS) Mumbai passed an order u/s 201 in which he held that the assessee had defaulted in not deducting TDS u/s 194-I on the lease premium. The assessee filed a Writ Petition to challenge the jurisdiction of the ITO (TDS) Mumbai. HELD upholding the plea: The assessee was assessed at New Delhi. Its PAN & TAN were allotted by the AO at New Delhi. All returns including the TDS returns were filed at New Delhi. Accordingly, there was complete absence of jurisdiction on the part of the AO at Mumbai to proceed against the assessee.**	**194-I**	**BOMBAY HIGH COURT**
	170	**S M SUNDARAM Vs. THE COMMISSIONER OF INCOME TAX CHENNAI, T.C.(A). No. 982 of 2004, DATE : 17.11.2011, HIGH COURT OF MADRAS** **Under section 48(1), the deduction in respect of the full value of the consideration received or accrued regarding the expenditure incurred wholly, etc. and cost of acquisition of asset and the cost of improvement are granted. This deduction has admittedly been granted from the capital gain in the hands of the partnership firm. Sections 48(1) and 48(2) of the Act cannot be read separately. Unless an assessee gets benefit u/s 48(1), he cannot independently claim the right of deduction u/s 48(2). While Section 48(1) of the Act confers substantial right of deduction, what is done in Section 48(2) of the Act is granting further deduction. If the contention of the assessee is accepted, then the partner after obtaining his share as a long term capital gain from the firm, in the hands of which deduction has already been granted, will be again entitled to claim the rights that can never be the intent of the lawmakers; in the hands of the partner the amount of long term capital gain is entitled to apportionment under various heads. But, the question here is whether the deduction already claimed under Section 48(2) of the Act by the firm can be claimed by the partner once again in his hands in respect of his share of long term capital gains. The analogy made**	**48(2)**	**HIGH COURT OF MADRAS**

7/12/2011	**171**	**Joint Commissioner of Commercial Taxes, Bangalore Vs. Sasken Communication Technologies Ltd., Writ Appeal Nos. 90-113 and 118-129 of 2011, DATE : 15.04.2011, HIGH COURT OF KARNATAKA** **ST : Where assessee entered into agreement with its clients for development of software and agreed to give up all rights and claims of software to be developed, such contract was not for sale of any software but contract for service simplicitor**	**Section 65(53a) of the Finance Act, 1994, read with section 4 of the Karnataka VAT Act, 2003**	**HIGH COURT OF KARNATAKA**
	172	**Commissioner of Central Excise, Bangalore Vs. Ecof Industries (P.) Ltd., CEA NO. 51 OF 2010, DATE : 08.04.2011, HIGH COURT OF KARNATAKA** **ST : There is no restrictions under rule 7 of Cenvat Credit Rules in limiting distribution of service tax credit made in respect of one unit solely on ground that services are used in respect of another unit.**	**Rule 7 of Cenvat Credit Rules**	**HIGH COURT OF KARNATAKA**
8/12/2011	**173**	**COMMISSIONER OF INCOME TAX Vs. RAJAJINAGAR CO-OPERATIVE BANK LTD, ITA No. 86 of 2006, Dated: 20.07.2011 HIGH COURT OF KARNATAKA** **If the assessee is able to show reasonable cause for on-compliance of such provision, no penalty is imposable u/s 273B; as stated by the assessee, they did not properly construe this provision. By mis-construing this provision they also did not deduct tax from the interest payable to non-members. That is the bonafide mistake which they have committed. Their bonfides is demonstrated to the effect that once in a survey the said mistake was notice and pointed out immediately they have paid the tax with interest. Therefore, in the light of this undisputed facts of this case, when the CIT(A) and the Tribunal held that the same constitutes a reasonable cause and when the same is not shown to be false, the assessee has satisfied the requirement of Section 273-B, in which event, no penalty shall be imposable.**	**271C**	**HIGH COURT OF KARNATAKA**

	174	**CIT Vs. SUMANGAL OVERSEAS LTD., ITA No. 174 of 2011, Decision Delivered On: 18.11. 2011, HIGH COURT OF DELHI** **The claim on bad debts to be patently wrong and erroneous in law is manifest in the conduct of the assessee in admitting the falsity of the claim and not preferring any further appeal. The CIT (A) observed that the assessee was a corporate whose accounts were duly audited by qualified Chartered Accounts and thus, the claim of bona fide mistake, due to lack of professional held is untenable on its very face. The CIT (A) rejected the claim of non-leviability of penalty on the ground that the assessment was a loss of `76,61,830/- in view of the provisions of Explanation 4(a) to Section 271(1)(c) of the Act On these facts, it is apparent that the claim was neither mala fide nor false. It was a bona fide claim preferred by the assessee, who had also disclosed all the facts relating to and material to the computation of his income. In these circumstances, the assessee fulfilled both the conditions to be outside the purview of Explanation (1) to Section 271(1)(c) of the Act.**	**271(1)©**	**HIGH COURT OF DELHI**
10/12/2011	**175**	**COMMISSIONER OF INCOME TAX Vs. ARVIND KUMAR JAIN, ITA No. 589 OF 2011, DATE : 30.09.2011, HIGH COURT OF DELHI** **S. 2(22)(e) provides that any "loan or advance" by a closely held company to a substantial shareholder shall be assessed as "deemed dividend". The purpose is to tax accumulated profits distributed in the form of loans. Bearing this purpose in mind, the word "advance" has to be read in conjunction with the word "loan". The attributes of a loan are that it involves a positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries interest and there is an obligation of re-payment. The term "advance" may or may not include lending. The word "advance" if not found in conjunction with the word "loan" may or may not include the obligation of repayment. If it does then it would be a loan. Applying the doctrine of noscitur a sociis, the word "advance" means such advance which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to a commercial transactions do not fall within the ambit of s. 2(22)(e).**	**2(22)(e)**	**HIGH COURT OF DELHI**

	176	**THE DY. COMMISSIONER OF INCOME TAX Vs. M/S. EVERSMILE CONSTRUCTION CO. PVT. LTD., ITA No. 4238/MUM/2010, Date : 30.08.2011, ITAT – MUMBAI** **153A requires the AO to make the assessment afresh and compute the "total income" in respect of each of the relevant six assessment years. There is no inhibition on the jurisdiction of the AO on the including of new income and likewise there is no restriction on the assessee to claim any deduction which was not allowed in the original assessment. The determination of total income u/s 153A has to be done afresh without any reference to what was done in the original assessment. The fact that there was an addition in the original assessment does not preclude the assessee from contesting it in the s. 153A proceedings. As it is a fresh exercise of framing assessment of "total income", the assessee is not estopped from arguing about the merits of his case qua the additions made in the original assessment. Debarring the assessee from making a claim about the deductibility of any item, which was earlier disallowed, counters the very concept of fresh assessment of total income**	**153A**	**ITAT - MUMBAI**
13-12-2011	**177**	**CIT Vs. SAMSUNG ELECTRONICS CO. LTD., ITA NO. 2808/2005, DATE OF ORDER : 15/10/2011, HIGH COURT OF KARNATAKA** **U/s 9(1)(vi) of the Act & Article 12 of the DTAA, "payments of any kind in consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work" is deemed to be "royalty". Under the Copyright Act, 1957, a software programme constitutes a "copyright". A right to make a copy of the software and use it for internal business by making copy of the same and storing it on the hard disk amounts to a use of the copyright u/s 14 (1) of that Act because in the absence of such a licence, there would have been an infringement of the copyright. Accordingly, the argument that there is no transfer of any part of the copyright and the transaction involves only a sale of a copyrighted article is not acceptable. The amount paid to the supplier for supply of the "shrink-wrapped" software is not the price of the CD alone nor software alone nor the price of licence granted. It is a combination of all. In substance unless a licence was granted permitting the end user to copy and download the software, the CD would not be helpful to the end user.**	**9(1)(VI)**	**HIGH COURT OF KARNATAKA**

	178	**THE COMMISSIONER OF INCOME TAX DELHI IV Vs. I P INDIA PVT. LTD., ITA NO. 1192/2011 DATE OF DECISION : 21/11/2011, HIGH COURT OF DELHI** **In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was reasonable cause u/S.273B, therefore no substantial question of law arises from the order of the Tribunal**	**273B**	**HIGH COURT OF DELHI**
15-12-2011	**179**	**PRASAD KOCH TECHNIK TECH PVT. LTD. Vs. ASSISTANT COMMISSIONER OF INCOME (OSD) - TAX, SPECIAL CIVIL APPLICATION NO. 16074 OF 2011. DATE : 02/12/2011, HIGH COURT OF GUJARAT** **Reopening not for roving enquiries and scope of sec. 40(a)(i) Vis a vis Foreign supplier raw material payment** **For the assessee to deduct tax at source, it was necessary that the payee had liability to pay any tax on such payment in India. In the reasons recorded, there is not even a prima facie belief or disclosure that on what basis, the Assessing Officer has formed his reason to believe that such payment to the foreign supplier attracted tax in India. In absence of any live link with the reasons recorded and the belief formed, we are of the opinion that the notice was wholly invalid.** **The Assessing Officer cannot be permitted to reopen the assessment only for fishing enquiry. Significantly, before issuing notice for reopening the assessment, the Assessing Officer had gathered the assessee's views on the nature of payment made. The assessee had firmly contended that the payments did not incur any tax liability in India on the supplier. Without any further enquiry, the Assessing Officer straightaway issued notice for reopening such assessment. As we have already held, the Assessing Officer did not have any**	**40(a)(i)**	**HIGH COURT OF GUJARAT**

	180	**KIMPLAS TRENTON FITTINGS LTD. Vs. ASSTT COMMISSIONER OF INCOME TAX, MUMBAI, WRIT PETITION NO. 2140 OF 2011, DATED: 22/11/2011. HIGH COURT OF BOMBAY** **Whether assessment can be re-opened beyond four years when all primary facts for making the claim were disclosed to the AO.** **Where the re-opening is beyond four years, the escapement of income is not sufficient in itself to validate the reopening. The jurisdictional requirement where an assessment is opened beyond four years is a failure to disclose all material facts necessary for the assessment. Unless that condition is fulfilled, the re-opening cannot be sustained; all primary facts for making the claim were disclosed to the AO. Even assuming that there was an error on the part of the AO that cannot legitimately be the basis for re-opening assessment beyond four years unless a failure of the assessee to disclose truly all material facts for the assessment caused it. That is not the case here. It is not possible to come to the conclusion that there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment. Notice u/s 148 set-aside.**	**148**	**HIGH COURT OF BOMBAY**
19-12-2011	**181**	**M/S. SKIL INFRASTRUCTURE LTD. Vs. INCOME TAX OFFICER - TDS 3(3), ITA NO. 3419 & 3420/MUM/2010, DATE OF PRONOUNCEMENT : 31.10.2011, ITAT – MUMBAI** **S. 194-I: Distinction between “hire of vehicles” & “transportation contract”.** **The department’s argument that the assessee has hired helicopter/air craft/vehicle is not correct because these were not hired on a periodic basis or on day-to-day basis. Instead, the transport services provided by the transporters were availed of. The assessee paid charges on the basis of flying hours, cost of landing charges and refuelling charges, etc. The crew, fuel, maintenance operation licences, etc. were all under the control of the service providers and not under the control of the assessee. If the assessee does not enjoy control over the vehicles and if the running and maintenance expenditure is borne by the transport service providers, the contract is not one for the “hiring” but is merely for availing transportation services. Payment for transportation services is not covered by s. 194-I.**	**194-I**	**MUMBAI**

	182	**PRADIP KUMAR MALHOTRA Vs. COMMISSIONER OF INCOME-TAX WEST BENGAL-V, ITA NO. 219 OF 2003, JUDGMENT ON: 02.08.2011, HIGH COURT AT CALCUTTA** **The phrase "by way of advance or loan" s. 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of shares. If such loan or advance is given to such share holder as a consequence of any further consideration received from the shareholder, then such advance or loan cannot be said to be "deemed dividend" u/s 2(22)(e). Thus, while gratuitous loan or advance given by a company to a substantial shareholder comes within the purview of s. 2(22)(e), a case where the loan or advance is given in return to an advantage conferred upon the company by the share holder does not. On facts, as the advance was in lieu of the company being permitted to mortgage the assessee's falt, it was not "gratuitous" and so not assessable as "deemed dividend".**	**2(22)(e)**	**HIGH COURT AT CALCUTTA**
20-12-2011	**183**	**Bharti Airtel Ltd. Vs. State of Karnataka, W.A. Nos. 530-541, 654, 789 To 792-803, 805-816, 817-328 and 829-840 of 2011, W.P. Nos. 2015-2065 of 2011 (T-RES.), Date : 25th February 2011, High Court of Karnataka** **HELD:** **The expression 'sale of goods' in entry 54 of List II of the Seventh Schedule to the Constitution is a nomen juris , its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. A customer approaches the service provider to transmit voice or a data and the agreement he enters into with the service provider is for transmission of voice or data. He is not concerned with the technology adopted by the service provider to transmit the said voice or data. In the instant case, ACLE is used for transmitting the said voice/data. ACLE is only a carrier. The subscriber has not entered into an agreement to purchase ACLE or any portion thereof. The consideration paid by him is for the service rendered and transmitting the voice/data to its destination. He does not come in contact with this carrier at all. Therefore, none of the conditions prescribed to constitute the sale of goods exists in the instant case. Therefore, there is no sale of goods, which empower the State to levy sales tax/Vat. [Para 97].**	**Entry 54 of List II of the Seventh Schedule to the Constitution**	**High Court of Karnataka**

	184	**All India Tent Dealers Welfare Organization Vs. Union of India, W.P. NO. 12345 of 2009, Date : 30th September 2011, High Court of Delhi** **HELD:** **If the entire provision is properly understood, it is clearly discernible that Hindu marriage is not treated or regarded a social function per se. If the dictionary clause is appositely appreciated, there can be no trace of doubt that only when a 'Pandal or Shamiana' is used for marriage, it earns the status of 'social function' because the service component is involved. It is worth nothing, that the statute itself postulates that marriage is to be regarded as a social function and full effect has to given to the same. That apart, the prerequisite is the use of 'Pandal or Shamiana' and, therefore, the contention raised that Hindu marriage is not a contract but a sacred institution and, hence, no service tax is imposable treating it as a social function has to be repelled.**	**65(105)(zzzz) and Section 66 of the Finance Act, 1995 as amended by the Finance Act, 2010**	**HIGH COURT OF DELHI**
22-12-2011	**185**	**CRAWFORD BAYLEY & CO. Vs. UOI, WRIT PETITION NO. 2004 OF 2011, DATE OF JUDGMENT : 01.12. 2011, BOMBAY HIGH COURT** **Where the assessee successfully uploaded its return on the official website of income-tax department then merely because the ITR-V sent to CPC was not received for no failure on part of assessee, the return cannot be treated as invalid. The assessee provided with opportunity to submit a copy of return before AO again.**	**S. 139**	**BOMBAY HIGH COURT**

	186	**COMMISSIONER OF INCOME-TAX Vs. JYOTI PLASTIC WORKS (P.) LTD., IT APPEAL NO. 5045 OF 2010, DATE OF DECISION: 15.11. 2011, HIGH COURT OF BOMBAY** **Whether condition imposed under section 80-IB(2)(iv) is that assessee must employ ten or more workers in manufacturing process/production of articles or things and it is immaterial whether workers were employed directly or by hiring workers from a contractor - Held, yes....** **Assessee, engaged in manufacturing of plastic parts, claimed deduction under section 80-IB - Assessing Officer disallowed claim of assessee on ground that firstly- Assessee was not a manufacturer as goods were not manufactured at factory premises of assessee but were manufactured at factory premises of job workers, and secondly - Total number of permanent employees employed in factory being less than ten, assessee had not fulfilled condition stipulated in section 80-IB(2)(iv). On appeal, Commissioner (Appeals) allowed claim of assessee - Tribunal upheld order of Commissioner (Appeals) by recording findings of fact that manufacturing activity was carried out at factory premises of assessee, and that assessee, in addition to its regular employees (which was less than ten), had also employed between 84 to 123 contract laborers per month for manufacturing goods in its factory and, thus, condition of section 80-IB (2)(iv) had been fulfilled.**	**80-IB**	**HIGH COURT OF BOMBAY**

23-12-2011	**187**	**P.C. Paulose, M/s. Sparkway Enterprises Vs. Commissioner of Central Excise & Customs, CIVIL APPEAL NO. 483 OF 2011, DATED : 13.01.2011, SUPREME COURT OF INDIA** **HELD,** **12.Under the terms and conditions set out hereinbefore of the agreement the appellant is authorized to provide all the services as mentioned therein and, therefore, as per the statutory definition the appellant steps into the shoes of AAI for the service provided on the basis of the authorization and becomes liable to pay such taxes in terms of the operation of Section 65 Clause 105 (zzm) of the Finance Act, 1994.** **Brief fact of the case:** **2. The issue that falls for consideration in this appeal is whether the appellant, who is a licencee, could be held liable for payment of service tax when actually the service provided by them could and should be said to be provided by the Airport Authority of India (for short "AAI"). It was contended on behalf of the assessee that the role of the licensee-appellant was the role of an agent and was therefore limited to collecting of fees for the services rendered by AAI.**	**165**	**SUPREME COURT OF INDIA**

	188	**M/S BAJAJ TRAVELS LTD. Vs. COMMISSIONER OF SERVICE TAX, DATED : 03.08.2011, CASE NO. CEAC-06 OF 2009 CEAC-07 OF 2009, HIGH COURT OF DELHI** **Held,** **We are, thus, of the opinion that it was not a case of imposition of penalty upon the appellant. We answer the questions of law no. 1 & 2 in favour of the appellant and against the Revenue. As a result, penalties imposed upon the appellant under Section 76 and 78 of the Finance Act are hereby set aside.** **Brief Fact of the case:** **The appellant submitted a detailed written reply dated 17th November, 2005. The defence was that it was paying service tax as per its bona fide understanding that the service tax was to be paid on the commission retained by the appellant. It was pleaded that the matter of calculation was not clear to it. Therefore, it had been filing its service tax returns on the basis of the commission retained by it and the correct method of computing the service tax was pointed out by the visiting team of the department. Therefore, the allegation of suppression, mis-statement were wrongly attributed to it.** **The learned Senior Counsel for the appellant also referred to series of orders passed by the various Benches of CESTAT where such penalties were set aside holding that when the service tax/short-service tax was paid before the show cause notice, it was a bona fide error.**	**76 and 78 of the Finance Act**	**HIGH COURT OF DELHI**

26-12-2011	**189**	**CIT Vs. M/S COMPAQ ELECTRIC LTD., ITA NO. 172 OF 2011, DATE OF ORDER : 18/10/2011, HIGH COURT OF KARNATAKA** **Held waiver of unsecured loan is a capital receipt non chargeable to tax u/s 41(1) of the Act since there is no prior deduction/allowance of the same to assessee.** **The condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under section 41. The whole object is to avoid double benefit to the assessee. In the instant case, the amount claimed as capital receipt is in respect to which there was no allowance or deduction claimed by the assessee for the previous year. therefore when his creditor has waived the repayment of the said amount, it amounts to a capital recipt and not a revenue receipt as the assessee did not have the benefit of any allowance or deduction in respect of the said amount section 41 is not attracted.**	**41(1)**	**HIGH COURT OF KARNATAKA**
	190	**CIT Vs. M/S HORIZON CAPITAL LTD., ITA NO. 434 OF 2010, DATE OF ORDER : 24/10/2011, HIGH COURT OF KARNATAKA** **Held in MAT Assessment on book profits u/s 115JB the benefit of rebate u/s 88E is available to assessee as same is in nature of assurance and promise given to tax payer.** **The contention that this benefit is not available to assessee whose total income is assessed u/s 115JB has no substance. In other words, when the total income is assessed u/s 115JB has no substance. In other words when the total income is assessed and the tax chargeable is computed, it is from that tax which is chargeable, the tax paid under section 88 is given deduction, by way of rebate, under section 87 of the Act. This is the legislative intent. That is a promise to give deduction of the tax already paid. This is the mode in which tax already paid is handed back at the time of final computation.**	**115JB**	**HIGH COURT OF KARNATAKA**

27/12/2011	**191**	**RRB CONSULTANTS AND ENGINEERS PVT. LTD. Vs. DEPUTY COMMISSIONER OF INCOME TAX, W.P.(C) 7313/2010, DATE OF DECISION : 08.12.2011,** **The assessee has not failed or omitted to disclose material facts either deliberately or intentionally. On the other hand, full and true information and details were furnished and given during the course of the original assessment proceedings. The relevant and germane facts were truly and fully disclosed. As per the case of the Revenue, the Assessing Officer made an error of judgment and did not form a proper legal opinion. A wrong legal inference wasdrawn from the facts stated by the assessee and on record. Once primary facts have been disclosed then, it is for the Assessing Officer to draw proper legal conclusion and apply the provisions of the statute. In the present case, it is not alleged that any fact or factual detail was embedded in the evidence/books of accounts which the Assessing Officer could have uncovered but had failed to do so. The letter written by the assessee dated 10th January, 2006, spelt out and in categorical terms had stated truly and fully the material facts. Nothing remained to be discovered or unearthed.** **This being the position the jurisdiction pre-conditions required for re-opening of the assessment order are not satisfied in the present case.**	**148**	**HIGH COURT OF DELHI**
	192	**CADILA HEALTHCARE LTD. Vs. ASST. COMMISSIONER OF INCOME TAX, SPECIAL CIVIL APPLICATION NO. 15566 OF 2011, DATE OF DECISION : 14.12.2011,** **U/s 147, it is only the AO's opinion with respect to the income escaping assessment which is relevant for the purpose of reopening an assessment. While it is true if the audit party brings certain aspects to the notice of the AO and thereupon, the AO forms his own belief, it may be a valid basis for reopening assessment, the mere opinion of the Audit Party cannot form the basis for the AO to reopen an assessment. On facts, the AO had categorically come to the conclusion that the objection of the audit party was not valid and that the assessee's explanation with respect to non-requirement of collection of TDS was required to be accepted. Accordingly, the AO could have no "reason to believe" that income had escaped assessment and so the s. 148 notice was without jurisdiction.**	**147**	**HIGH COURT OF GUJARAT**

29/12/2011	**193**	**ICICI BANK LTD. Vs. DEPUTY COMMISSIONER OF INCOME-TAX, CIRCLE 3(1), WRIT PETITION NO. 1765 OF 2011, 09.11.2011,** **Whether power to reopen an assessment cannot be exercised to reopen what formed subject matter of an appeal to Commissioner (Appeals).** **The object and purpose underlying the second proviso to section 147 is that upon an assessment being reopened, the Assessing Officer is entitled to assess or reassess such income which is chargeable to tax which has escaped assessment. However, matters, which are the subject matter of an appeal, reference or revision, are excepted from the jurisdiction of the Assessing Officer. In the instant case, the exercise of the power to reopen the assessment on the grounds which relate to the write off of bad debts under section 36(1)(vii) is in excess of jurisdiction, once the write off formed the subject matter of an appeal before the Commissioner (Appeals) and which resulted in an order of the appellate authority. The power to reopen an assessment cannot be exercised to reopen what formed the subject matter of an appeal to the Commissioner (Appeals).**	**147**	**HIGH COURT OF BOMBAY**
	194	**BLB LIMITED Vs. ASSISTANT COMMISSIONER OF INCOME TAX, W.P.(C) 6884/2010, DATE OF DECISION: 01.12. 2011,** **The petitioner BLB Ltd. has filed the present writ petition impugning notice under Section 148 dated 01.02.2010 and the order dated 16.9.2010 passed by the Assessing Officer dismissing their objections to the re-opening. Notice U/s 148 issued to BLB Ltd. on the basis of non-competence fees allowed as revenue expenditure. The reasons for issue of notice were recorded on 01.02.2010 i.e. after the period of four years from the end of the assessment year without compliance of Proviso to Section 147 of the Act is applicable. HC quashing the Notice under Section 148 dated 01.02.2010 and the order dated 16.9.2010 passed by the Assessing Officer.**	**148**	**HIGH COURT OF DELHI**