Issue 10 October , 2013

SNK Newsletter

Website : **www.snkca.com** **Email**: **newsletter@snkca.com**

DIRECT TAXES

Judicial pronouncements

ACIT Vs. Source Hub India Pvt. Ltd. [TS-446-ITAT-2013 (Bang), ITAT Bangalore bench, dtd. 06.09.2013, in favour of assessee]

Sec. 2(22)(e) doesn't contemplate lifting of corporate veil; ITAT Deleted deemed dividend addition

Provisions of Sec. 2(22)(e) to be applied as it is and they do not contemplate looking behind corporate veil; Rejects Revenue's argument that common shareholder "indirectly" held substantial interest in Borrower Co, as Lending Co had majority shareholding in Borrower Co; Accepting such an argument would mean ignoring assessee's corporate personality; Requirement of common shareholder having substantial interest in borrower company, not satisfied; Reliance placed on Delhi HC ruling in Ankitech P Ltd; Deeming fiction of Sec. 2 (22)(e) enlarges definition of 'dividend' but doesn't broaden the concept of 'shareholder

Green Infra Ltd. Vs. ITO [TS-420-ITAT-2013(Mum), ITAT Mumbai bench, dtd. 23.08.2013, in favour of assessee]

Huge share premium for newly incorporated company neither sham nor income

Share allotment at heavy premium, in very first year of operations, can't be taxed as "income" invoking Sec 56; Issue of shares is capital transaction, cannot be taxed as revenue receipt; Relies on SC rulings in Punjab State Industrial Corporation Ltd. & Brooke Bond India Ltd; Quantum of premium prerogative of Board of Directors', subscription at high premium is wisdom of shareholder; Revenue can't question high premium without any bar from law of the land; Shareholders investing at high premium included banks and financial undertakings, directly or indirectly controlled by Government; Investments have been made in subsidiaries, where assessee owns more than 98% of holdings; Transaction of allotting shares at high premium not sham; Transaction also

not taxable u/s 68, as all details of shareholders are explained

Perfect Scale Company Pvt. Ltd. Vs. DCIT [TS-475-ITAT-2013(Mum), ITAT Mumbai Bench, dtd. 06.09.2013, in favour of revenue]

Primary object being letting-out, not commercial exploitation, income assessable under "house property"

Income from business assets used for renting out & not exploited commercially, assessable as income from house property; Reliance placed on SC ruling in Shambhu Investment; When rental income not actually received, income not to be notionally assessed under house property since assets were business assets; Delay of 513 days condoned relying on ITAT ruling in Phoenix Mills Ltd.

State Bank of India Vs. DCIT [ITA No. 5470/Mum/2002, ITAT Mumbai Bench, dtd. 26.07.2013, in favour of revenue]

S. 32: Lease transactions by Banks are in the nature of loans/ advances. Transaction of sale & lease back of railway assets cannot be treated as genuine

The assessee, a Bank, entered into a sale and lease back transaction with Konkan Railway Corporation pursuant to

which it bought assets like railway tracks, rails, sleepers etc for a consideration of Rs. 25 crore and leased it back for a period of 84 months for a monthly lease rental. The AO & CIT(A) disallowed the claim for depreciation on the ground that the sale and lease back transaction was in the nature of a financial transaction and that it was given the shape of a lease transaction only in order to enable the assessee-bank to claim depreciation and reduce its taxable income. On appeal by the assessee to the Tribunal, dismissing the appeal ITAT held that the real object of the entering into the sale and lease back transaction so far as Konkan Railway is concerned is to raise funds. The transaction of sale of the asset to the assessee bank and its lease back to Konkan Railway cannot be separated. It was not possible for Konkan Railway to sell out the railway system. Thus, the sale transaction was merely on paper and to facilitate the financial arrangement by the assessee to Konkan Railway without involving any real intention of transfer of the assets. The terms of the lease agreement are only to secure the interest of the bank till the recovery of the full amount along with the interest. The assessee cannot exercise the real and actual ownership over the asset keeping in view the facts and circumstances and nature of the asset in question. Further, under the Banking Regulation Act, 1949 read with RBI circular dated 19.2.1994, banking companies can undertake the activities of equipment leasing but these are required to be treated on par with loans and advances. Therefore, the activity of equipment leasing permitted by the RBI is only in the nature of finance lease. The terms and conditions specified by the RBI for income recognition of lease transactions are also on par with the manner in which a loan transaction is treated. In view of the said circular, there is no scope for treating the instant lease agreement as that of an operating lease (IndusInd Bank 135 ITD 165 (Mum) (SB) followed; ICDS 350 ITR 527 (SC) distinguished on the basis that the lease there was not by a Bank but by a NBFC).

UTI Bank Limited Vs. ACIT [ITA No. 2572/Ahd/2006, ITAT Ahmedabad Bench, dtd. 10.09.2013, in favour of assessee]

S. 32: Sale & lease transactions by banks are genuine and eligible for depreciation

The assessee, a Bank, purchased windmills worth Rs. 27 crore in a sale-and-lease-back transaction and claimed depreciation thereon. The AO & CIT(A) rejected the claim and held that the transaction was not one of purchase but was a finance transaction in which the windmills were received as security on the basis that (a) under the Banking Regulation Act, 1949, the assessee was not permitted to engage in any business other than banking, (b) the lease rentals were fixed on the basis of interest on advances and other charges receivable by the assessee as a financier and were not co-related to the projected income on the capacity of each wind energy generator, (c) the assessee was not entitled for surplus income on excess generation of power and was not to suffer any loss owing to lesser production or any other contingencies, (d) the return of the assessee on financing was granted by taking interest-free deposit, (e) the assessee had no responsibility of labour, repairs, taxes etc in running of the project and (f) though the purchase of wind energy generators was in the assessee's name, the land and power purchase agreements with the Electricity Boards were not in its name. On appeal by the assessee to the Tribunal, allowing the appeal, ITAT held that sec. 32 allows depreciation if the asset is "owned, wholly or partly, by the assessee and used for the purposes of the business". There is no requirement that the asset must be used by the assessee himself. It is sufficient if the asset is utilized for the purpose of business of the assessee. The argument, relying onMcDowell 154 ITR 148 (SC), that Sale & Lease Back transactions are a devise for lowering the tax effect cannot be accepted. Sale & Lease Back transactions are genuine and cannot be considered to be sham. By virtue of the judgement in Cosmo Films Ltd 338 ITR 266 (Del), the contrary judgements in MidEast 87 ITD 537 (Mum) (SB) and Induslnd Bank 135 ITD 165 (Mum) (SB) are impliedly reversed (ICDS Ltd 350 ITR 527 (SC) & Development Credit Bank Ltd (ITAT Mum) followed).

Hathway Investments Pvt. Ltd. Vs. ACIT [ITA No. 4069/Mum/2001, ITAT Mumbai bench, dtd. 07.08.2013, in favour of revenue]

S. 32: A finance lease designed as a sale-and-lease back has to be treated as a sham transaction

The assessee, an investment company, bought electric meters from the Gujarat State Electricity Board (GSEB) which were leased back to GSEB simultaneously. The assessee claimed 100% depreciation on the purchase cost of the meters. The AO and CIT(A) rejected the claim on the ground that the circumstances like no physical possession of the meters given etc showed that the transaction of 'sale and lease-back' was a "sham" and that it was one merely of giving finance and that the assets were held as a security for the finance given. On appeal by the assessee to the Tribunal, tribunal held that a distinction between an 'operating lease' and a 'finance lease' has been made by the Special Bench in IndusInd Bank 135 ITD 165 (Mum) (SB) on the basis of which it can be said that a

'finance lease' is a 'sale' which is given the colour of a 'lease' by the parties for their mutual benefit and to avoid tax. In such transactions, it has to be seen whether the sale transaction is a real transaction or a sham transaction with the object of enabling the alleged purchaser to claim himself as the owner of the goods, which are further claimed to be leased back to the original owner of the goods. In a sham transaction of sale and lease back the ownership of the goods is not transferred to the alleged lessor, but is shown to be done, so as to enable the purchaser to claim ownership for the goods for the purpose of tax relief. On facts, the 'sale and lease back' transaction is a sham transaction done with the object to facilitate the benefits of depreciation to a person who otherwise is not eligible to claim the same. The intention of the parties was not that of sale or lease but was a loan transaction. The rates of interest/ rental have been fixed taking into consideration that the equipments are eligible for 100% depreciation and it is provided that if the claim of depreciation is changed, the rental in the shape of interest will accordingly change. Such clauses cannot be a part of any lease agreement but finance agreement only because in a normal lease agreement, the lessee is not concerned as to what benefits are available to the owner/ lessor under the Income-tax Act. The contention that as the transaction is with a State Government undertaking, it would be highly improper to impute any collusiveness or colourable nature of the transaction is misconceived. The argument that there is no bar for the assessee for making tax planning so as to reduce its taxes, provided it is within the framework of the law, is also not acceptable as u/s 23 of the Indian Contract Act, even if the consideration or object of an agreement may not be expressly forbidden by law, but if it is of such a nature that, if permitted, it would defeat the provisions of law, the same will not be lawful. Engaging in sham transactions with the object of reducing tax liability cannot be said to be a case of tax avoidance but is one of tax evasion (ICDS 350 ITR 527 (SC), IndusInd Bank 135 ITD 165 (Mum)(SB) &Development Credit Bank referred)

CIT Vs. Rajinder Kumar/Naresh Kumar ITA No. 65/2013, Delhi High Court, dtd. 06.09.2013, in favour of assessee]

S. 40(a)(ia) TDS: Amendment by Finance Act 2010 permitting TDS payment till due date of ROI is retrospective. Bharati Shipyard 132 ITD 53 (Mum)(SB) disapproved

In 2007-2008 the assessee made professional payments for which TDS had not been paid by 31.3.2007 though it was paid before the due date for filing the return of income. The AO & CIT(A) disallowed the expenditure u/s 40(a)(ia) though the Tribunal deleted it by relying on Virgin Creations (Cal) which held that the proviso to s. 40(a)(ia) amended by the Finance Act 2010 has retrospective effect. On appeal by the department to the High Court, dismissing the appeal, High court held that the intention behind s. 40(a)(ia) is to ensure that TDS is deducted and paid. The object of introduction of s. 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries. It is not to penalise an assessee when payment has been made within the time stated. Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable. The provision should be interpreted in a fair, just and equitable manner. It should not be interpreted in a manner which results in injustice and creates tax liabilities when TDS has been deposited/ paid and the respondent who is following cash system of accountancy has made actual payment to the third party for services rendered. Also, s. 40(a)(ia), prior to the insertion of the proviso by the Finance Act 2010, was not free from interpretative difficulties and problems. The amended provisions are clear and free from any ambiguity and doubt and will help curtail litigation. The amended provision clearly support the view that the expression "said due date" used in clause A of proviso to the un-amended section refers to the time specified in s. 139(1) of the Act. The amended s. 40(a)(ia) expands and further liberalises the statue when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance. Consequently, the proviso to s. 40(a)(ia) must be treated as retrospective in operation (Virgin Creations referred/ followed; Bharati Shipyard 132 ITD 53 (Mum)(SB) disapproved)

Rajmoti Industries Vs. ACIT [TS-500-ITAT-2013(Rjt), ITAT Rajkot bench, dtd. 30.09.2013, in favour of revenue]

Only 'account payee' cheque satisfies Sec 40A(3) compliance, disallows payment by 'crossed cheque'

ITAT Rajkot bench rejected assessee's stand that payment by "cross cheque" is sufficient compliance of Sec 40A(3) of the Act; Expense disallowance u/s 40A (3) upheld since purchase payment exceeding Rs 20,000 not made by an "account payee cheque", but by crossed cheque; Crossed cheque can be negotiated and can be credited by drawee

bank to bank account of a person other than the payee; Amendments u/s 40A (3) have been carried out for strict enforcement and compliance; Rejects assessee's claim that purchases being genuine, disallowances u/s 40A(3) ought to be deleted; Reliance placed on Pune ITAT ruling in T G Mutha vs. ITO

CIT(A) Vs. Rama Rani Kalia [TS-399-HC-2013(All), Allahabad High Court, dtd. 07.08.2013, in favour of assessee]

Conversion from leasehold to freehold would not impact taxability of capital gains.

High Court rejected Revenue's contention that property sold within 3 days after conversion from leasehold to freehold taxable as short term gain; Conversion of leasehold land to freehold amounts to improvement of title, since property was owned prior to such conversion; Such conversion would not have any impact on determination of holding period; Period over which asset held relevant, not the nature of title over property; Capital gains on sale of land taxable as long term

Smita Conductors Ltd. Vs. DCIT [TS-480-ITAT-2013(Mum), ITAT Mumbai Bench, dtd. 17.09.2013, in favour of assessee]

ITAT computed short-term gain but apply long-term rate on depreciable property sale

Income from sale of flat, forming part of block of assets, to be treated as 'short term capital gain' u/s 50; However, if asset is held for more than 3 years, tax rate as applicable to 'long term asset' to be applied; Accepts assessee's reliance on ratio of Bombay HC ruling in Ace Builders P. Ltd., wherein Sec 54EC exemption was allowed on sale of depreciable asset; Relies on Mumbai ITAT ruling in Manali Investments, wherein it was held that Sec 50 to be extended only to stage of computation of capital gain; Sec 50C applicable on sale of depreciable asset, as held in ITAT SB ruling in United Marine Academy.

ITO Vs. Zinger Investments (P) Ltd. [ITA No. 275/Hyd/2013, ITAT Hyderabad bench, dtd. 21.08.2013, in favour of assessee]

S. 50B: Transfer of assets without monetary consideration is not a "slump sale"

The assessee transferred its manufacturing division to Novapan Industries Ltd under a scheme of amalgamation pursuant to which Novapan transferred investments worth Rs. 25.24 crore to the assessee and allotted shares worth Rs. 6.81 crore to the assessee's shareholders. There was no monetary consideration. The AO held that the transfer of the manufacturing division was a "slump sale" and that it attracted s. 50B. He computed capital gains on that basis. The CIT(A) reversed the AO and held that there was no slump sale. On appeal by the department to the Tribunal, dismissing the appeal, ITAT held that sec. 2(42C) defines a 'slump sale' to mean the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. A plain reading of s. 2(42C) makes it clear that to qualify as a slump sale, two conditions have to be satisfied viz., (i) there must be transfer of one or more undertakings as a result of sale and (ii) the sale should be for a lump sum consideration without values being assigned to the individual assets and liabilities. The presence of money consideration is an essential element to a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale. In the present case, as no monetary consideration was received by the assessee for transfer of the assets and liabilities of the manufacturing division to Novapan Industries Ltd, the transaction is not a "slump sale" and does not attract s. 50B (Motors and General Stores 66 ITR 692 (SC), R.R. Ramakrishna Pillai 66 ITR 725 & Avaya Global Connect 26 SOT 397 (Mum) followed)

CIT Vs. Chandra Narain Chaudhri [ITA No. 287 of 2011, Allahabad High Court, dtd. 29.08.2013, in favour of assessee]

S. 50-C: Extent to which reliance can be placed by AO on stamp duty valuation explained

The assessee sold property for Rs. 25 lakhs. The AO held that as the property was valued by the stamp valuation officer at Rs. 78.48 lakhs and as the purchaser had paid stamp duty on that basis, the capital gain had to be worked out on that basis applying s. 50C(2). The assessee claimed that the property was tenanted and produced valuation reports to justify the sale consideration. On appeal by the assessee the CIT(A) held that the AO ought to have referred the matter to the DVO and directed him to adopt the value arrived at by an approved valuer. This was approved by the Tribunal. On appeal by the department to the High Court, High Court held that -

1. S. 50-C is a rule of evidence in assessing the valuation of property for calculating capital gains and is rebuttable. It is well known that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. The Stamp Valuation Authority does not take into consideration the attributes of the property for determining the fair market value and determines the value in accordance with the circle rates fixed by the Collector.

The object of valuation by the Stamp Valuation Authority is to secure revenue on such sale and not to determine the true, correct and fair market value for which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other attributes such as it occupation by tenant, any charge or legal encumbrances;

2. If the assessee raises an objection that the value assessed by the stamp valuation authority u/s 50-C (1) exceeds the fair market value of the property on the date of transfer, the AO has to apply his mind on the validity of the objection and may either accept the valuation of the property on the basis of the report of the approved valuer filed by the assessee or invite refer the valuation of the capital asset to the DVO in accordance with s. 55-A. In all these events, the AO has to record valid reasons, which are justifiable in law. He is not supposed to adopt an evasive approach of applying the deeming provision without deciding the objection or referring the matter to the DVO u/s 55-A as a matter of course without considering the report of the approved valuer submitted by the assessee.

Meher R. Surti Vs. ITO [TS-452-ITAT-2013(Mum), ITAT Mumbai bench, dtd. 04.09.2013, in favour of revenue]

Rejects Sec 54 exemption on transfer of 'tenancy rights', Deemed ownership not relevant

Assessee holding mere tenancy rights, not eligible for capital gains relief u/s 54; Deemed ownership relevant only for computation of income from house property, not for exemption u/s 54; Cost to previous owner to be considered as 'cost of acquisition' (COA) of tenancy rights u/s 49(1)(iii)(a); Previous owner acquired tenancy rights prior to April 1, 1981; Fair market value as on April 1, 1981 with indexation relief to be considered as COA of tenancy rights for computation of capital gains; Allowed exemption u/s 54F with respect to amount deposited in Bank account as required u/s 54F; Expenditure on improvement for making house habitable, eligible as investment in new asset for Sec. 54F.

Sundaram Brake Linings Ltd. Vs. ACIT [TS-441-ITAT-2013(Chny), ITAT Chennai bench, dtd. 29.08.2013, in favour of assessee]

ITAT Allowed SEZ unit's loss set-off, Relies on recent CBDT circular

Assessee eligible to set-off loss of Sec 10AA unit against profit of other taxable units; Section 10AA, a deduction provision not an exemption provision; Relies on Mumbai ITAT ruling in Capgemini India and CBDT Circular No. 7 of 2013 dated July 16, 2013; As per Circular, income / loss from eligible or ineligible units to be aggregated in accordance with Sec. 70 & 71, thereafter deduction u/s 10AA to be allowed.

Arvind Footwear Pvt. Ltd. Vs. DCIT [ITA No. 363/Luck/2010, 435 to 437/Luck/2011, ITAT Lucknow Bench, dtd. 27.08.2013, in favour of assessee]

Sec. 80-IB: Though Duty Drawback & DEPB were held not eligible for deduction in Liberty India 317 ITR 218 (SC), answer could be different if business model shows dependence on Duty Drawback & DEPB for survival

The assessee claimed that the "duty drawback" receipt of Rs. 1.53 crores was eligible for deduction u/s 80-IB on the ground that the said duty drawback refund was a refund of customs and central excise duty on inputs used in manufacturing of its products. The AO & CIT(A) rejected the claim by relying on Liberty India 317 ITR 218 (SC) where it was held that duty drawback was not "derived" from the industrial undertaking. On appeal by the assessee to the Tribunal, tribunal held that though in Liberty India it was held that duty drawback and DEPB arises from an independent source and is not "derived" from the industrial undertaking, in Dharam Pal Premchand 317 ITR 353 (Del) (SLP dismissed) it was held that refund of excise duty had a direct nexus with the manufacturing activity & was eligible for s. 80-IB deduction. Accordingly, though duty drawback & DEPB was held in Liberty India to be an independent source of income and to not have a "first degree" nexus with the undertaking, this was in the context of a fact-situation where the duty drawback & DEPB did not arise from core activities of the undertaking and was an additional, ancillary or supplemental profit. There can be situations in which duty drawback itself could be more than the overall profits and in such situations, the duty drawback may not be seen on standalone basis or as an independent source of income because the overall profit is only a part of the duty drawback receipt, and the commercial motivation of running the industrial undertaking is earning only that part of duty drawback receipts. On the present facts, the duty drawback was more than the entire operational profit and so it cannot be an open and shut inference that the duty drawback receipts are an independent source of income and have no first degree nexus with the business activity of the industrial undertaking. There is still room for consideration of the plea that but for the duty drawback the assessee would not have carried out the business activity in the industrial undertaking, because, that would have meant carrying out business for incurring losses. If that be so, the duty drawback receipts can be said to derived from the undertaking and to be eligible for s. 80-IB deduction. The question whether the duty drawback is an incidental profit or a profit of the first degree depends on the business model followed by the assessee.

MGF Automobiles Ltd. Vs. ACIT [ITA No. 4212 & 4213/Del/2011, ITAT Delhi Bench, dtd. 28.06.2013, in favour of assessee]

S. 153A: In case of completed assessments, addition can be made only if incriminating document found during search

Pursuant to a search and seizure operation u/s 132, the AO passed an assessment order u/s 153A in which he held that the accumulated loss and unabsorbed depreciation of the amalgamating company was not allowable u/s 72A of the Act. The assessee claimed that as the assessment for that year had not abated, an addition u/s 153A could be made only if there was incriminating material found during the search and as the issue of amalgamation was a part of the record in the original assessment, it could not be assessed u/s 153A. The CIT(A) rejected the claim. On appeal by the assessee to the Tribunal HELD allowing the appeal:

There are three possible circumstances that emerge on the date of initiation of search u/s 132 (1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material found in the course of search indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. In circumstance (a), since the proceedings are pending, they are abated and the AO gets a free hand to make the assessment. In circumstance (b), there is no question of abatement as the proceedings are not pending and the AO has to pass an assessment order u/s 153A to assess the undisclosed income. In circumstance (c), the AO has to pass an assessment order though as there is no incriminating material no income can be assessed. On facts, as the assessments were completed and there was no incriminating material found during the search, the AO was not entitled to make any addition (All Cargo Global Logistics 137 ITD 287 (Mum)(SB), Anil Kumar Bhatia 80 DTR 169 (Del), Pratibha Industries (ITAT Mum) & Gurinder Singh Bawa (ITAT Mum) followed)

ACIT Vs. Infosys BPO [ITA No. 1390 & 1391/Bang/2012, ITAT Bangalore Bench, dtd. 28.06.2013, in favour of assessee]

Law on s. 192 TDS obligation on medical reimbursement & LTC explained

The assessee recruited employees under a contract of employment which provided the salary as a 'cost to company' or 'CTC'. Having determined the CTC, the employee was permitted to choose what would be the various components of his salary and for this purpose a basket of allowances was made available for the employee to choose from. The maximum allowance for each such allowance was fixed by the assessee. The said allowances included a component towards medical expenditure & leave travel concession (LTC). If the employee submitted proof of having incurred the expenditure towards medical treatment, he was allowed exemption to the extent provided in proviso (iv) to s. 17(2) of the Act. Likewise, if the employee submitted proof regarding leave travel, he was allowed exemption u/s 10 (5) read with Rule 2B. The AO held that as Proviso (iv) to s. 17(2) and s.10(5) used the expression "actually incurred", the exemption towards medical reimbursement and LTC could be conferred only for amounts paid as reimbursement after they were incurred by the employee and not before. She held that as the assessee was paying medical reimbursement & LTC as a component of salary every month, without the employee having incurred expenditure, the same had to be considered as salary disbursement for purposes of TDS u/s 192. The assessee was accordingly treated as being in default. On appeal by the assessee, the CIT(A) reversed the AO. On appeal by the department to the Tribunal, dismissing the appeal, tribunal held that though TDS has to be effected at the time of payment of salary, s. 192(3) permits the employer to increase or reduce the amount of TDS for any excess or deficiency. Even assuming that the case of the AO that at the time of payment the assessee ought to have deducted tax at source is sustainable, the assessee, on a review of the taxes deducted during the earlier months of the previous year, is entitled to give effect to the deductions permissible under proviso (iv) to s.17(2) or exemption u/s10(5) of the Act in the later months of the previous year. What has to be seen is the taxes to be deducted on income under the head 'salaries' as on the last date of the previous year. The case of the AO that LTC and Medical reimbursement should be paid at the time the expenditure is incurred or after the expenditure is incurred by way of reimbursement and not at an earlier point of time and that if it is so paid, then, even though the payment would not form part of taxable salary of an employee, the employer has to deduct tax at source treating it as part of salary, is contrary to s.192(3) and cannot be sustained. The reliance placed by the AO on the expression "actually incurred" in s.10(5) & Proviso (iv) to s.17(2) cannot be sustained. In any event, the interpretation of the word "actually paid" is not

relevant while ascertaining the quantum of tax that has to be deducted at source u/s192. As far as the assessee is concerned, his obligation is only to make an "estimate" of the income under the head "salaries" and such estimate has to be a bona fide estimate. The primary liability of the payee to pay tax remains. In a situation of honest difference of opinion, it is not the deductor that is to be proceeded against but the payees of the sums. On facts, as the assessee had granted exemption towards medical expenditure and leave travel after verifying the details and evidence furnished by the employees, it could not be treated as an assessee-in-default.

Citicorp Finance (India) Ltd. Vs. ACIT [ITA No. 8532/Mum/2011, ITAT Mumbai Bench, dtd. 13.09.2013, in favour of assessee]

TDS Credit must be given even if TDS Certificate is not available/ entry is not shown in Form 26AS

The assessee claimed credit for TDS which was denied by the AO on the ground that the claim did not match the entries shown in Form No. 26AS and that there was a discrepancy. On appeal, the CIT(A) held that the assessee would be entitiled to credit to the extent shown in the computer system of the department. On further appeal by the assessee to the Tribunal, ITAT held that the AO is not justified in denying credit for TDS on the ground that the TDS is not reflected in the computer generated Form 26AS. In Yashpal Sahwney 293 ITR 539 the Bombay High Court has noted the difficulty faced by taxpayers in the matter of credit of TDS and held that even if the deductor had not issued a TDS certificate, still the claim of the assessee has to be considered on the basis of the evidence produced for deduction of tax at source. The Revenue is empowered to recover tax from the person responsible if he had not deducted tax at source or after deducting failed to deposit with Central Government. The Delhi High Court has in Court On Its Own Motion Vs. CIT 352 ITR 273 directed the department to ensure that credit is given to the assessee even where the deductor had failed to upload the correct details in Form 26AS on the basis of evidence produced before the department. Therefore, the department is required to give credit for TDS once valid TDS certificate had been produced or even where the deductor had not issued TDS certificates on the basis of evidence produced by assessee regarding deduction of tax at source and on the basis of indemnity bond.

National Highway Authority of India Vs. ACIT [TS-465-ITAT-2013(Jab), ITAT Jabalpur bench, dtd. 12.09.2013, in favour of assessee]

No interest leviable for TDS default when deductee has Nil tax liability

Assessee 'not in default' for failure to deduct tax at source (TAS), when deductee assessed to nil tax liability; Interest u/s 201(1A) also not leviable; No question of delay in deposit of tax when tax liability is nil; Rejects Revenue's argument that lower TDS rate specified in certificate u/s 197 can't be applied to payments made prior to issue of such certificate; Reliance placed on SC ruling in Hindustan Coca Cola Beverages & ITAT ruling in Madhya Pradesh Madhya Kshetra Vidyut Vitaran Company

CIT Vs. Reliance Energy Ltd. [Special leave to Appeal (Civil) No. 14013/2013, The Supreme Court of India, dtd. 05.09.2011, in favour of assessee]

S. 234D does not apply to an assessment year commencing pre 1.6.2003 if the assessment order is passed prior to that date

For AY 1998-99, the AO passed an assessment order prior to 01.06.2003 in which interest u/s 234D was not levied. The assessee filed an appeal against the said order on certain other issues and in giving effect to the order of the appellate authority, the AO levied interest u/s 234D on the ground that excess refund had been allowed u/s 143(1) than what the assessee was entitled to u/s 143(3). The Tribunal allowed the assessee's appeal by relying on Exta Promoters 305 ITR (AT) 1 where it was held that as s. 234D was inserted with effect from 1.6.2003, it did not apply to earlier assessment years. The department's appeal was dismissed by the High Court (order included) by relying on its own judgement in the case of Delta Airlines 245 CTR 16 (Bom) (order included). On appeal by the department to the Supreme Court, dismissing the appeal, Supreme Court held that explanation 2 to s. 234D makes it clear that the provisions of the section shall not apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed before the said date. As the assessment order in the present case was passed before 1.6.2003, the question of retrospectivity of s. 234D does not arise.

CIT Vs. Gujarat Flouro Chemicals [Special Leave Petition (C) No. 11406 of 2008, The Supreme Court of India, dtd. 18.09.2013, in favour of revenue]

S. 244A: The department is not obliged to pay interest on interest as that is not provided in the law. Sandvik Asia 280 ITR 643 (SC) awarded compensation for inordinate delay on its facts

In Sandvik Asia 280 ITR 643 (SC) the Supreme Court held that if the department delays paying interest on the refunded amount, the assessee is entitled to interest on interest. Subsequently, in CIT vs. Gujarat Flouro Chemicals, a

view was expressed that Sandvik Asia 280 ITR 643 (SC) did not lay down the correct law and ought to be reconsidered. The matter was referred to a larger Bench. The larger Bench held that the judgment in Sandvik Asia 280 ITR 643 (SC) has been misquoted and misinterpreted by the assessees and also by the Revenue. Their view that in Sandvik case this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment and that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period is not correct. In Sandvik Asia, the Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court came to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same but not an interest on interest. S. 244A provides for interest on refunds under various contingencies. It is clarified that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

Prashant Projects Ltd. Vs. Dy. CIT [(2013) 37 taxmann.com 137 (Mumbai - Trib.)]

Liberal view in condoning delay is one of the guiding principles in the realm of belated appeals, which can't be equated with a license to file appeals at will-disregarding the time-limits fixed by the statutes

In the instant case the assessee moved an application before the FAA for condoning the delay in filing appeal. The FAA dismissed the appeal filed by assessee.

On appeal, the Tribunal explains basic principles of condonation of delay as under:

1. If sufficient causes for delay are presented, discretion is available to the FAAs to condone the delay and admit the appeal. The expression 'sufficient cause' is not defined, but it means a cause which is beyond the control of the assessee;
2. Any cause which prevents a person approaching the FAA within given time limit is considered as a sufficient cause. The test whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention;
3. In every case of delay, there is some lapse on the part of the assessee. If there are no mala fides the FAA should consider the application of the assessee. But when there is reasonable ground to think that the delay was occasioned otherwise than a bonafide conduct, then the FAA should lean against acceptance of the explanation;
4. The application for condonation of delay should be supported by an affidavit, showing that there is sufficient cause for condonation. Condonation of delay, though an equitable relief, yet, cannot be accorded merely on sympathy or compassion and the grounds offered have to be evaluated to test whether the party in default had been guilty of conscious and deliberate inaction.

Based on the above principles it held in favour of revenue as under:

1. Adopting a liberal view in condoning delay is one of the guiding principles in the realm of belated appeals, but liberal approach cannot be equated with a license to file appeals at will-disregarding the time-limits fixed by the Statutes;
2. For a period of more than three years, assessee did not bother to find out the outcome of the appeal it had filed. The behaviour of the assessee could be termed as personified inaction and negligence which would not constitute reasonable cause;
3. Assessee, a corporate-assessee, filing returns of income of lacs of Rupees and assisted by highly qualified professionals couldn't take umbrella of ignorance of the provisions of law. Therefore, the order of FAA was to be upheld.

Millennium International Vs. ACIT [TS -422-ITAT-2013(Del), ITAT Delhi Bench, dtd. 01.08.2013, in favour of assessee]

No concealment penalty when Appellate authorities took differing views on same issue

ITAT Deleted penalty for concealment u/s 271(1)(c) as the the two appellate authorities, CIT(A) and ITAT had differing views on same issue; Sec. 271(1)(c) is a deeming provision regarding concealment of income, applicable in two scenarios; First scenario where no explanation is provided and the other where assessee is unable to substantiate the explanation; Assessee's case not within purview of both scenarios as assessee provided explanation and substantiated the same as well; Earlier, CIT(A) had granted relief and ITAT reversed relief due to lack of evidence; Following Amritsar ITAT ruling, penalty u/s. 271(1)(c) not imposable as two views are possible.

ACIT Vs. Nortel Networks Ltd. [TS-415-ITAT-2013(Del), ITAT Delhi bench, dtd. 31.07.2013, in favour of assessee]

No concealment penalty imposable for variation in tax rate, income remaining same

No penalty u/s 271(1)(c) can be levied for variation in tax rate; There is no concealment of income, absent difference between returned income and assessed income; AO levied tax on income at 20% as against 15% claimed by assessee, holding that assessee had PE in India and income was not assessable as FTS.

ITO Vs. Gope M. Rochlani [ITA No. 7737/Mum/2011, ITAT Mumbai Bench, dtd. 24.05.2013, in favour of assessee]

Expl 5 to s. 271(1)(c): Undisclosed income offered in belated return filed u/s 139(4) eligible for immunity from penalty

Pursuant to a search and seizure action u/s 132 on 16.10.2008, the assessee offered undisclosed income of Rs. 1.25 crore to tax in the statement recorded u/s 132(4) for AY 2008-09. The due date for filing of the return of income u/s 139 (1) for AY 2008-09 was 30.09.2009. The assessee filed the return of income on 31.10. 2009. The return was accordingly filed u/s 139(4) and not u/s 139(1). The AO held that as the return had been filed late, it was beyond the "due date" specified in clause (b) of Explanation 5A to s. 271(1)(c) and so penalty had to be levied under Explanation 5A to s. 271(1)(c). The CIT(A) reversed the AO. On appeal by the department to the Tribunal, dismissing the appeal, ITAT held that explanation 5A to s. 271(1)(c) provides that if during the course of search, the assessee is found to be the owner of any asset or income which has not been shown in the return of income which has been furnished before the date of search and the "due date" for filing the return of income has expired, the assessee is deemed to have concealed the particulars of his income or furnish inaccurate particulars of income and liable for penalty u/s 271(1)(c). In other words, if the income is offered in the return is filed by the "due date", no penalty can be imposed. The question is whether the "due date" in Explanation 5A encompasses a belated return filed u/s 139(4). The "due date" can be very well inferred as due date of filing of return of income u/s 139(4) because wherever the legislature has provided the consequences of filing of the return of income u/s 139(4), then the same has also been specifically provided. E.g., s. 139(3) which denies the benefit of carry forward of losses u/s 72 to 74A if the return of income is not filed within the time limit provided u/s 139(1). In absence of such a restriction, the limitation of time of "due date" cannot be strictly reckoned with s. 139(1). Even a belated return filed u/s 139(4) will be entitled to the benefit of immunity from penalty (Rajesh Kumar Jalan 286 ITR 276 (Gau) & Jagriti Aggarwal 339 ITR 610 (P&H) & Jagtar Singh Chawla (decisions in the context of s. 54) followed).

Judicial Pronouncements - International Taxation

Vodafone India Service Pvt. Ltd. Vs. UOI [Writ Petition No. 488 of 2012, Bombay High Court, dtd. 06.09.2013, in favour of revenue]

S. 92CA(2A), though substantive, applies to all proceedings pending on 1.6.2011 & TPO can examine unreferred transactions. S. 92CA(2B) applies even to cases where Form 3CEB is filed but the transaction is not reported. DRP has power to hold that TPO had no jurisdiction & to quash his order. Writ cannot be entertained where there is alternate remedy

In AY 2008-09, the assessee entered into two transactions: (i) it sold its call center business to Hutchison Whampoa and (ii) it assigned its call options to Vodafone International Holdings B.V. The said two transactions were not reported in Form 3CBEB. The AO made a reference on 25.01.2010 u/s 92CA(1) to the TPO to determine the ALP of certain other transactions entered into by the assessee with the AEs. The said two transactions were not a part of the reference. The TPO took suo motu cognizance of the said two transactions and held that though the sale of the center business was between two domestic companies, it was pursuant to the share sale agreement with Vodafone International and so was hit by s. 92-B(2). He also held that the assignment of the call options was the transfer of a capital asset giving rise to capital gains. He made an adjustment of Rs. 8,590 crore. The assessee did not raise any objection on the jurisdiction of the TPO to consider the said two un-referred transactions though it filed objections on the merits before the DRP. During the pendency of the DRP proceedings, the assessee filed a Writ Petition contending that (a) under the law laid down in Amadeus 203 TM 602 (Del) the TPO has no jurisdiction to go beyond the reference made by the AO, (b) s. 92CA (2A) which was inserted on 1.6.2011 to provide that the TPO can suo motu take cognizance of an un-referred international transaction is a substantive provision and cannot apply retrospectively to a reference made on 25.01.2010, (c) the rewriting of the call options was not an international transaction in view of the law laid down in Vodafone International Holdings B.V. 341 ITR 1. It was urged that as there was inherent lack of jurisdiction in the TPO and as the DRP did not have jurisdiction u/s 144C(8) to quash the TPO's order, the Writ Petition was maintainable. Dismissing the petition, High Court held that:

1. Though s. 92CA(2A) inserted w.e.f 1.6.2011 is a substantive provision and not a procedural one and confers fresh jurisdiction on the TPO, it applies to all proceedings that are pending as of 1.6.2011. Consequently, the TPO has jurisdiction to consider unreported and un-referred international transactions in proceedings that were pending before him on 1.6.2011;

2. The assessee's contention that s. 92CA (2B) inserted by FA 2012 w.r.e.f. 1.6.2002 operates only where an assessee has not furnished a report u/s 92E in Form 3CEB and thereafter an international transaction comes to the notice of the TPO is not correct. S. 92CA(2B) applies also where the assessee has filed Form 3CEB but not included certain transactions. There is no cogent reason why the Legislature would have conferred jurisdiction upon the TPO to consider an unreported international transaction in cases where a report has not been furnished at all but not in cases where a report has been furnished u/s 92E, but the report does not include a particular international transaction;

3. The department's contention that the AO is entitled to revisit and, in effect, sit in appeal over the TPO's report in all respects is not correct. It is not that the TPO is a valuer who merely facilitates the AO in the computation of the arm's length price. U/s 92CA(4) the AO is bound to pass an order "in conformity" with the TPO's order and so he is bound by the TPO's determination and cannot sit in judgment over the same in any respect;

4. The assessee's contention that it has no alternate remedy because the DRP is not entitled u/s 144C to consider whether or not the transactions are international transactions is not correct. Though s. 144C(8) refers to the DRP's powers to only "confirm, reduce or enhance", its powers are wider and it can consider the question as to whether the unreported transactions are international transactions or not or even whether what the TPO considered was a transaction at all. S. 144C is an alternate to an appeal to the CIT (A) and the legislature cannot be intended to curtail the assessee's rights;

5. While in principle a Writ Petition can be entertained if the TPO lacks inherent jurisdiction to proceed in the matter u/s 92CA(2A)/(2B), that should be done only if it is invoked at the appropriate time viz. at the outset or soon thereafter. There would be no question of exercising jurisdiction after the TPO has made the order or has proceeded to a considerable extent in the determination of the arm's length price. On facts, as the TPO has already passed his order and as the assessee has an alternate remedy before the DRP/ ITAT, the writ petition cannot be entertained;

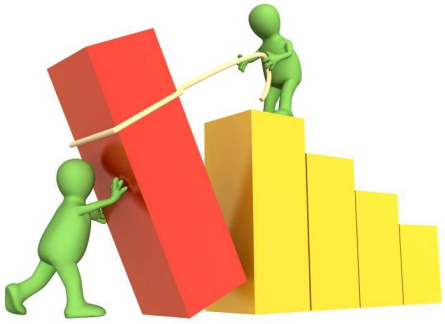
6. On merits, the contention that the sale of the call center business was between two domestic companies and that it could not be regarded to be pursuant to the share sale agreement for purposes of s. 92-B (2) cannot prima facie be accepted because the sale of the call center business appears to be foreshadowed by the shares sale agreement. The assessee does not have an 'open and shut' case. Likewise, the argument that there was no transfer of the call options and that the findings of the TPO are contrary to Vodafone International Holdings BV 341 ITR 1 would have to be urged before the DRP especially in view of the subsequent amendment to s. 2(47).

Tellabs India Pvt. Ltd. Vs. ACIT [IT (TP)A No. 1037 & 1038/Bang/2008, ITAT Bangalore Bench, dtd. 05.04.2013, in favour of revenue]

Transfer Pricing: Assignment of contract by AE is an international transaction and should be at arms length price

The assessee's AE, Tellabs Denmark, was awarded a contract by Power Grid Corporation for the supply, installation and commissioning of telecommunication equipments. The work was to be performed both outside India (manufacture and supply of telecom equipments from Denmark- offshore) and in India (customs clearance in India and installation of the equipments – onshore). The Off-shore and Onshore contracts were independent contracts. Pursuant to a corporate restructuring, Tellabs Denmark assigned a portion of the On-shore contract relating to freight, insurance and installation to the assessee. Power Grid consented to the assignment on the condition that Tellabs Denmark will continue to be liable for due performance of all contracts. The AO & TPO held that as Tellabs Denmark continued to be liable to Power Grid for the onshore contract, the assignment of the said contract by Tellabs Denmark to the assessee constituted a sub-contract (and not an independent contract) and that for the work of customs clearance and installation of equipment performed thereby the assessee ought to have earned an arms length profit margin of PBIT/Sales of 9.49%. On appeal by the assessee to the Tribunal, tribunal held that the assessee's claim that the effect of the assignment of the work of customs clearance and installation by Tellabs Denmark to the assessee is that an

independent contract came into existence between the assessee and Power Grid and that as both parties were residents, the transfer pricing provisions cannot apply is not acceptable because it is clear from the various agreements that there has been only an assignment of the portion of an onshore contract by Tellabs Denmark to the assessee and not a novation of the portion of the onshore contract between Tellabs Denmark and PGCIL. The consequences in the event of an assignment and novation are different. Since there has only been an assignment and not novation of the contract in the present case, the transaction of assignment between the assessee and Tellabs Denmark cannot be said to be a transaction between two persons either or both of them were not non-residents. It is a very strange situation because if Tellabs Denmark had not assigned the portion of the onshore contract, the transfer pricing provisions would not have been applicable because Tellabs Denmark and PGCIL are not Associated Enterprises. Though the assignment of the portion of the onshore contract has taken place exactly at the same consideration for which Tellabs Denmark agreed to render services to PGCIL, nevertheless, the assignment agreement between Tellabs Denmark and the assessee has all the ingredients of an international transaction within the meaning of s.92 of the Act. However, the ALP will have to be determined afresh because the international transaction is the assignment between Tellabs Denmark and the assessee and not the agreement between the assessee and PGCIL. The TPO should also consider whether as the assignment of the contract had taken place due to business restructuring and on the same terms as agreed between Tellabs Denmark and PGCIL, it could be said that this transaction itself would constitute a comparable uncontrolled transaction (Swarnandhra IJMII Integrated Township (ITAT Hyd) distinguished).



Essar Oil Limited Vs. ACIT [ITA No. 2428/Mum/2007, ITAT Mumbai bench, dtd. 28.08.2013, in favour of revenue]

Law on non-taxing foreign PE profits no longer good law after insertion of s. 90(3) & Notification dated 28.08.2008 (which has clarificatory effect)

The assessee, an Indian company, had a P.E. in Oman and Qatar. The net business profits of the said Oman & Qatar Branch was Rs. 2.30 crore. The assessee also earned long term capital gains on sale of assets of the said P.E. in Oman and Qatar. The assessee claimed that as the said business profits and LTCG were taxed in accordance with the taxation laws of Oman & Qatar, they were not chargeable to tax in India. The assessee relied on the judgement of the Tribunal and High Court in its own case (included in this file) where the view was taken that as the DTAA provided that the business profits & capital gains of the PE "may be taxed in the other Contracting State", the Country of residence i.e., India loses its right to tax if the Country of source has taxed the income. This view was based on the verdicts of the Supreme Court in P.V.A.L. Kulandagan Chettiar 267 ITR 654 and that of the High Courts in R.M. Muthaiah 202 ITR 508 (Kar) & S.R.M. Firm 208 ITR 400 (Mad). The department argued that the aforesaid law was no longer good law in view of s. 90 (3) inserted by the Finance Act, 2003, which provides that any term used but not defined in the Act or the DTAA shall have the same meaning as assigned to it in the notification issued by the Central Government. Pursuant thereto, the Central Government has issued a Notification No. 91/2008, dated 28.08.2008, wherein it has been expressly provided that where the tax treaty provides that any income of a resident of India "may be taxed" in other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Act and relief shall be granted in accordance with the method of elimination or avoidance of double taxation provided in the DTAA. The Tribunal held that the law laid down by the Courts on the interpretation of the expression "may be taxed" that once the tax is payable or paid in the country of source, then the country of residence is denied of the right to levy tax on would no longer apply after the insertion of s. 90 (3) w.e.f. 1.4.2004, i.e. AY 2004-05 pursuant to which Notification dated 28.08.2008 has been issued. The said Notification is clarificatory in nature and hence the interpretation given by the Central Government through the Notification is effective from 1.4.2004. Also, as the phrase "may be taxed" is not appearing in the statute but is appearing in the DTAA, the interpretation as understood and intended by the negotiating parties should be adopted. Here one of the parties i.e., Government of India has clearly specified the intent and the object of this phrase and the meaning assigned by the Government of India for a phrase or term used in the DTAA notification will prevail. The result is that the business income from the P.E. in Oman and Qatar and also the capital gain from sale of assets in these countries will be chargeable to tax in India.

DDIT Vs. Reliance Infocom Ltd./ Lucent Technologies [ITA No. 837/ M/07, ITAT Mumbai Bench, dtd. 06.09.2013, in favour of revenue]

Consideration for supply of software which is not embedded in equipment is taxable as "royalty"

The assessee, Reliance Infocomm Ltd, wanting to establish a wireless telecommunications network in India, entered into a contract with Lucent Technologies for supply of software required for the telecom network. The assessee claimed, relying on Tata Consultancy Services 271 ITR 401 (SC), Ericson AB 343 ITR 370 (Del), Nokia Networks OY 25 taxmann.com 225 & Motorola 270 ITR (AT) (SB) 62, that the amount paid by it to Lucent for acquiring the software was for purchase of a "copyrighted article" and "goods" and that it was not assessable to tax as "royalty" u/s 9(1)(vi) or Article 12(3) of the India-USA DTAA. The claim was upheld by the CIT(A). On appeal by the department to the Tribunal, allowing the appeal ITAT held that there is a distinction between a case where the software is supplied along with hardware as part of the equipment and there is no separate sale of the software and a case where the software is sold separately. Where the software is an integral part of the supply of equipment, the consideration for that is not assessable as "royalty". However, in a case where the software is sold separately, the consideration for it is assessable as "royalty". On facts, the assessee had acquired the software independent of the equipment. It had received a license to use the copyright in the software belonging to the non-resident. The non-resident supplier continued to be the owner of the copyright and all other intellectual property rights. As there was a transfer of the right to use the copyright, the payment made by Reliance to Lucent was "for the use of or the right to use copyright" and constituted "royalty" under s. 9(1)(vi) and Article 12(3) of the India-USA DTAA (Synopsis International 212 Taxman 454 (Kar), Samsung Electronics 345 ITR 494 (Kar),Lucent Technologies 348 ITR 196 (Kar), Citrix Systems 343 ITR 1 (AAR) & Microsoft/ Gracemac Corp 42 SOT 550 (Del) followed).

IJM (India) Infrastructure Ltd. Vs. ACIT [(2013) 37 taxmann.com 200 (Hyderabad - Trib.)]

Substance over form rule under section 92B(2) applies only when third party is interposed in international transaction ('IT') between two associated enterprises ('AEs').

Transactions between resident assessee and resident AE of foreign parent company can't be deemed as IT by invoking the substance over form rule under section 92B(2).

The Tribunal held as under:

1. The primary condition for attracting transfer pricing provisions is that there should be a transaction between two or more AEs. Section 92A defines the term "AEs". Section 92A (1) provides the broad parameters on satisfaction of which two or more enterprises constitute AEs;

2. Sub-section (2) of section 92A enlists specific situations which make two or more enterprises associates of each other for the purposes of sub-section (1). One of the essential limbs or constituents of an IT is "AEs".

3. The deeming fiction under section 92A(2) are limited to the parameters of management, control or capital. Section 92B(2)travels beyond these parameters. Though section 92B(2) is a part of section 92B with the heading "Definition of IT", yet it is to be read as an extension of section 92A(2) and not as an extension of section 92B(1);

4. Section 92B(2) only deems certain transactions to be 'transactions between AEs' and not as 'IT between two enterprises'. Section 92B(2) was enacted to hit at those cases where two AEs intend to have an IT but want to avoid transfer pricing provisions by interposing a third party as an intermediary. In such cases, the third party intermediary will generally not be the ultimate consumer of the services or goods;

5. The intermediary would facilitate the transfer of services or goods from one enterprise to its AE with no value addition or insignificant value addition. The intermediary is used to break a transaction into two different parts, which when viewed in isolation would not satisfy the requirements of section 92A;

6. The legal form of the transaction in such circumstances is ignored. The substance of the transaction is given effect to, not by disregarding the existence of the intermediary but by deeming the transaction with the intermediary itself to be one with an AE;

7. The legal fiction created in respect of the specified transaction can be used only for the purpose of examining whether such transaction constitutes an 'IT' under section 92B(1)? In case section 92B(1) is not attracted, the fiction under section 92B(2) ceases to operate.

Notification No. 67 dtd. 02.09.2013

Vide the above notification, rule 37BB has been amended once again and hence form 15CA and 15CB has been changed.

As per amended rule, exemption from filing of Form 15CA has been given if remittance is not chargeable to tax in the hands of payee, it also provides immunity from obtaining Form 15CB if the taxable remittances are covered by Part A of new Form 15CA.

Part B of Form 15CA as prescribed earlier has been removed from the new Form 15CA. Part C of Form 15CA as prescribed earlier has been taken in Part B of Form 15CA.

No major changes were made in Form 15CB by Twelfth Amendment Rules and Fourteenth Amendment Rules.

Earlier income not chargeable to tax and covered by specified list was required to be reported in Part B of Form 15CA but now all the remittances falling under specified list aren't required to be reported in Form 15CA.

Following categories of remittances have been removed from specified list (Thus, they are required to be reported in Form 15CA):

1.	Payment for life insurance premium
2.	Other general insurance premium
3.	Payments on account of stevedoring, demurrage, port handling charges etc.
4.	Freight on imports - Airlines companies
5.	Booking of passages abroad - Shipping companies
6.	Freight on exports - Shipping companies
7.	Freight on imports - Shipping companies
8.	Payments for surplus freight or passenger fare by foreign shipping companies operating in India.
9.	Imports by diplomatic missions
10.	Payment towards imports-settlement of invoice
11.	Advance payment against imports

Notification No. 68 dtd. 04.09.2013

Vide the above notification, rule 12BA - Statement under sub-section (3) of section 115TA has been inserted in Income Tax Rules. As per the said rule, the securitisation trust shall furnished statement of income distributed (Form 63AA) to Assessing officer duly verified by the accountant.

Notification No. 73 dtd. 18.09.2013

Vide the above notification, Safe Harbour Rules (Rule 10TA to 10TG) has been inserted w.e.f. 18.09.2013. For detail notification, please visit

http://law.incometaxindia.gov.in/DIT/File_opener.aspx?page=NOTF&schT=&csId=19f86a75-b517-4f86-a93c-4fa437032867&NtN=&yr=ALL&sec=&sch=&title=Taxmann%20-%20Direct%20Tax%20Laws

Notification No. 75 dtd. 23.09.2013

Vide the above notification; Application of General Anti Avoidance Rule (Rule 10U, 10UA, 10UB, 10UC) has been inserted w.e.f. 01.04.2016, For detail notification, please visit

http://law.incometaxindia.gov.in/DIT/File_opener.aspx?page=NOTF&schT=&csId=33f8dc62-afac-4666-b62d-f935b9ed61c3&NtN=&yr=ALL&sec=&sch=&title=Taxmann%20-%20Direct%20Tax%20Laws

INDIRECT TAXES

Judicial pronouncements

Bharat Heavy Electrical Ltd. Vs. Commissioner of Service Tax [(2013) 36 taxmann.com 366 (Chennai - CESTAT)]

Where activities undertaken by assessee were identifiable separately, such activities couldn't be termed as 'composite contract'

In the instant case, the assessee was involved in the activity of "Construction of Civil Work" as well as "Erection, Commissioning and Installation Services" for setting-up of the power plant. It outsourced the 'Civil Work' on which it did not take any Cenvat credit of input services or capital goods and the sub-contractor had paid the service tax on that activity. For the activity of 'Commissioning and Installation', assessee took the Cenvat credit and discharged its service tax liability accordingly without claiming the benefit of Exemption Notification Nos. 15/2004 or 19/2005 or 1/2006. However, the Department argued that assessee's contract was a composite contract taxable in its entirety under "Erection, Commissioning and Installation Services" and it was liable to pay service tax on entire value .

In the case of CCE v. BSBK Pvt. Ltd. (2010) 26 STT 263 (New Delhi - Cestat) the Tribunal held that when the activities undertaken by the applicants were identifiable separately, the whole of the activity couldn't be termed as "composite contract". In the instant case also the activities undertaken by the appellants could be identified separately, therefore, following the decision in the case of BSBK Pvt. Ltd. (supra), it was held that the assessee had made out a prima facie case for 100 percent waiver of service tax, interest and penalty.

Kalpataru Power Transmission Ltd. Vs. Commissioner of Central Excise [(2013) 36 taxmann.com 581 (Ahmedabad - CESTAT)]

Where show cause notice sought classification under consulting engineering services but demand was confirmed under "Erection, Commissioning and Installation Services", demand was, prima facie, not maintainable

In the instant case the department issued a show-cause notice to the assessee for the period from 1997-98 to 9 -9-2004 seeking payment of service tax under category of consulting engineering services. The adjudicating authority came to conclusion that services rendered by assessee were not 'consulting engineers' services but were taxable under Erection, Commissioning and Installation Services and confirmed demand accordingly. The assessee argued that demand was invalid as show-cause notice did not put them on notice as to that services would be classified under 'Erection, Commissioning and Installation Services'. Thus, this stay petition was filed by assessee for the waiver of pre-deposit requirement.

The Tribunal held as under:

1. The assessee was not put to notice as regards the classification of its services under "Erection, Commissioning and Installation Services";
2. The assessee had made out a prima facie case for the waiver of the pre-deposit requirement of the amounts involved, as the Board's circular dated 8-8-2007 specifically clarified that services provided by assessee would be classifiable under the category of Erection, Commissioning and Installation Services from 10-9-2004 only;
3. In view of this, the application filed by the assessee for the waiver of the pre-deposit requirement and stay of recovery was allowed.

Circulars / Notifications / Instructions

Notification No. 13/2013-ST dtd. 10.09.2013

Vide the above notification; a new entry 9A has been inserted in exemption notification no. 25/2012. As per above notification, any services provided by -

- the National Skill Development Corporation set up by the Government of India;
- a Sector Skill Council approved by the National Skill Development Corporation;
- an assessment agency approved by the Sector Skill Council or the National Skill Development Corporation;
- a training partner approved by the National Skill Development Corporation or the Sector Skill Council

in relation to (a) the National Skill Development Programme implemented by the National Skill Development Corporation; or (b) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or (c) any other Scheme implemented by the National Skill Development Corporation is exemption from service tax.

Exemption Order 01/2013-ST dtd. 17.09.2013

CBEC has provided ad-hoc exemption to following taxable service provided to any person in the State of Uttarakhand, from the whole of service tax leviable thereon under section 66B of the Finance Act, 1994 (32 of 1994), namely:-

1. Services by way of renting of a room in a hotel, inn, guest house, club, campsite or other commercial place meant for residential or lodging purposes;
2. Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess.

This exemption order is applicable for the above mentioned taxable services provided during the period 17th September, 2013 to 31st March, 2014.

Circular No. 171/6/2013-ST dtd. 17.09.2013

The Board vide above Circular has released the guidelines for arrest and bail in relation to offences punishable under the Finance Act, 1994 (Service Tax) similar on line as issued under the Central Excise Provisions vide Circular No.974/08/2013-CX, Dated: September 17, 2013 and under the Customs vide Circular No.38/2013-Customs, Dated: September 17, 2013, wherein certain issues are clarified on Bail, Arrest Memo, Precautions to be taken by the departmental officers and Certain modalities, etc. For detail please visit

http://www.servicetax.gov.in/st-circulars-home.htm

Circular No.172/7/2013-ST dtd. 19.09.2013

Vide the above circular, CBEC has provided clarification in respect of Education Services. It has been clarified that by virtue of the entry in the negative list and by virtue of the portion of the exemption notification, it is clear that all services relating to education are exempt from service tax. There are many services provided to an educational institution. These have been described as “auxiliary educational services” and they have been defined in the exemption notification. Such services provided to an educational institution are exempt from service tax. For example, if a school hires a bus from a transport operator in order to ferry students to and from school, the transport services provided by the transport operator to the school are exempt by

virtue of the exemption notification. In addition to the services mentioned in the definition of "auxiliary educational services", other examples would be hostels, housekeeping, security services, canteen, etc.

Circular No. 173/8/2013-ST dtd. 07.10.2013

Vide the above circular, it has been clarified that-

1. Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air conditioning or central air heating in any part of the establishment, at any time during the year (hereinafter referred as 'specified restaurant') attracts service tax. In a complex, if there is more than one restaurant, which are clearly demarcated and separately named but food is sourced from a common kitchen, only the service provided in the specified restaurant is liable to service tax and service provided in a non air-conditioned or non centrally air- heated restaurant will not be liable to service tax. In such cases, service provided in the non air-conditioned / non-centrally air-heated restaurant will be treated as exempted service and credit entitlement will be as per the Cenvat Credit Rules.
2. In a hotel, if services are provided by a specified restaurant in other areas e.g. swimming pool or an open area attached to the restaurant, Services provided by specified restaurant in other areas of the hotel are liable to service tax.
3. If goods are sold on MRP basis (fixed under the Legal Metrology Act) they have to be excluded from total amount for the determination of value of service portion.

Notification No. 12/2013-CE(NT) dtd. 27.09.2013

Vide the above notification, Rule 5A of Cenvat Credit Rules, 2004 has been amended. As per the amended notification, it has been stated that **if** the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.

Circular No. 973/07/2013-CE dtd. 04.09.2013

Vide notifications no 29/2012-CE, 30/2012-CE, 31/2012-CE, 32/2012-CE and 33/2012-CE, exemption has been provided to certain manufactured goods when cleared against the specified duty credit scrip issued to an exporter. The holder of the said scrip, to whom the goods are cleared, is entitled to avail Cenvat credit of duties of excise, against the amount debited in the said scrip as per one of the conditions of the notification.

Representations have been received from the trade that such clearances are being treated as clearances of exempted goods and payment of amount under rule 6(3), as applicable, of the Cenvat Credit Rules, 2004 is being demanded. Trade has requested that a clarification be issued that these goods be treated as equivalent of duty paid goods so that such payment of amount under rule 6(3) is not required to be made.

One of the conditions for availing of these exemptions is that duties leviable, but for these exemptions, shall be debited in or on the reverse of said scrip. The scrip holder is also permitted to avail of cenvat credit of the duties debited in the scrip. In view of these provisions it has been clarified that such debit of duty in these scrips shall be treated as payment of duty for the purpose of determining the applicability of rule 6 of the Cenvat Credit Rules, 2004. Therefore, it is clarified that in respect of goods cleared availing the benefit of any of notifications no. 29/2012-CE, 30/2012-CE, 31/2012-CE, 32/2012-CE and 33/2012-CE all dated 9th July, 2012, payment of amount under rule 6(3) of the Cenvat Credit Rules, 2004 is not applicable.

Due Dates of key compliances pertaining to the month of October 2013:

5th October	***Payment of Service Tax & Excise duty for the month of September***
6th October	***Payment of Service tax & Excise duty paid electronically through internet banking for the month of September***
7th October	***TDS/ TCS Payment of September***
10th October	***Excise Return ER1/ER2/ER6***
15th October	***PF Contribution of September***
15th October	***Due date for filing TDS return for the quarter ending on 30.09.2013.***
21st October	***ESIC payment of for the month of September***
25th October	***Due date for filing Service tax return for half year ending on 30.09.2013.***