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SNK Newsletter

DIRECT TAXES

Judicial pronouncements

CIT Vs. Deepak Mittal [(2013) 38 taxmann.com 83 (P & H), Punjab & Haryana High Court, dtd. 03.09.2013, in favour of assessee]

AO couldn't apply Rule 8D blindly despite assessee's contentions that no expenditure was incurred to earn exempt income

The assessee had earned dividend income and claimed that no expenses were incurred against earning of such income. The Assessing Officer disagreeing with the plea of the assessee held that interest bearing funds had been invested for generating dividend income and had made an addition by making disallowance under section 14A read with rule 8D. The Commissioner (Appeals) deleted the addition. The Tribunal also dismissed the revenue's appeal.

On further appeal, to the High Court, High Court held that perusal of section 14A leaves no manner of doubt that plea of the revenue that onus was upon the assessee to prove quantum of expenditure incurred on earning of tax-free income of dividend, is correct. When consistent case of the assessee, despite notice given by the Assessing Officer to give details of the expenditure made on earning of exempted income in the nature of dividend was that he had not made any expenditure on earning such income, the Assessing Officer in terms of sub-section (2) of section 14A was to proceed further to collect such material or evidence to determine expenditure, if any, incurred by the assessee but the Assessing Officer instead relying on rule 8D of the Rules applied as a formula, applicable to an assessee who has incurred expenditure by way of interest which is not directly attributable to any particular income or receipt which is not the case of the present assessee, which was clearly a wrong application introduced as a substitute for sub-section (2) of section 14A and, thus, was not permissible in law. In view of the above discussion, no substantial question of law arose for adjudication.

Hatkesh Co. Op. Housing Society Ltd. Vs. ACIT [ITA No. 500/Mum/2011, ITAT Mumbai bench, dtd. 04.09.2013, in favour of revenue]

A Co-op Hsg Society is not a mutual association because its members can earn income from its property. The transfer fee and TDR premium charged by the Society from its members is a commercial transaction and not eligible for exemption on grounds of mutuality

The assessee, a co-operative housing society, received transfer fee and TDR premium from its members which it claimed was exempt on the ground of mutuality. This stand was upheld by the Tribunal for the earlier years relying on the judgements in Sind Co-op Housing Society 317 ITR 47 (Bom), Mittal Court Premises Co-op Society 320 ITR 414 (Bom) & Jai Hind CHS Ltd 349 ITR 541 (Bom). In the present year, the Department argued that this view was not correct and that the transfer fee and TDR premium were not exempt on the ground of mutuality. The Tribunal upholding the Department's plea, held that :

1. The three perquisites which form the essential conditions for mutuality are (a) complete identity between contributors and participants, (b) the actions of the participants must be in furtherance of the mandate of the society as

determined from the memorandum and articles of association & rules & (c) there must be no scope of profiteering by the contributors from the fund made by them, which could only be expended on or returned to them. The principle or the notion of mutuality cannot be extended to a cooperative housing society, be it a flat owner's society or a plot owner's society;

2. There are three objections to treating a co-op housing society as a mutual concern. The first objection is that while a mutual concern cannot lead to any profit for the members, a member of a co-op housing society can earn income from the property such as by letting. The contributors, by virtue of their membership, obtain a valuable capital asset in their own hands, i.e., the leasehold right in the plots allotted to them, as well as the interest in the super structure. They may encash or capitalize on or even trade on the property. Such valuable rights that inure to the members are separate and distinct from the rights that vest in them as a part of the class of contributors and militates against the very notion of mutuality, which in its concept and operation cannot yield any income to them in their individual capacity. The second objection is that the assessee's activities of charging premium at one half the amount of the premium received by the transferor-member from the transferee-member is a commercial transaction. As such, not only does the arrangement lead to creation and holding of wealth/ property by the individual-members, it allows them to encash or otherwise exploit it, paying the society its share. That is, the society also partakes of the profit arising on the subsequent transfer by a member, to the extent of 50% thereof. The third objection is that the policy of allowing the individual members to purchase TDRs from outside and load them on to their existing structures and of allowing non-members residing in the flats built by the members on their plots to have access to and enjoy the common facilities means that there is a breakdown in the identity between the contributors and participants and violates another basic condition of mutuality that there must be no dealings with the non-members;

3. Apart from that, transfer fees cannot be considered as tax-exempt because the income arises from the exercise of commercial rights, which is akin to a sale. The judgement in Sind CHS cannot be followed because the decision inPresidency CHS Ltd 216 ITR 321 (Bom) would prevail. Sind CHS was based on the fact that the amount there was reasonable and based on the bye-laws. The decision in Mittal Court PCS Ltd does not apply as it is in respect of non-occupancy charges. The TDR Premium is also not governed by the principle of mutuality. The judgement in Jai Hind CHS Ltd holding TDR premium to be exempt does not apply because the question whether commerciality is involved, or the transaction is guided by profit motive, is a matter of fact. The assessee's charter as well as its' operations have been found to be imbued with commerciality and common facilities are being enjoyed by the non-members (Bangalore Club 350 ITR 509 (SC) & Presidency Co-op Housing Society 216 ITR 321 (Bom) followed).

CIT Vs. Excel Industries Ltd. [Civil Appeal No. 125 of 2013, The Supreme Court of India, dtd. 08.10.2013, in favour of assessee]

(i) Question whether income has accrued must be considered from a realistic & practical angle (ii) If Dept has accepted adverse verdict in some years, it cannot be allowed to challenge verdict in other years (iii) disputes as to the year of taxability with no/ minor tax effect should not be raised by Dept

Pursuant to the import-export policy of the Government, the assessee was entitled to make duty free imports of raw materials in respect of the exports made by it. The assessee accounted for the benefit of the entitlement to make duty free imports in the year of export but claimed that the benefit was not chargeable to income-tax in the year in which the exports were made but it was chargeable to tax only in the year in which the imports were availed of and the raw materials consumed. The AO rejected the contention and held that as the assessee was following the mercantile system of accounting, the right to receive the benefit accrued as soon as the export obligation was fulfilled and it was chargeable to tax in that year u/s 28(iv). On appeal, the CIT(A), Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court, dismissing the appeal, the Supreme Court held that :

1. Three tests have been laid down by various decisions of the Supreme Court to determine when income can be said to have accrued: (a) whether the income is real or hypothetical; (b) whether there is a corresponding liability of the other party to pay the amount to the assessee & (c) the probability or improbability of realisation of the income by the assessee has to be considered from a realistic and practical point of view. Applying these tests, on facts, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well

as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee. Also, from a realistic and practical point of view (the assessee may not have made imports), no real income accrued to the assessee in the year of exports and sec. 28(iv) would be inapplicable. Essentially, the AO is required to be pragmatic and not pedantic (Shoorji Vallabhdas 46 ITR 144 (SC), Morvi Industries 82 ITR 835 (SC) & Godhra Electricity Co 225 ITR 746 (SC) followed);

2. Further, as in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further, it cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it (Radhasoami Satsang 193 ITR 321 (SC) & Parashuram Pottery Works 106 ITR 1 (SC) followed);

3. Further, as the dispute was only as to the year of taxability and as the rate of tax remained the same the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public offers. It is hoped that the Revenue implements its litigation policy a little more practically and a little more seriously

Himatasingike Seide Ltd. Vs. CIT [SLP (C) No. 10359-10360 of 2011, The Supreme court of India, dtd. 19.09.2013, in favour of revenue]

Sec. 10A/10B (when an "exemption" provision): Unabsorbed depreciation (and business loss) of same (sec. 10A/10B) unit brought forward from earlier years have to be set off against the profits before computing exempt profits

The assessee set up a 100% EOU in AY 1988-89. For want of profits it did not claim benefits u/s 10B in AYs 1988-89 to 1990-91. From AY 1992-93 it claimed the said benefits for a connective period of 5 years. In AY 1994-95, the assessee computed the profits of the EOU without adjusting the brought forward unabsorbed depreciation of AY 1988-89. It claimed that as sec. 10B conferred "exemption" for the profits of the EOU, the said brought forward depreciation could not be set-off from the profits of the EOU but was available to be set-off against income from other sources. It was also claimed that the profits had to be computed on a "commercial" basis. The AO accepted the claim though the CIT revised his order u/s 263 and directed that the exemption be computed after set-off. On appeal by the assessee, the Tribunal reversed the CIT. On appeal by the department, the High Court (CIT vs. Himatasingike Seide Ltd 286 ITR 255 (Kar)) reversed the Tribunal and held that the brought forward depreciation had to be adjusted against the profits of the EOU before computing the exemption allowable u/s 10B. On appeal by the assessee to the Supreme Court, dismissing the appeal, the Hon'ble Supreme Court held that having perused the records and in view of the facts and circumstances of the case, we are of the opinion that the Civil Appeal being devoid of any merit deserves to be dismissed and is dismissed accordingly.

Shri Rengalatchumi Education Trust Vs. ITO (OSD) Exemptions [(2012) 137 ITD 318 (Chennai), dtd. 25.03.2011, in favour of assessee]

Assessee entitled to depreciation on capital asset even if cost of acquisition of such asset was earlier allowed as application of income while computing income u/sec. 11

Assessee trust claimed depreciation while computing its income for the respective assessment years. The Ld. AO held that as the cost of addition to asset was claimed by the assessee as application of income for the respective assessment years, assessee could not further claim depreciation on the very same assets and hence disallowed the claim of depreciation.

For the purpose of determining the income of trust eligible for exemption u/s. 11, income should be construed strictly in commercial sense (i.e., normal accounting principles), without reference to the heads of income specified in section 14. The income to be considered is the book income and not the total income as defined in section 2(45). The concept of commercial income necessarily envisages deduction of depreciation on the assets of the trust. This position is as confirmed by the CBDT vide its circular N0.5-P (LXX-6), dated 19-6-1968. Normal accounting principles clearly provide for deducting depreciation to arrive at income. Income so arrived at (after deducting depreciation) is to be applied for charitable purpose. Capital expense is application of income so determined. Hence, there is no double deduction or double claim of the same amount as application. Thus, depreciation is to be deducted to arrive at income and it is not application of income.

STCI Commodities Limited Vs. ACIT [TS-538-ITAT-2013(Mum), ITAT Mumbai bench, dtd. 23.10.2013, in favour of revenue]

ITAT rejects Merilyn principle, Payments to Holding Co for services without TDS disallowed

Sec.40(a)(ia) disallowance for non-deduction of tax at source applies not only to amounts payable as on March 31 but also to amounts paid during the year; Rejects assessee's reliance on SB ruling in Merylin Shipping; Followed HC rulings in Crescent Export and Sikandarkhan Tunvar; Quashed assessee's contention that expenditure for which the disallowance has been made was actual reimbursement; Various services and infrastructure facility provided by holding company under a composite agreement amounts to works contracts, liable for TDS u/s 194C; Rejects assessee's contention that work refers to production of something tangible**.**

CIT Vs. Kichha Sugar Co. Ltd. [(2013) 35 taxmann.com 54 (Uttarakhand), Uttarakhand High Court, dtd. 20.05.2013, in favour of assessee]

Employee's contribution towards Provident Fund if paid before due date of filing return is allowable under section 36(1)(va) to employer assessee

The Assessing Officer disallowed the payment made by the assessee to the Provident Fund Authority on account of employee's contribution towards Provident Fund since there was delay.

On first appeal, the Commissioner (Appeals) held that since the money had already been paid by the assessee employer and was no longer in the hands of assessee it could not be taken as income.

On appeal by revenue, the Tribunal confirmed the decision of Commissioner (Appeals).

On further appeal by the revenue, high Court held that any sum received by the assessee from his employees towards contributions to the Provident Fund is the income of the assessee, however, section 36(1)(va) makes it a deduction in the event the contribution thus received is deposited on or before the due date.

The due date referred to in section 36 (1)(va) must be read in conjunction with section 43B(b) and a reading of the same would make it amply clear that the due date as mentioned in section 36 (1)(va), is the due date as mentioned in section 43B(b) *i.e.*, payment/ contribution made to the Provident Fund Authority any time before filing the return for the year in which the liability to pay accrued along with evidence to establish payment thereof. The Assessing Officer proceeded on the basis that 'due

date', as mentioned in section 36(1)(va) is the due date fixed by the Provident Fund Authority, whereas in the matter of culling out the meaning of the word 'due date', as mentioned in the said section, the Assessing Officer was required to take note of section 43B(b) and by not taking note of the provisions contained therein committed gross error, which having been rectified by the Appellate Authority and confirmed by the Tribunal, there is no scope of interference.

Ramsukh Properties Vs. DCIT [(2012) 138 ITD 278 (Pune), ITAT Pune Bench, dtd. 25.07.2012, in favour of assessee]

Where assessee was incapacitated to complete housing project in time due to reasons beyond its control, it was entitled for benefit under section 80-IB(10) in respect of flats completed before prescribed limit

The assessee was a firm engaged in the business of builders and promoters. Its housing project consisted of six buildings having 205 flats. The housing project was not fully completed in time as specified under 80(IB)(10)(a) and hence it received completion certificate for 173 flats only. The assessee claimed deduction u/s. 80(IB)(10) in respect of all its 205 flats as the project has been substantially completed and as such the completion certificate as obtained. The Assessing Officer rejected the claim of the assessee for granting whole deduction in respect of whole project as well as alternative aim with regard to the proportionate deduction on the ground that the project was not completed within the stipulated period of time. On appeal, the Commissioner (Appeals) upheld the action of the assessing Officer.

ITAT Pune bench held that out of 205 flats, completion certificate was obtained and furnished before the AO for 173 flats only. The request for granting whole deduction in respect of whole project has rightly been rejected because deduction u/s. 80-IB(10) could not be granted to assessee on incomplete construction at relevant point of time. However, the fault of noncompletion of construction was not attributable to assessee. In case such a contingency emerges which makes the compliance with provisions of section 80-IB (10) impossible, then benefit bestowed on an assessee cannot be completely

denied. Such liberal interpretation should be used in favour of assessee when he is incapacitated in completing a project in time of reasons beyond his control. The phrase 'completion' is a relative and not absolute term. Accordingly, even part completion must be construed as completion. The provisions of taxing statute should be construed harmoniously with the object of statute to effectuate the legislative intention.

CIT Vs. Pratham Developers [(2013) 33 taxmann.com 272 (Gujarat), Gujarat High Court, dtd. 02.04.2013, in favour of assessee]

Interest received from purchasers on delayed payments is part of assessee's income derived from development of housing project and eligible for deduction under section 80-IB

During course of business in developing housing project, difference between bill amount and payment actually made to suppliers would be amount generated during course of business and same would form part of eligible deduction under section 80-IB(10)

The assessee was in the business of developing and building housing projects and accordingly was en-titled to deduction u/s. 80-IB (10) of the Income-tax Act, 1961. The Assessing Officer made an addition of Rs. 11,05,556 (Rs. 4.36 lakh - interest received from purchasers on delayed payments and Rs. 8.70 lakh - balances written off in case of contractors and suppliers) by way of disallowance out of the claim for deduction u/s. 80-IB(10). The Assessing Officer held that these sums did not represent the assessee's income from the development of hous-ing project. The CIT(A) and the Tribunal allowed the assessee's claim and deleted the addition.

On appeal by the Revenue, the Gujarat High Court upheld the decision of the Tribunal and held as under:

1. Interest received on delayed payments by the purchasers was part of income derived from the business of the assessee. It was entitled to special deduction u/s. 80-IB (10) in respect of the amount.
2. During the course of the business in developing the housing project, the assessee had made payments to suppliers towards various purchases made. On such payments, the assessee would occasionally deduct sum amounts and pay the bill. The difference between the bill amount and the payment actually made would be the amount generated during the course of business. The assessee was entitled to special deduction u/s. 80-IB(10) in respect of such income.

Bhagirath Aggarwal Vs. CIT [TS-540-SC-2013, The Supreme Court of India, dtd. 24.10.2013, in favour of revenue]

SC dismiss review petition, Rejects 'retraction' of voluntarily surrendered income

SC dismisses review petition in Bhagirath Aggarwal case; Review petition filed against SC order dismissing SLP by assessee against Delhi HC ruling; Delhi HC upheld ITAT ruling against assessee, wherein 'retraction' of voluntarily surrendered income was rejected; Assessee post search voluntarily offered Rs 1.75 crores as income, but later claimed that only Rs 1.5 crores be taken as income in his hands and balance as income of family members or group concerns; HC held that admission allowed to be retracted but onus on the admitter to prove incorrectness of original admission, which was not done in the present case.

CIT Vs. Gautam Manubhai Amin [(2013) 38 taxmann.com 42 (Gujarat), Gujarat High Court, dtd. 03.09.2013, in favour of assessee]

In computing long term capital gains on sale of inherited asset, indexed cost of acquisition is to be computed with reference to year first held by previous owner

The assessee inherited property along with his brother on the demise of their father on 23-12-1998. The property was sold for a consideration of Rs. 3.35 crores. The assessee calculated his share of capital gain at Rs. 21,24,438 taking the benefit of "Cost Inflation Index" as per the base year 1981-82.

The Assessing Officer passed an order of assessment considering "Cost Inflation Index" as per the Financial Year 1998-99 on the ground that property had been acquired by the assessee on 23-12-1998. On appeal, Commissioner (Appeals) held that the "Cost Inflation Index" was to be taken with reference to 1-4-1981.

On appeal, the Tribunal confirmed the order passed by the Commissioner (Appeals).

On Revenue's Appeal, High Court held that he issue involved is squarely covered by the decision of this Court in the case of B.N. Vyas v. CIT [1986] 159 ITR 141/25 Taxman 133 and the decision of the Bombay High Court in the case of CIT v. Manjula J. Shah [2012] 204 Taxman 691/16 taxmann.com 42 (Bom.) wherein it has been held that for the purpose of computation of long term capital gain, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.

In view of the above, no error has been committed by the Tribunal in dismissing the appeal preferred by the revenue and confirming the order passed by Commissioner (Appeals) allowing the indexed cost of acquisition from the base year, i.e., from 1-4-1981 and thereby deleting the addition of Rs. 1,00,76,878 on account of long term capital gain.

CIT Vs. Axa Business Services Pvt Ltd. [TS-530-HC-2013(Kar), Karnataka High Court, dtd. 09.10.2013, in favour of assessee]

High Court allows filing of revised return during assessment alongwith condonation request

Rejects Revenue's appeal against ITAT ruling on whether additional deduction can be claimed by filing revised computation during the assessment; HC allows taxpayer (Axa Business Services Pvt Ltd) to file revised return of income claiming set-off of loss of UK Branch; Also allows taxpayer to move application for condonation of delay u/s 119(2)(b); HC directs Revenue to consider applications on merits and in accordance with law.

ITO (TDS) Vs. Wadhwa & Associates Realtors (P.) Ltd. [[2013] 36 taxmann.com 526 (Mumbai - Trib.), ITAT Mumbai Bench, dtd. 03.07.2013, in favour of assessee]

Payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI, are not liable to TDS liability under section 194-I

ITAT held that a careful reading of the lease deed transpires that the premium is not paid under a lease but is paid as a price for obtaining the lease, hence it precedes the grant of lease. Therefore, by any stretch of imagination, it cannot be equated with the rent which is paid periodically. A perusal of the records further show that the payment to MMRD Ltd. is also for additional built up area and also for granting free of FSI area, such payment cannot be equated to rent.

It is also seen that the MMRD in exercise of power under section 43 read with section 37(1) of the Maharashtra Town Planning Act, 1966, MRTP Act and other powers enabling the same has approved the proposal to modify regulation 4A(ii) and thereby increased the FSI of the entire area. The Development Control Regulations for the area specify the permissible FSI. Pursuant to such provisions, the assessee became entitled for additional FSI and has further acquired/purchased the additional built up area for construction of additional area on the aforesaid plot.

Thus, the assessee has made payment to MMRD under development control for acquiring leasehold land and additional built up area. In the case of CIT v.Khimline Pumps Ltd. [2002] 258 ITR 459/125 Taxman 104 (Bom.) squarely and directly apply on the facts of the case wherein the jurisdictional High Court has held that payment for acquiring leasehold land is a capital expenditure.

Considering the entire facts in totality in the light of the judicial decisions *vis-à-vis* provisions of section 194-I, definition of rent as provided under the said provision, there is no reason to tamper or interefere with the findings of the Commissioner (Appeals) which is confirmed by the Tribunal.

Pusphendra Subhashchandra Vs. ACIT [TS-502-ITAT-2013(Pun), ITAT Pune bench, dtd. 26.09.2013, in favour of assessee]

Interest for advance tax default not leviable if seized cash adjustment requested

ITAT Deleted levy of interest u/s 234A/B/C, as assessee requested for adjustment of seized cash against tax liability; Cash seized prior to first advance tax installment date; Rejects CIT(A)'s stand that no specific application of adjustment against 'advance tax liability' was made; Assessee's appeal allowed following Bombay HC ruling in Jafferali Kasamlai Rattonsey and Jyotindra B. Mody

Bharat Petroleum Corporation Ltd. Vs. ITAT [Writ Petition No. 1740 of 2013, Bombay High Court, dtd. 23.10.2013, in favour of revenue]

Tribunal has no power to dismiss appeal for non-appearance of appellant. It has to deal with the merits. An application for recall of an ex-parte dismissal order is under sec. 254(2) & must be filed within 4 years from the date of the order. The Tribunal must permit "mentioning" of matters

The assessee's appeal was fixed for hearing before the Tribunal on 4.12.2007. As nobody appeared for the assessee, the Tribunal dismissed the appeal for want of prosecution. The assessee filed a Miscellaneous Application before the Tribunal on 6.8.2012 seeking to recall the exparte order. The Tribunal dismissed the MA on the ground that the application for recall had been filed beyond a period of 4 years from the date of the ex-parte order. The assessee filed a Writ Petition contending that (a) the Tribunal had no power under Rule 24 to dismiss an appeal for want of prosecution, (ii) an application for recall of an ex-parte order does not fall u/s 254(2) and the time limit of 4 years does not apply to it. It was also contended that the Tribunal ought to allow the system of "mentioning" matters as is done in the High Court. The High Court, dismissing the Petition, held that—

1. It is a little strange that the Tribunal does not permit the practice of mentioning matters at any time of the day. If it had done so, the exercise of filing an application for recall may not have been necessary. The ultimate object of the Tribunal is to decide a dispute between the revenue and assessee in accordance with law to ensure that justice is done. In the aid of ensuring that justice is done, the Tribunal cannot as a matter of practice bar any Advocates/representative from mentioning their matters before the Tribunal. If indeed this is so, the Tribunal must do away with such a practice. The mentioning of matters should be allowed by the Tribunal. It is of course in the Tribunal's discretion to allow the request made by the parties while mentioning but prohibiting mentioning of matters before a Court/Tribunal is a likely recipe for injustice. We request the Tribunal to henceforth do away with such a practice and allow mentioning of matters;

2. Under Rule 24, the Tribunal has no power to dismiss an appeal for non-appearance of the assessee. It has to decide the appeal on merits. The dismissal order is consequently erroneous and the assessee is entitled to have the order set aside (S. Chenniappa Mudaliar 74 ITR 41 (SC) followed; Chemipol (244) ELT 497 (Bom) distinguished);

3. However, because dismissing an appeal for non-prosecution in the face of Rule 24 is an error apparent on the face of the record, an application to set right the error of dismissal for non-prosecution is an application u/s 254(2) and not under sec. 254(1). Where Parliament has provided a specific provision to deal with a particular situation, it is not open to ignore the same and apply some other provision. Such an application has to be filed within a period of 4 years from the date of the order;

4. Though the Proviso to Rule 24 empowers the Tribunal to recall an ex-parte order without specifying any period of limitation, this applies only where the appeal is decided ex-parte on merits. Where the appeal is dismissed ex-parte for non-prosecution, it is a case of an erroneous order which only be rectified u/s 254(2). Also an order passed in breach of Rule 24 is an irregular order but not a void order. Assuming the said order is a void order, yet it continues to be binding till it is set aside by a competent authority (Sultan Sadik v/s. Sanjay Raj Subba 2004 (2) SCC 277 followed).

CIT Vs. Makino Asia Pvt. Ltd. [TS-533 -HC-2013(KAR), Karnataka High Court, dtd. 25.09.2013, in favour of assessee]

Inaccurate particulars attract concealment penalty, not incorrect claim

No levy of penalty u/s 271 (1)(c) for inaccurate claim of set-off of brought forward loss, though return of earlier year was filed belatedly; Rejects Revenue's arguments that claim of set-off amounted to concealment of income and furnishing of inaccurate particulars of income; Assessee's right for loss set-off was disputed merely by way of a letter from the Department without any assessment order; Details of loss were factually correct and hence claim for set -off led to incorrect return, not concealment or inaccurate particulars; Though propriety demands that assessee should not make claims it is not entitled for, but it cannot be reason for levy of penalty; Follows SC ruling in Reliance Petroproducts.

DCIT Vs. Roop Singh Bagga [2013-TIOL-764-ITAT-INDORE, ITAT Indore bench, dtd. 31.05.2013, in favour of assessee]

Disallowance u/s. 40(a)(ia) does not attract penalty u/s. 271(1)(c). Making an incorrect claim in law does not tantamount to furnishing of inaccurate particulars of income. Levy of penalty is not justified merely because the assessee has claimed certain expenditure that expenditure is not eligible in view of the provisions of section 40 (a)(ia) of the Act and for that reason, expenditure is disallowed.

The Assessing Officer (AO) while assessing the total income of the assessee, a transport contractor, found that payment of freight was made without deducting tax at source. Accordingly, he disallowed the freight u/s. 40 (a)(ia). The assessee did not challenge the addition and paid tax thereon. The AO also levied penalty u/s. 271(1)(c) with reference to the disallowance so made by him. Aggrieved, the assessee preferred an appeal to the CIT(A) who following the decisions of the Hyderabad 'A' Bench of the Tribunal in the case of ACIT vs. Seaway Shipping Ltd. (ITA No. 80H/2011, order dated 11th June, 2010) and Ahmedabad Bench of the Tribunal in the case of L.C. Chaudhary (2012-TIOL-205-ITAT-AHM) deleted the penalty.

Aggrieved, the revenue preferred an appeal to the Tribunal.

The Tribunal noted that—

- the default for non-deduction of tax in respect of payment for freight charges was accepted by the assessee himself by filing letter dated 21-12-2009 before the Assessing Officer; the Supreme Court has in the case of Suresh Chand Mittal observed that additional income

offered by the assessee to buy peace and to come out of vexed litigation would be treated as bona fides;

- the issue with regard to levy of penalty u/s. 271(1)(c) on the plea of non-deduction of tax u/s. 40(a)(ia) has been considered by the coordinate Bench in the case of Seaway Shipping Ltd and L.G. Choudhary wherein exactly on the similar issue, levy of penalty was held to be not justified;
- Supreme Court in the case of Reliance Petro Products (P) Ltd. (322 ITR 158XSC) has categorically observed that "By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars".

The Tribunal confirmed the order passed by CIT(A) and decided the issue in favour of the assessee. The appeal filed by the revenue was dismissed.

Mak Data P. Ltd. Vs. CIT [Civil Appeal No. 9772 of 2013, The Supreme Court of India, dtd. 30.10.2013, in favour of revenue]

Under Explanation 1 to sec. 271(1)(c), voluntary disclosure of concealed income does not absolve assessee of sec. 271(1)(c) penalty if the assessee fails to offer an explanation which is bona fide and proves that all the material facts have been disclosed

The assessee filed a return of income for AY 2004-05 declaring an income of Rs.16 lakhs. During the course of the assessment proceedings, the AO noticed certain documents comprising of share application forms, bank statements, blank share transfer deeds etc had been impounded in the course of sec. 133A survey proceedings conducted in the case of the assessee's. The AO sought specific information re-

garding the documents from the assessee. In reply to the show-cause notice, the assessee made an offer to surrender Rs.40.74 lakhs with a view to avoid litigation and buy peace and to make an amicable settlement of the dispute. The AO assessed the said sum of Rs.40.74 lakhs to tax and levied penalty u/s 271(1)(c) for concealment of income and not furnishing true particulars. This was upheld by the CIT(A) though the Tribunal reversed it on the ground that the surrender was without admitting any concealment. On appeal by the department, the High Court (87 DTR 172 (Del)) reversed the Tribunal on the ground that as there was absolutely no explanation by the assessee for the concealed income of Rs.40.74 lakhs, the first part of clause (A) of Explanation 1 to sec. 271(1)(c) is attracted. On appeal by the assessee to the Supreme Court, dismissing the appeal, the Supreme Court held that: -

- The Tribunal has not properly understood or appreciated the scope of Explanation 1 to sec. 271(1)(c). The AO shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to sec. 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise;
- The assessee has only stated that he had surrendered the additional sum of Rs.40.74 lakhs with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. The statute does not recognize those types of defences under Explanation 1 to sec. 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty;
- On facts, the surrender of income is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements etc have been impounded in the course of survey proceedings u/s 133A conducted in the case of the assessee's sister concern. The survey was conducted more than 10 months before the assessee filed its

return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income;

- It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings u/s 271 read with sec. 274 of the Act;
- The AO has to satisfy himself whether penalty proceedings be initiated or not during the course of the assessment proceedings. He is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of sec. 271(1)(c) has also been elaborately discussed by the Supreme Court in UOI vs. Dharmendra Textile Processors 306 ITR 277 (SC) and CIT vs. Atul Mohan Bindal 317 ITR 1 (SC). The principle laid down by this Court has been correctly followed by the Revenue and there is no illegality in the department initiating penalty proceedings in the instant case.

CIT Vs. BPL Sanyo Finance Ltd. [TS-543-HC-2013(Kar), Karnataka High Court, dtd. 11.09.2013, in favour of revenue]

High Court levied penalty for willful participation in bogus lease transaction to claim depreciation

Penalty u/s 271(1)(c) upheld by High Court as assessee could not prove that failure to return correct income was not due to fraud or negligence; Being engaged in leasing business, assessee had claimed 100% depreciation on non-existent assets supposedly leased to its lessee under a bogus transaction; Though having withdrawn the claim for depreciation subsequently, assessee failed to prove that improper return filed due to fraud committed by the lessee; Assessee's conduct indicates that assessee was not innocent or ignorant but it was a party to the bogus lease transaction; Assessee deemed to have furnished inaccurate particulars thereof; Following SC ruling in T.Ashok Pai and Reliance Pertroproducts, penalty confirmed.

Judicial Pronouncements - International Taxation

CIT Vs. Hede Consultancy Company Pvt. Ltd. [TS-532-HC-2013(GOA), Goa High Court, dtd. 23.10.2013, in favour of assessee]

Not all tax planning illegal/ impermissible, permits loss set-off relying on Vodafone

High Court allowed set-off of long term capital loss against short term capital gains; Dismisses Revenue's argument that the transaction was a colourable device; The findings of facts arrived at by lower authorities indicated that transaction was not dubious or illegal; HC cannot reassess facts as established by lower authorities; Not all tax planning is illegal / illegitimate / impermissible; Relied on SC rulings in M. Janardhana Rao and Vodafone International Holdings BV.

Cairn UK Holding Ltd. Vs. DIT [Writ Petition (Civil) No. 6752/2012, Delhi High Court, dtd. 07.10.2013, in favour of assessee]

Non-residents are eligible for the benefit of 10% tax rate on long-term capital gains under the Proviso to sec. 112. The AAR should avoid giving conflicting rulings

The assessee, a company based in Scotland, sold 4,36,00,000 equity shares of Cairn India Ltd to Petronas International, Malaysia, for consideration of US$ 241 Million. The sale was not through a stock exchange and resulted in long-term capital gain of US$ 85 Million in the hands of the assessee after applying the benefit under first proviso to sec. 48. The assessee filed an application for advance ruling in which it claimed that the said capital gains was chargeable to tax at the rate of 10% as per the proviso to sec. 112(1). However, the AAR (337 ITR 131), departing from its earlier view in Timken France SAS 294 ITR 513 (AAR), held that the expression "before giving effect to the 2nd proviso to sec. 48" in the Proviso to sec. 112(1) presupposes the existence of a case where computation of long-term capital gains could be made in accordance with the formula contained in the 2nd proviso in sec. 48 (indexation) and that as non-residents were not eligible for indexation, the lower rate of tax specified in the Proviso to sec. 112 was not available. On a writ petition by the assessee to challenge the AAR's ruling, the High Court reversing the AAR order held that it is not possible to decipher the exact legislative purpose behind the proviso to sec. 112 (1) in a categorical and unambiguous manner.

However, if one squarely focuses on the words used in the proviso and interprets them without extracting or subtracting any phrase or word, a non-resident assessee is entitled to benefit of the said provision. The proviso to sec. 112(1) does not state that an assessee, who avails benefits of the first proviso to sec. 48, is not entitled to benefit of lower rate of tax @ 10%. The said benefit cannot be denied because the second proviso to sec. 48 is not applicable. In case the Legislature wanted to deny the said benefit where the assessee had taken benefit of the first proviso to sec. 48, it was easy and this would have been specifically stipulated. The fact that by this interpretation, a non-resident becomes entitled to double deductions by way of computation of gains in foreign currency under the first proviso to sec. 48 and then the benefit of lower rate of tax under the proviso to sec. 112(1) is no reason to interpret the proviso differently. Further, as the AAR had taken a view in Timkin France SAS which was followed in several cases over several years, it ought not to have taken an opposite view and brought about uncertainty in understanding the effect of the proviso to sec. 112(1). There should be consistency and uniformity in interpretation of provisions as uncertainties can disable and harm governance of tax laws. The AAR should follow its' earlier view, unless there are strong grounds and reasons to take a contrary view.

Poompuhar Shipping Corporation Ltd. Vs. ITO [TS-528-HC-2013(Mad), madras High Court, dtd. 09.10.2013, in favour of revenue]

Income from time charter of ship constitutes 'Royalty', holds ship as "Equipment"

Income from time chartering or use of ship, constitutes royalty u/s 9(1)(vi)(b); As per time charter agreement, charterers pay for use and hire of vessel, have liberty to sub-let vessel for all or part time, but remain responsible for entire chartered time; Whole reach of the Vessel's hold, docks and usual places of loading are at charterer's disposal & Captain is also under direction of charterer; SC in Union of India vs Gosalia Shipping P. Ltd held that character of payment cannot change as per use of ship; For constituting royalty, no necessity of termination of rights of the owner, so long as assessee has custody and had "use and right to use" for economic exploitation of the ship on payment of charges; Charterer as per agreement, had right to use ship, selected time & decided route as per its requirement, hence character of payment nothing but royalty; Sec 43(3) relevant for Sections 28 to 41, defines "plant" to include ships; Given definition u/s 43(3), only because of separate depreciation rate for ships, does not mean that 'ship' is not a 'plant'; Going by the assessee's contention also, with the definition available on plant, difficult to accept the assessee's contention that term 'equipment' does not include a 'ship'; Word 'any' preceding an equipment, clearly points out the need for construing 'equipment' widely; Explanation 5 to sec 9(1)(vi) merely clarifies what is implicit in Clause (iva) of Explanation 2; Held ship to be equipment of the business of a ship owner on a natural and ordinary meaning of the word; Ship being plant/equipment with which the ship owner operates the business and commercially exploits, income from chartering of ship assessed as 'royalty'

Global Turbine Services Inc. Vs. ADIT [(2013) 38 taxmann.com 220 (Delhi-Trib.), ITAT Delhi Bench, dtd. 06.09.2013, in favour of assessee]

Suitable adjustment for non-utilisation of capacity is to be taken into account for TP adjustment while working out ALP

The assessee was engaged in providing manpower sourcing and support services to its associated enterprises ('AEs') for specific project and duration. The TPO made the adjustment on account of provision of sourcing and support services by holding that the assessee assumed all the operational/ business risks like market risks, foreign exchange risks and capacity risks. The assessee's case was that its business was adversely impacted by unutilized capacity which resulted in unabsorbed overheads and operating losses. The Assessing Officer/TPO as well as the Commissioner (Appeals) rejected assessee's plea about capacity under utilization and held that since the assessee was engaged in recruiting highly technical and skilled employees, the assessee was in the business of services, in which a business loss was least expected and, hence, the loss claimed by the assessee was obviously due to the transfer price of the international transactions pertaining to services. On appeal, the assessee submitted that there was a loss in gestation period on account of inadequate volumes of work generated during the year and creation of capacity was a business investment for the assessee and such an investment was necessary during the gestation period and would be borne by any independent company in its initial years and that economic adjustments is to be made on account of under capacity utilization.

ITAT held that suitable adjustment for non-utilisation of capacity is to be taken into account for TP adjustment while working out the ALP. In the given facts and circumstances it was required on the part of the lower authorities to have given due effect to under capacity utilization of the assessee which had not been done by TPO, for adjustment for ALP determination. In view of the facts and circumstances, the matter was to be set aside and issue was restored back to the file of the Assessing Officer/TPO to decide the same afresh.

ITO Vs. Pubmatic India (P.) Ltd. [(2013) 36 taxmann.com 100, ITAT Mumbai bench, dtd. 26.07.2013, partly in favour of assessee]

Where foreign holding company sold online advertisement space to assessee company at cost plus profit, neither party acted or did business on behalf of other, and therefore, assessee was not agency PE of holding company

The Taxpayer, an Indian company (I Co.), and its parent company, a resident of the US (US Co.), are engaged in the business of providing services of internet advertising and marketing services. I Co. caters to Indian clients whereas the US Co. caters solely to clients outside India and generally in the US.

In case of advertisements on foreign websites, the US Co. purchases the advertisement space from foreign website owners and sells them to I Co. at cost plus mark-up and I Co. in turn, sells to I Co.'s clients. In India, a similar procedure, in reverse, is followed when foreign clients of the US Co. want to place advertisements on Indian websites.

I Co. made payments to US Co. towards purchase of online advertising space without deducting taxes.

The Tax Authority disallowed the payments made by the I Co. for failure to deduct taxes and contended that the I Co. constituted a DAPE for US Co. as I Co. was habitually conducting business on behalf of the US Co. in India and the activities of the I Co. were devoted wholly or almost wholly on behalf of US Co.

On appeal, the CIT(A) ruled in favour of I Co. by holding that the I Co. and US Co. are independent parties transacting on arm's length.

On appeal by the tax authority, the Tribunal based on the following reasons held that I Co. was an independent party. Further, purchase of advertisement space on a foreign website by I Co. from US Co. constituted a trading receipt of US Co., not taxable in India in the absence of a PE.

1. The advertisement space from US Co. was purchased for I Co.'s customers and was not a transaction which was carried out on behalf of US Co. Further the same was sold at cost plus mark-up being an arm's length price to I Co on a principal-to-principal basis. All risks and rewards of the business were borne by I Co.

2. The advertisement space was in turn 'sold' by I Co. to customers at a different price and the same income has been offered as business income of I Co.

3. The similarity of business activity does not, by itself, indicate that I Co is acting or doing business on behalf of US Co.

   Further, neither I Co. nor US Co. was providing services or goods to the clients of the other party or dealing with the clients of the other party.

4. Accordingly, remittance was towards business income which was not taxable in absence of PE.

Circulars / Notifications / Instructions

F. No. 225/117/2013/ITA.II dtd. 24.10.2013

Vide the order under Sec. 119 of the IT Act, CBDT has directed that in cases where the due date of furnishing reports of audit and corresponding income tax returns was 30th September 2013 and where the same are furnished electronically on or before 31st October 2013, such report shall be deemed to have been furnished within the due date prescribed under section 139 of the IT Act.

INDIRECT TAXES

Larsen & Toubro Ltd. Vs. State of Karnataka [(2013) 38 taxmnan.com 98 (SC), The Supreme Court of India, dtd. 26.09.2013, in favour of revenue]

- **Building/Construction contract is a 'works contract' and goods like cement, concrete, steel, bricks etc. are liable to VAT even if they lose their identity as goods**
- **If contract with flat purchaser is entered only after construction is completed, goods used in construction cannot be deemed to have been sold by builder since at that time there was no purchaser and no VAT can be levied**
- **Value of goods chargeable to sales-tax/VAT has to be value of goods at time of incorporation of goods in works even though property passes on later; value addition made to goods transferred after agreement is entered into with flat purchaser can only be made chargeable to tax by State Government**

1. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled :
   - there must be a works contract,
   - the goods should have been involved in the execution of a works contract and
   - the property in those goods must be transferred to a third party either as goods or in some other form.

2. For the purposes of Article 366 (29A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

3. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29A)(b) limits the term "works contract".

4. Building contracts are species of the works contract.

5. A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

6. The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

7. A transfer of property in goods under clause (29Ab) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

8. Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366 (29A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

9. The expression 'tax on the sale or purchase of goods' in Entry 54 in List II of Seventh Schedule when read with the definition clause (29A) of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

10. Article 366(29A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

11. Taxing the sale of goods element in a works contract under Article 366 (29A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

Bhayana Builders (P.) ltd. Vs. Comm. Of Service tax [(2013) 38 taxmann.com 221 (New Delhi – CESTAT) (LB), CESTAT New Delhi Bench (Large bench), dtd. 06.09.2013, in favour of assessee]

Value of goods and materials supplied free of cost by a service recipient to provider of taxable construction service is not a consideration paid by or flowing from service recipient, accruing to benefit of service provider and not includible in value of services determined under section 67

In view of ambiguous explanation in Notification No. 15/2004-ST, only value of goods or materials belonging to service provider and used/ supplied/provided by him against consideration can only form part of 'gross amount charged' for computation of abatement; free supplies by buyer cannot be so included

Free supplies not includible in value by virtue of Section 67(1)(ii), as they are not additional consideration

Section 67(1)(ii) : Section 67(1)(ii) applies where a taxable service is provided for a consideration which is not either wholly or partly, for money. Therefore the non-monetary consideration must still be a consideration accruing to the benefit of the service provider, from the service recipient and for the service provided.

Consideration : The expression "consideration" is not defined in the Finance Act, 1994; hence, its meaning as derived from the definition of the expression in section 2(d) of the Contract Act, 1872 could be considered. Consideration means a reasonable equivalent for other valuable benefit passed on by the promisor to the promisee or by the transfer of to the transferee.

Consideration must flow to benefit of service provider : Section 67 defines what constitutes the value received by the service provider as "consideration" from the service recipient for the service provided. Implicit in this legislative architecture is the concept that any consideration whether monetary or otherwise should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the later. "Free supplies", incorporated into construction (cement or steel for instance), even on an extravagant inference, would not constitute a non-monetary consideration remitted by the service recipient to the service provider for providing a service, particularly since no part of the goods and materials so supplied accrues to or is retained by the service provider. Wherever a monetary consideration is charged for providing the taxable service and no non-monetary consideration forms part of the agreement between the parties, it is clause (i) that applies and the value of the taxable service would in such case be the gross amount charged by the service provider and paid by the service recipient.

Free supplies not includible : The conclusion is that the value "free supplies" by a construction services recipient, for incorporation in the constructions would not constitute a non-monetary consideration to the service provider nor form part of the gross amount charged for the services provided.

M/s. Tandus Flooring India Pvt. Ltd. Vs. The Commissioner of Service Tax [2013-TIOL-ARA-ST]

Place of Provision of Service Rules, 2012 -marketing and sales in India to a firm in China ans USA - place of provision is location of service receiver - Rule 3 applicable - Export.

The applicant, an Indian company (wholly-owned subsidiary of a Singapore company) with the objec-tive of strengthening and enhancing sales of the products of Tandus USA and Tandus China to its Indian customers against consideration receivable in freely convertible foreign exchange, agreed to provide services of marketing and promotion of products to Indian service recipients. The ser-vices also included demonstration of products, communication with customers, management of dealer accounts, coordination with representatives of customers, etc. The applicant sought advance ruling on the following questions:

1. What would be the place of provision of the marketing and support services provided in India by the company to Tandus US and Tandus China in terms of the Place of Provision of Service Rules 2012 (introduced vide Notification No. 28/2012-S.T. dated 20-06-2012)?
2. Whether the said services would also qualify as export of taxable services under Rule 6A of the Service Tax Rules, 1994?

Considering the case of service proposed to be provided from Indian territory to a business en-tity located outside India and referring to Circular No.111/5/2009 dated 24-02-2009, it was observed that the benefit of service accrued outside India. Accordingly, in terms of the applicable Place of Provision of Services Rules, 2012, the Hon. Author-ity held that the service so provided by Tandus India was covered under the default Rule 3 which stipulated that the place of provision shall be the location of the service recipient i.e., Tandus USA and Tandus China and thus service was deemed to be provided in a non-taxable territory. Further, referring to Rule 6A of the Service Tax Rules, 1994, the Hon. Authority held that since the applicant satisfied all the conditions of the said Rule, the services so provided would tantamount to export.

Rambagh Palace Hotels Pvt. Ltd. Vs. Commissioner of Central Excise, Jaipur [2013 (31) STR 480 (Tri.-Del.)]

Valuation - Rules of classification- Mandap Keeper service - room charges of hotel accommodation service not to be included - Hotel accommodation and Mandap Keeper are distinct services.

The Appellants provided mandap keeper's services and convention services and discharged service tax on banquet charges, banquet sundries and banquet food.

The Appellants, however, did not discharge service tax on the value of room charges booked by them for the purpose of marriage, confer-ence, meetings etc. The department contended to include such room charges in the value of mandap keeper services.

Relying on the decision of Merwara Estates vs. C.C.E., Jaipur 2009 (16) STR 268 (Tri.-Del.), the Hon. Tribunal held that renting of hotel rooms cannot be held to be covered under the definition of mandap keeper services especially when the hotel has an identity, responsibility and function distinguishable from the mandap. The Tribunal further observed that the activity of giving hotel rooms on rent to customers, who might organise functions in the hotel, was different from that of the activity of a mandap keeper and that the definition of mandap keeper did not cover temporary accommodation of hotel rooms or boarding or temporary residence. Further, the functions were also not held in hotel rooms which were used for stay.

Commissioner of C. Ex., Indore Vs. Spendex Industries Ltd. [2013 (31) STR 472 (Tri-Del.)]

Payment of service tax through CENVAT Credit is permissible in law

The Respondents received GTA services and paid service tax under reverse charge mechanism by utilising CENVAT credit which the department disallowed.

The revenue contended that since the services were not output services, the Respondents were not entitled to use CENVAT credit for payment of tax.

The Respondents contended that inasmuch as they were liable to pay tax in respect of GTA services received by them, they were required to be treated as provider of taxable services in terms of the relevant rules. They further relied upon the Delhi Tribunal's divisional bench decision in case of Shree Rajasthan Syntex Ltd. vs. CCE, Jaipur 2011 (24) STR 670 (Tri.-Del.) and Delhi Tribunal's decision in case of Dhillon Kool Drinks &. Beverages Ltd. 2011 (263) ELT 241 (Tri.-Del.) relating to a similar case.

Comm. of ST Vs. Krishna Communications [2013 STR 285 (Tri.-Ahmd)]

CENVAT credit - output services written off as bad debts - No reversal of CENVAT credit is required.

The respondents providing advertising services were duly registered with the department and discharged service tax liability as and when the payments were received. The amounts already billed but subsequently found irrecoverable, were written off by it as bad debts.

The department demanded reversal of propor-tionate CENVAT credit taken on input services on account of such output service invoices being written off as bad debts which the Commissioner (Appeals) dropped holding that credit on input services was taken correctly and that the said input services were used for providing output services liable for payment Of service tax.

The appellants contended that the value of bad debts constituted only 0.8% and that the eligibility of availment and utilisation the credit was not in question.

Observing that there cannot be one-to-one co-relation for availing and utilising CENVAT credit of input services with provision of output service, the Hon. Tribunal held that the reasoning of the first appellate authority was correct and in consonance with the law and requires no interference and thus, rejected revenue's appeal.

Magarpatta Township Development & Construction Co. Ltd. Vs. Commissioner of Central Excise, Pune-III [2013-TIOL-1068-CESTAT-MUM]

Valuation - Notional interest on Interest-free security deposit, whether amounts to additional consideration - Held, No.

The appellant provided renting of immovable property services and collected interest-free se-curity deposit from the lessees for the damages, if any, caused to the property. The department contended to levy tax along with interest and penalty on the notional interest on security deposit considering it as an additional consideration for the provision of service. Relying on the decision of ISPL Industries Ltd. 2003 (154) ELT 3 (SC), the appellant contended that there was no evidence on record which proved that the security deposit in any way influenced the rent of property leased out and it was merely a presumption on part of the department.

Applying the case of ISPL Industries Ltd. (supra), the Hon. Tribunal observed that there was no evidence on record to prove that the notional interest on interest-free security deposit influenced the consideration received by the appellant and thus granted full waiver from predeposit.

Thiru Arooran Sugars Ltd. Vs. Commissioner of Central Excise, Tiruchirapalli [2013-TIOL-1270-CESTAT-MAD]

CENVAT Credit - Rent a cab service', 'telephone service' and 'contract bus service' - no distinction between services used at factory and corporate office and both are eligible CENVAT credit.

The Appellant, a manufacturer, availed CENVAT of "Rent-a-cab Service", "Telephone Services" and "Contract Bus Services" received at the corporate office against which the department demanded tax, interest and penalty..

The department contended that providing "rent-a-cab service" for officers at

the corporate office was a welfare activity and not related to manufacturing. It further contended that the said services do not fall within the inclusive portion of the definition and argued that unless proved that the said services were essential for the manufacture, they cannot be considered as input services.

Allowing the appeal, the Hon. Tribunal held that:

1. As many Courts and Tribunals have already held earlier, rent-a-cab service is covered under the definition of "input service" and that it also includes the transportation of executives and employees from residence to corporate office and back.
2. All the three services (supra) are covered by the definition of input service and that no distinction can be made between the factory and corporate office as per the provisions of the CENVAT Credit Rules, 2004.
3. Where the expenditure is incurred by the company in its books of accounts there is a presumption in favour of the appellant that the service is availed in relation to its business and thus no nexus is required to be proved as long as Revenue did not contend anything the contrary.

M/s. Cerebral Learning Solutions Pvt. Ltd. Vs. Commis-sioner of Central Excise, Indore [2013-TIOL-834-CESTAT-DEL]

Commercial training and coaching services - va-lidity of CBEC Circular No. 59/8/2003-ST dated 20-06-2003 vis-a-vis Exemption Notification N0.12/2003-ST dated 20-06-2003 - Held, circular is ultra vires.

The Appellants provided "Commercial Training & Coaching Services" and composed and furnished course materials relevant to the coaching to its students. Relying upon Notification N0.12/2003-ST dated 20-06-2003 granting exemption to the value of goods or materials sold, the Appellants sepa-rately raised an invoice of the materials sold and did not charge service tax on the same.

Relying on Circular No. 59/8/2003-ST dated 20-06-2003 which stated that the Exemption Notification was applicable only where the value of the course material met the description of the standard textbooks which were priced, the department contended to levy tax along with interest and penalty on the said value of supply of materials.

Considering the circular to be misconceived, illegal and contrary to the statutory Exemption Notifica-tion dated 20-06-2003, the Hon. Tribunal stated that where the legislature had spoken in exercise of its statutory power exemption granted by the Central Government u/s. 93 of the Act, the CBEC had no manner of power, authority or jurisdiction to deflect the course of an enactment or the exemp-tion granted. Grant of exemption from the liability to tax was a power exclusively authorised to the Central Government and no participatory role to the Board. In seeking to restrict the generality of the exemption granted by the Central Government, the CBEC transgressed into the domain of the Central Government which was clearly prohibited.

Circulars / Notifications / Instructions

Notification No. 14/2013-Service tax, dtd. 22.10.2013

Vide the above notification, services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948, having the facility of air-conditioning or central air-heating at any time during the year has been added as exempted service by including the same in mega exemption notification.

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

5th November	***Payment of Service Tax & Excise duty for the month of October***
6th November	***Payment of Service tax & Excise duty paid electronically through internet banking for the month of October***
7th November	***TDS/ TCS Payment of October***
10th November	***Excise Return ER1/ER2/ER6***
15th November	***PF Contribution of October***
21st November	***ESIC payment of for the month of October***
30th November	***Due date for filing return of income in case of assessee who are required to furnish a report in Form No. 3CEB under Sec. 92E pertaining international transactions or specified domestic transaction.***