LIST OF CASES TO BE DISCUSSED by Mr. Kapil Goel, Advocate

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Compilation of recent judicial pronouncements (income tax)

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Humble Caveat/rubric: Reference may please be made to full text of the decisions compiled so as to appreciate the *ratio/*gist of the said decisions.

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Case law 1:

Hon'ble Apex court in State of U.P. Versus Sudhir Kumar Singh * Others civil appeal number 3498 of 2020 order dated 16 october 2020 (Citation: AIR 2020 SC 5215)

Violation of principle of natural justice and theory of prejudice analysed

Significantly in this three judge bench decision Hon'ble Apex court speaking though Hon'ble Justice His lordship Justice R.F. Nariman has observed as under:

"39. An analysis of the aforesaid judgments thus reveals: (1)Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused. (2)Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest. (3)No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice. (4)In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person. (5)The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice. 40. Judged by the touchstone of these tests, it is clear that Respondent No.1 has been completely in the dark so far as the cancellation of the award of tender in his favour is concerned, the audi alteram partem rule having been breached in its entirety. As has been correctly argued by Shri Rakesh Dwivedi, prejudice has indeed been caused to his client, not only from the fact that one year of the contract period has been taken away, but also that, if the impugned High Court judgment is to be set aside today, his client will be debarred from bidding for any of the Corporation's tenders for a period of three years. Undoubtedly, prima facie, the rates at which contracts have been awarded pursuant to the tender dated 01.06.2018 are way above the rates that were awarded of the same division, and for exactly the same amount of work awarded vide the earlier tender advertisement dated 01.04.2018. Shri Dwivedi's argument that in the neighbouring regions the rates tendered were also high, and nothing has yet been done to nullify these tenders and the financial loss caused, does carry some weight. That a huge financial loss to the Corporation has also taken place is something for the Corporation to probe, and take remedial action against the persons responsible. 41. We, therefore, uphold the impugned judgment of the High Court on the ground that natural justice has indeed

been breached in the facts of the present case, not being a case of admitted facts leading to the grant of a futile writ, and that prejudice has indeed been caused to Respondent No.1. In view of this finding, there is no need to examine the other contentions raised by the parties before us."

Aforesaid decision has become a regular feature with tax authorities to be cited more often, to argue that almost all type of natural justice violation, as if according to their-revenue interpretation are pardoned stands jettisoned and rejected in following recent decisions:

1) *Karnataka High court decision in case of Google India Pvt Ltd vs CIT ITA 503/2018 and batch matters order dated 17.04.2021 (Paragraph: 33/34 said SC order cited and dilated by Karnataka high court)- ITAT used in its order some google study etc colleted at back of assessee which was never put for its rebuttal*
2) *Bombay high court full/larger bench decision in case of Mr Mohd. Farhan A Shaikh in Tax Appeal No. 51 & 57 of 2012 order dated 11.03.2021 order dated 11.03.2021 on validity of pre-printed penalty notices issued u/s 274 of the Act without specific charge being pointed out therein – in paragraph number 117 to 120 analyse the same – para.189 & 190 distinguish the same – importance of mandatory provision of law vis a vis prejudice theory analysed-*
3) *Madras high court decision in case of CIT vs Janak Shantilal Mehta in Tax Appeal Number 273/2020 order dated 16.12.2020 (in context of impact of violation of procedure of GKN Driveshft case 259 ITR 19 referred in section 148 reopening proceedings – revenue cited aforesaid SC decision after consider the same Madras high court held any violation to GKN Driveshaft process leads to nullity and invalidity of the whole proceedings – para 12 may be referred where section 292BB also discussed)*

Further one may allude to :

Indore Bench of ITAT decision in case of Ariba Foods Pvt Ltd ITA 736/Ind/2019 AY 2016-2017 Date of order :11.01.2021

21. We find that recently the Coordinate 'D' Bench of ITAT Ahmedabad in the case of ACIT vs. E I Dorado Biotech Pvt. Ltd. (2020) 60 CCH 0233 (Ahm. Trib), at para (33) has held that if AO intends to rely, for the purpose of making addition to the total income of an assessee, on the basis of statement of third party as a witness, then he has to summon such witness, record his statement, offer that witness to the assessee for cross examination. The Coordinate Bench, Ahmedabad at para (36) has held as under:

" In other words where AO wants to rely on the statement of a witness (such as statement of entry operator recorded by investigation wing) to hold that share application money received by the assessee is not genuine but is only an accommodation entry then he has to provide copy of such statement to the assessee. Where the AO does not provide the copy

of the statement of the witness then it is violation of principle of natural justice, and entire addition solely based on such statement is likely to be deleted."

22. Respectfully relying upon the recent decision of the Coordinate Bench of Ahmedabad Tribunal in the case of ACIT vs. E I Dorado Biotech Pvt. Ltd (supra) and as also various judicial pronouncements, referred to hereinabove, we find no infirmity in the findings given by the Ld. CIT(A) on the issue of cross examination."

Ahmedabad bench of ITAT in case of E.I.Dorado case (supra) has held at length that:

26. The Principles of Natural Justice requires that the Department which seeks to rely on the statement of a witness (Shri Partik R. Shah)has to allow the adverse party (the assessee) an opportunity of cross-examination of such witness. Admittedly, the opportunity for the cross examination of Shri Partik R. Shah was not provided to the assessee despite the request made by it (the assessee) which was sine qua non before making any addition. In this respect the Hon'ble Bombay High court in the case of Addl. CIT v. Miss Lata Mangeshkar [1974] 97 ITR 696 (Bom.) held as under: "Revenue has got a tendency to make an addition on the basis of entries appearing in the books of a third party or a statement recorded from a third party or loose papers seized from a third party. In all such cases, it is imperative to afford an opportunity to the assessee to cross-examine the said third party." 27. Similarly in CIT v. Eastern Commercial Enterprises [1994] 210 ITR 103, the Hon'ble Calcutta High court held that "Cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily also postulates that he should cross-examine the witness. 28. The Hon'ble Supreme Court in case of Kalra Glue Factory v. Sales Tax Tribunal [1987] 167 ITR 498 set aside the order of the Tribunal as well as order in revision of the High Court on the ground that the statements of a partner of another firm upon which the Sales Tax Tribunal relied, had not been tested by cross examinations 29. The Hon'ble Delhi High Court also in case CIT v. Pradeep Kumar Gupta [2008] 303 ITR 95 (Delhi) held that where addition was sought to be made in reassessment proceedings only on the basis of statement, it was held that it was mandatory for the revenue to produce the proprietor for cross-examination by the assessee on its specific demand in that regard. Therefore, the reopening of assessment based on deposition of the third party was not justified. 30. It is also important to note that the onus of ensuring presence of the witness upon which the Revenue is relying, cannot be shifted to assessee. In other words, wherever Revenue wants to rely on the statement of third person for making addition, onus is on the AO to ensure the presence of that third person. That onus cannot be shifted to the assessee as third person is a witness of the AO. In this respect Hon'ble Delhi High Court in case of PCIT v. Best Infrastructure (India) (P.) Ltd. [2017] 84 taxmann.com 287 (Delhi) held as under: "A copy of the statement of 'T' recorded under Section 132(4), was not provided to the assessees and he was also not offered for the cross-examination. The remand report of the Assessing Officer before the Commissioner (Appeals) unmistakably showed that the attempts by the Assessing Officer, in

ensuring the presence of 'T' for cross-examination by the assessees, did not succeed. The onus of ensuring the presence of 'T', whom the assessees clearly stated that they did not know, could not have been shifted to the assessees. The onus was on the revenue to ensure his presence. Apart from the fact that 'T' has retracted from his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement. [Para 37]" 31. In the case on hand, the AO has relied on statement of Shri PartikR Shah for drawing adverse inference against the assessee but without providing the opportunity of cross-examination despite it was demanded by the assessee during the assessment proceedings. As such the AO has considered the request made by the assessee for the cross examination as very vague and beyond belief. The relevant finding of the AO reproduced as under: "The assessee instead of complying with the department's query for producing the above persons for cross examination has put the responsibility on the department to produce the above persons in front of the assessee for cross examination, which is very vague and beyond belief." 32. ***From the above there remains no ambiguity that no opportunity was provided by the Assessing Authority to rebut the material on the basis of which the assessing authority intended to proceed. 33. In brief, if AO intends to rely, for the purposes of making addition to the total income of the assessee, on the statement of the third party as a witness, then he has to summon such witness, record his statement, offer that witness to the assessee for cross examination. In this regard, it may be noted that it is the AO who is duty bound to provide opportunity of cross-examination of the witness, if he relies on the statement of such witness to decide against the assessee, particularly when it is demanded by the assessee at the AO stage. The illegality creeps in, the moment request for cross-examination is denied or is not accepted to. 35. Yet, the another controversy arises whether not affording opportunity to cross-examine a witness upon whose statement AO sought to rely for making addition is illegality leading to vitiating the assessment or is irregularity leading to setting aside of the assessment for providing opportunity for cross-examination of the witness by the assessee. This controversy has been resolved by the judgment of the Hon'ble Apex Court in the case of Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3/52 GST 355 (SC),*** *wherein the Hon'ble Apex Court observed as under- "6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority, though the statements of those witnesses were made the basis of the impugned order, is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. " From the above judgment it flows that when statements of witnesses are made the basis for the addition but without allowing assessee to cross-examine such witnesses, then the illegality creeps in which makes the order nullity, as it amounts to violation of principles of natural justice.* ***36. In other words where AO wants to rely on the statement of a witness (such as statement of entry operator recorded by investigation wing) to hold that share application money received by the assessee is not genuine but is only an accommodation entry then he has to provide copy of such statement to the assessee. Where the AO does not provide the copy of the statement of the witness then it is violation of principle of natural justice, and entire addition solely based on such statement is likely to be deleted.***

But the question arises, the assessee should be suffered on account of the inefficiency of the Department. The answers stands in negative. It is because the assessee should not be suffered on account of the inefficiency of the Income Tax Department. In holding so we draw support

***and guidance from the judgement of Hon'ble Bombay High Court in the case of Nu-tech Corporate Services Limited vs. ITO reported in 98 taxmann.com 454 wherein it was held that: "By allowing the Writ Petition and without visiting the concerned officials with any consequences would send a wrong message. We must as a part of our duty send strong signal and message that we do not tolerate any inefficiency and lapse in the working and functioning of this Department. Hence, while we allow the Writ Petition, we impose costs on the Respondents which are quantified in the sum of Rs.1.5 Lakhs. The costs to be paid to the Petitioner within a period of four weeks from today. The costs be apportioned between the officer who is present in Court and the officer who was his predecessor. The amounts shall be in the first instance paid by the Respondents and thereafter they shall be recovered from the salaries of these two officers. Equally, the lapses and errors on their part be noted by taking due cognizance of this order. The superiors should enter in their Annual Confidential Reports these lapses and errors on account of which the Respondents faced this embarrassment in the Court. Once the Respondents could not justify their acts and solely because of the inefficiency of these officials, then, the superiors must initiate the requisite steps and if they include denial of any promotional or monetary benefits to such officials, then, even then such steps and measures be initiated* in accordance with law. That is the minimal expectation of this Court."**

(Leading authosity is Hon'ble Apex Court in the case of Andaman Timber Industries Ltd vs Commissioner of Central Excise in Civil Appeal No. 4228 of 2006 reported in (2015) 62 Taxman 3 (SC))

Case law 2

Hon'ble Apex court in Radha Krishan Industries vs State of Himachal Pradesh &Others Civil Appeal no. 1155 of 2021 order dated 20 april 2021

- **Scope of article 226 writ petition in tax matters**
- **Criteria to form opinion for provisional attachment on part of competent authority under GST Act**
- **Principle of natural justice (written objection and hearing)**
- **Change of opinion /review power whether to be inferred**

First notable observations (***on concept of fairness on part of revenue authorities***):

" This appeal raises significant issues of public importance, engaging as it does, the interface between citizens and their businesses with the fiscal administration. Legislation enacted for the levy of goods and services tax confers a power on the taxation authorities to impose a provisional attachment on the properties of the assessee, including bank accounts. The legislation in Himachal Pradesh, which comes up for interpretation in the present case, has conferred the power on the Commissioner to order provisional attachment of the property of the assessee, subject to the formation of an opinion that such attachment is necessary in the interest of protecting the government revenue. What specifically, is the ambit of this power? What are the safeguards available to the citizen? In interpreting the law, the court has to chart a course which will ensure a fair exercise of statutory powers. The legitimate concerns of citizens over arbitrary exercises of power have to be protected while ensuring that the legislative purpose in entrusting the authority to order a provisional attachment is fulfilled. ***The rule of law in a constitutional framework is fulfilled when law is substantively fair, procedurally fair and applied in a***

fair manner. Each of these three components will need to be addressed in the course of interpreting the tax statute in the present case"

Then it was posed by Hon'ble Apex court as under:

"At issue in this case is whether the orders of provisional attachment issued by the third respondent against the appellant on 28 October 2020 are in consonance with the conditions stipulated in Section 83 of the HPGST Act. The answer to this will require the court to embark on an interpretative journey of unravelling the substantive and procedural content of the power. The preliminary issue is whether the High Court was right in concluding that the provisional attachment could not be challenged in a petition under Article 226…"

Hon'ble Apex court culled out following important principles on scope of article 226 (writ remedy) vs alternate remedy issue after analyzing entire conundrum of the legal position:

"27 The principles of law which emerge are that : (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well; (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person; (iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged; (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law; (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and (vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with. 28 These principles have been consistently upheld by this Court in Seth Chand Ratan v Pandit Durga Prasad23, Babubhai Muljibhai Patel v Nandlal Khodidas Barot24 and Rajasthan SEB v. Union of India, 25 among other decisions."

Then on stated section 83 of HPGST Act , it is observed by Hon'ble Apex court that **(on aspect of formation of opinion by competent authority- relevant ingredient to be brought on records):**

"40 The marginal note to Section 83 provides some indication of Parliamentary intent. Section 83 provides for "provisional attachment to protect revenue in certain cases". The first point to note is that the attachment is provisional – provisional in the sense that it is in aid of something else. The second point to note is that the purpose is to protect the revenue. The third point is the expression "in certain cases" which shows that in order to effect a provisional attachment, the conditions which have been spelt out in the statute must be fulfilled. Marginal notes, it is well-settled, do not control a statutory provision but provide some guidance in regard to content. Put differently, a marginal note indicates the drift of the provision. With these prefatory comments, the judgment must turn to the essential task of statutory

construction. The language of the statute has to be interpreted bearing in mind that it is a taxing statute which comes up for interpretation. The provision must be construed on its plain terms. Equally, in interpreting the statute, we must have regard to the purpose underlying the provision. An interpretation which effectuates the purpose must be preferred particularly when it is supported by the plain meaning of the words used. 41 Sub-Section (1) of Section 83 can be bifurcated into several parts. The first part provides an insight on when in point of time or at which stage the power can be exercised. The second part specifies the authority to whom the power to order a provisional attachment is entrusted. The third part defines the conditions which must be fulfilled to validate the power or ordering a provisional attachment. The fourth part indicates the manner in which an attachment is to be leveled. The final and the fifth part defines the nature of the property which can be attached. Each of these special divisions which have been explained above is for convenience of exposition. While they are not watertight compartments, ultimately and together they aid in validating an understanding of the statute. Each of the above five parts is now interpreted and explained below: (i) The power to order a provisional attachment is entrusted during the pendency of proceedings under any one of six specified provisions: Sections 62, 63, 64, 67, 73 or 74. In other words, it is when a proceeding under any of these provisions is pending that a provisional attachment can be ordered; (ii) The power to order a provisional attachment has been vested by the legislature in the Commissioner; (iii) Before exercising the power, the Commissioner must be "of the opinion that for the purpose of protecting the interest of the government revenue, it is necessary so to do"; (iv) The order for attachment must be in writing; (v) The provisional attachment which is contemplated is of any property including a bank account belonging to the taxable person; and (vi) The manner in which a provisional attachment is levied must be specified in the rules made pursuant to the provisions of the statute……..48 Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the ower by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory preconditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live

*nexus to the purpose of protecting the interest of the government revenue. ……**A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assesses can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make preemptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue. 50 These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-Section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement…….51 We adopt the test of the existence of "tangible material". In this context, reference may be made to the decision of this Court in the Commissioner of Income Tax v Kelvinator of India Limited38. Mr Justice SH Kapadia (as the learned Chief Justice then was) while considering the expression "reason to believe" in Section 147 of the Income Tax Act 1961 that income chargeable to tax has escaped assessment inter alia by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief". This principle was followed subsequently in a two judge Bench decision in Income Tax Officer, Ward No. 162 (2) v Techspan India Private Limited39. While adverting to these decisions we have noticed that Section 83 of the HPGST Act uses the expression "opinion" as distinguished from "reasons to believe". However for the reasons that we have indicated earlier we are clearly of the view that the formation of the opinion must be based on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue"***

On aspect of natural justice as specified in relevant rules , it is highlighted by Hon'ble Apex court as under:

"..56 The second significant aspect of sub-Rule (5) is the mandatory requirement of furnishing an opportunity of being heard to the person whose property is attached. This is in consonance with the principles of natural justice and ensures that a fair procedure is observed. Sub-Rule (5) provides for a postprovisional attachment right of: (i) Submitting an objection to the attachment; (ii) An opportunity of being heard. Sub - Rule (5) contains clear language to the effect that a person whose property is attached is entitled to two procedural entitlements: first, the right to submit an objection on the ground that the property was not or is not liable to be attached; and second, an opportunity of being heard to the person filing an objection. This is a clear indicator that in addition the filing of an objection, the person whose

property is attached is entitled to an opportunity of being heard. It is not open to the Commissioner, as has been stated in the present case, to hold the view that the only safeguard under sub-Rule 5 is to submit an objection without an opportunity of a personal hearing. Such a construction would be plainly contrary to sub-Rule 5 which contemplates both the submission of an objection to the attachment and an opportunity of being heard. The opportunity of being heard can be availed of as a matter of right by the person whose property is attached. Both the right to submit an objection and to be afforded an opportunity of being heard are valuable safeguards. The consequence of a provisional attachment is serious. It displaces the person whose property is attached from dealing with the property. Where a bank account is attached, it prevents the person from operating the account. A business entity whose bank account is attached is seriously prejudiced by the inability to utilize the proceeds of the account for the purpose of business. The dual procedural safeguards inserted in sub-Rule 5 of Rule 159 demand strict compliance…"

On issue of change of opinion/review, it is highlighted by Hon'ble Apex court as under:

"71 Moreover, an order of provisional attachment was issued by the Joint Commissioner which was withdrawn on 30 January 2019, after considering the representations made by the petitioner. On the very ground, without any material change in circumstances. Another order of provisional attachment came to be issued by another Joint Commissioner. Therefore, it was the contention of the petitioner before the High Court that the subsequent order of provisional attachment is in substance and effect an order reviewing the earlier order withdrawing the order of provisional attachment which was not permissible and therefore the subsequent order of provisional attachment is without jurisdiction. The High Court has not considered this aspect. Both the earlier and the subsequent orders of provisional attachment are on the same grounds. Therefore, unless there was a change in the circumstances, it was not open for the Joint Commissioner to pass another order of provisional attachment, after the earlier order of provisional attachment was withdrawn after considering the representations made by the petitioner. This is an additional ground to set aside the subsequent order of provisional attachment."

Final conclusion:

"72 For the above reasons, we hold and conclude that :

(i) The Joint Commissioner while ordering a provisional attachment under section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3) and an appeal against the order of provisional attachment was not available under Section 107 (1); (ii) The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable; (iii) The High Court has erred in dismissing the writ petition on the ground that it was not maintainable; (iv) The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled; (v) The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue. (vi) The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot

be protected without ordering a provisional attachment; (vii) The formation of an opinion by the Commissioner under Section 83(1) must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue; (viii) In the facts of the present case, there was a clear non-application of mind by the Joint Commissioner to the provisions of Section 83, rendering the provisional attachment illegal; (ix) Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards: (a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and (b) An opportunity of being heard; There has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard; (x) The Commissioner is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached; (xi) A final order having been passed under Section 74(9), the proceedings under Section 74 are no longer pending as a result of which the provisional attachment must come to an end; and (xii) The appellant having filed an appeal against the order under section 74(9), the provisions of sub-Sections 6 and 7 of Section 107 will come into operation in regard to the payment of the tax and stay on the recovery of he balance as stipulated in those provisions, pending the disposal of the appeal.

73 For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 1 January 2021.

74 The writ petition filed by the appellant under Article 226 of the Constitution shall stand allowed by setting aside the orders of provisional attachment dated 28 October 2020"

Note: All the aforesaid propositions laid down are of extensive and wider use having serious implications on various adjudications specially tax adjudications including assessments framed by NeAC (under income tax law) recently where principle of natural justice are apparently flouted and impaired.

Some recent High court orders (interim/final) on validity of assessment orders framed by NeAC under income tax law are mentioned below in ready reckoner format : (case law 16)

A. Bombay High court interim orders

S.No	Case particulars	Remarks
1.	Praful M Shah vs National Faceless Assessment in W.P. (L) 11143 of 2021 order dated 06.05.2021	Interim order passed staying further action in pursuance to impugned order
2.	Parag Kishrorechandra Shah vs the National faceless assessment centre and Othrs in W.P. (L) 11052 of 2021 order dated 06.05.2021	Same interim order
3.	Signet Realties vs the Assessment unit etc. in W.P. `1204/2021 order dated 04.05.2021	Interim order passed

B. Gujarat high court

S.No	Case particulars	Remarks
1.	Gokul refoils and solvent limited vs National E Assessment Centre (NeAC) Special civil application number 7155/2021 interim order dated 06.05.2021	Copy of this interim order marked to CBDT- Show cause dated 21.04.2021 issued for reply by 23.04.2021 – petitioner submitted adjournment on 23.04.2021- without considering said adjournment request – straightway asst order passed on 26.04.2021- so apparent violation of natural justice –operation of asst. order stayed
2.	Jai Ma Hiralal Enterprise vs NEAC Delhi in Special civil application 6042/2021 interim order dated 06.04.2021	Adjournment request of petitioner dated 22.03.2021 no where considered and assessment order passed on 23.03.2021 – so apparent violation of natural justice – operation of asst. order stayed- Copy of this interim order marked to CBDT
3.	Ratnamani Healthcare Pvt Ltd vs NeAC in Special civil application 7107/2021 interim order dated 04.05.2021	Reply dated 12.04.2021 filed by petitioner not considered in assessment order dated 13.04.2021 (in asst order reply was not considered) - so apparent violation of natural justice –operation of asst. order stayed- Copy of this interim order marked to CBDT
4.	Royal Lake city vs NeAC in Special civil application 6215/2021 interim order dated 06.04.2021	Assessment order passed on 25.03.2021 prior to notified closure date of reply which was 26.03.2021 so apparent violation of natural justice – operation of asst. order stayed- Copy of this interim order marked to CBDT

C. <u>Delhi high court</u>

S.No	Case particulars	Remarks
1.	D.J.Surfactants vs NeAC in W.P. (C) 4814/2021 interim order dated 03.05.2021	Reply of assessee dated 12.03.2021 not considered in assessment order and

		requested personal hearing not provided to assessee – stay of operation of asst order granted
2.	K.L.Trading corporation vs NeAC in W.P.(C) 4774/2021 interim order dated 16.04.2021	Total absence of SCN prior to assessment order being passed – further refer similar orders in WP(C) Numbers 5087/2021 (04.05.2021); 5196/2021 (07.05.2021); 5272/2021(12.05.2021) etc
3.	KBB Nuts Private Limited vs NeAC in WP (C) 5234/2021 final order dated 10.05.2021 setting aside the assessment	Objections dated 22.04.2021 not taken into account in assessment order passed on 22.04.2021 (similar final order in Romano Buildtech Pvt Ltd vs UOI in WP(C) 4988/2021 order dated 12.05.2021)

Madras High court (***apart from 423 ITR 525***)

S.No	Particulars	Remarks
1.	Ekambaram Sukumaran vs ITO NeAC WO 10433/2019 order dated 27.04.2021	Revenue held bound to wait till end of working day when matter posted for finalization – relied on 83 ITR 683 – ultimately assessment order set aside in writ proceedings by Madras high court
2.	Kumaran Silk Traders vs ITO NeAC in WP 10656/2021 order dated 28.04.2021	Insufficient time given – assessment order set aside

Case law 3:

Hon'ble Delhi high court in Synfonia Tradelinks Pvt Ltd vs ITO Ward 22(4) New Delhi order dated 26.03.2021

- **Section 148 applicable principles culled out (reopening of assessment)**

- valid approval /sanction ingredients

- validity of reopening to be seen only with reference to reasons recorded

- writ scope under article 226 of indian constitution

Revenue's case

"To demonstrate that the formation of the belief, as discernible from the order recording reasons, was neither arbitrary nor irrational, a reference was made to the following portion of the said order : "Further, on perusal of return of income filed by the assessee for A.Y 2010-11 and A.Y 201l-12 it has been observed that the assessee has shown unsecured loans of Rs. 38,071/- and Rs. 25,57,206/- respectively. Thus there is substantial increase in the unsecured loans during A.Y. 2011-12. A careful scrutiny of information received from the investigation wing and reportreceived from Investigation Wing. New Delhi subsequent analysis of report of investigation wing, data of transactions and verification of ITR lead to an irresistible conclusion that the assessee company has taken accommodation entry at least up to the amount of Rs.26,93 ,500/- Considering the above referred credible information, and enquiries and analysis subsequent to the information. I have reason to believe that an amount at least of Rs.26,93,500/- & Commission @ 2.5% amounting to Rs 67,338/- (Total Rs.27,60,838/-) has escaped assessment in case the of M/s SYNFONIA TRADELINKS PVT. LTD for the A. Y 2011-12 within the meaning of Section 14 7/148 of Income-tax Act, 1961." 7.2. The submission advanced was that the assessee had taken accommodation entries from, one, Mr. Pradeep Kumar Jindal in lieu of cash via dummy companies/entities which was reflected in the balance sheets of the assessees as unsecured loans. It was contended that this fact was discovered upon search being conducted at the premises of Mr. Pradeep Kumar Jindal on 18.11.2015. 7.3. Mr. Singh attempted to explain away the assertion made in the order recording reasons "Thus the assessee company has taken bogus share capital/share premium account from the above said entry providers amounting to Rs.26,93,500/-" by submitting that the reference to share capital/share premium account was an inadvertent error. 7.4. According to Mr. Singh, the accommodation entries were reflected in the return of the assessee which is accompanied by its balance sheets in the form of unsecured loans. It was, thus, the contention of Mr. Singh that at the stage of initiation of reassessment proceedings, all that one is required to enquire is hether or not prima facie material was available, which could form the basis for reassessment. Mr. Singh emphasized the fact that, at this stage, the court was not required to examine the sufficiency or correctness of the material, which formed the edifice for the formation of the belief that the assessee's taxable income had escaped assessment. In support of this plea, reliance was placed by Mr. Singh on the judgment of the Supreme Court rendered in Raymond Wooden Mills Limited v. Income Tax Officer, Central Circle XI, Range Bombay and Ors., (2008) 14 SCC 218 7.5. Mr. Singh drew our attention, as noted above, to that part of the order recording reasons which bore the heading "analysis of information" to emphasize the fact that reassessment proceedings had been initiated as respondent no.1 suspected the genuineness of the loans received during the subject AY. 7.6. In sum, Mr. Singh argued that there was cogent material available for respondent no.1 to form a belief that the assessee's taxable income had escaped assessment. This information, according to Mr. Singh, which was received from the office of the ADIT and the report generated thereafter and its analysis formed the basis of respondent no.1's belief that the assessee's income chargeable to tax had escaped assessment. 7.7. Mr. Singh went on to state that respondent no.2 had given his approval to initiation of proceedings against the assessee only after satisfying himself that a case was made out for initiation of proceedings under the provisions of Section 147 of the Act"

Significantly Hon'ble Delhi high court after taking pains has succinctly culled out following important principles on section 148 of the Act:

"Analysis and Reasons: - 9. We have heard the learned counsel for the parties and perused the record. Before we proceed further, it would be helpful if we were to set forth certain well-established principles enunciated by the courts over the years vis-à-vis initiation of proceedings under Section 147 of the Act. (i) The reasons which lead to the formation of opinion or belief that the assessee's income chargeable to tax has escaped assessment should be inextricably connected. In other words, the reasons for the formation of opinion should have a rational connection with the formation of the belief that there has been an escapement of income chargeable to tax (See: ITO v. Lakhmani Mewal Das, 1976 3 SCC 757] (ii) The expression "reason to believe" is stronger than the word "satisfied". The belief should be based on material that is relevant and cogent. (See: Ganga Saran & Sons Pvt. Ltd. v. ITO, 1981 3 SCC 143]. (ii) (a) The assessing officer should have reasons to believe that the taxable income has escaped assessment. The process of reassessment cannot be triggered based on a mere suspicion. The expression "reason to believe" which is found in Section 147 of the Act does not have the same connotation as "reason to suspect". The order recording reasons should fill this chasm. The material brought to the knowledge of the assessing officer should have nexus with the formation of belief that the taxable income of the assessee escaped assessment; the link being the reasons recorded, in that behalf, by the assessing (iii) The AO is mandatorily obliged to record reasons before issuing notice to the assessee under Section 148(1) of the Act. This is evident from the bare perusal of sub-section (2) of Section 148 of the Act. (iv) No notice can be issued under Section 148 of the Act by the A.O. after the expiry of four years from the end of the relevant AY unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner arrives at a satisfaction based on the reasons recorded by the A.O. that it is a fit case for issuance of a notice under Section 148 of the Act. [See: Section151(1) of the Act]. (v) The limitation for issuance of notice under Section 148 as prescribed under Section 149 of the Act commences from the date of its issuance while the time limit for passing the order of assessment, reassessment, computation and re-computation as prescribed under Section 153 of the Act commences from the date of service [See: R.K. Upadhyay v. Shanab Bhai P. Patel, (1987) 3 SCC 96]. (vi) A jurisdictional error would occur, which can be corrected by a writ court, if reasons to believe are based on grounds that are either arbitrary and/or irrational. (See: Sheo Nath Singh v. Appellate ACIT, Calcutta (1972) 3 SCC 234]. 9.1. Thus, if one were to apply the aforestated principles, it would be clear as daylight that the order recording reasons discloses complete non-application of mind. The reason we say so is discernible from the following:…"

<u>Important inferences on basis of above principles:</u>

"9.5. *Mr. Singh, in a desperate attempt to salvage the situation, drew our attention to the unsecured loans shown in the income tax returns of the assessee for AYs 2010-2011 and 2011-2012 amounting to Rs.38,071/- and Rs.25,57,206/- respectively. Apart from anything else, simple math would show that the cumulative total of these figures is Rs.25,95,277/- and not Rs.26,93,500/- which, according to respondent no. 1, is the unexplained credit in the books of accounts of the assessee and, hence, required to be added under Section 68 of the Act. <u>Therefore, for Mr. Singh to say that these are inadvertent errors and hence</u>*

should be ignored, in our opinion, is an argument that is completely misconceived. As indicated above, if the information received (from the investigation wing) was that the accommodation entries, in lieu of cash, were taken in the form of share capital and share premium they could certainly not be linked to unsecured loans received in AYs 2010-2011 and 2011-2012,

9.6. It is pertinent to note that in the objections filed by the assessee, an attempt has been made to explain the purported accommodation entries by stating therein that the advances had been given to the 5 companies adverted to in the order recording reasons which were received back on the dates given in the said order. The assessee also went on to state, in its objections, that the opening balance (as on 01.04.2010) and closing balance (as on 31.03.2011) of the share premium account (Rs. 3,66,16,800/-) and the share capital account (Rs. 24,15,200/-) remained unchanged. In other words, the emphasis was that there was no increase in the share capital or the share premium account, as alleged, or at all. In the order passed by the assessing officer dated 08.10.2018, whereby, the objections of the assessee were rejected; none of this has been dealt with. Therefore, in our view, while the assessing officer may suspect that the taxable income of the assessee escaped assessment, he could not have formed a belief qua the same based on the material which is, presently, on record.

9.7. Therefore, in our opinion, the formation of belief by respondent no.1 that income of the assessee chargeable to tax had escaped assessment, was unreasonable and irrational, as it could not be related to the underlining information; something which is discernible from a bare reading of the order recording reasons.

9.8. This apart, what is even more disconcerting is the fact that respondent no.2, who accorded sanction for triggering the process under Section 147 of the Act, simply rubber-stamped the reasons furnished by respondent no.1 for issuance of notice under Section 148 of the Act. 9.9. The provisions of Section 151(1) of the Act required respondent no.2 to satisfy himself as to whether it was a fit case in which sanction should be accorded for issuance of notice under Section 148 of the Act and, thus, triggering the process of reassessment under Section 147. The sanction-order passed by respondent no.2 simply contains the endorsement 'approved'. 10. In our view, the sanction-order passed by respondent no.2 presents, metaphorically speaking 'the inscrutable face of sphinx' (See: Breen v. Amalgamated Engineering Union [1971] 2 QB 17500; Also see: State of H.P. v. Sardara Singh, (2008) 9 SCC 392). In our view, the satisfaction arrived at by the concerned officer should be discernible from the sanction-order passed under Section 151 of the Act.

Even if we were to assume for the moment that the approval of the ACIT was rightly taken, a bare perusal of the endorsement would show that there is no application of mind as to whether the information received by the AO had any nexus with the formation of honest belief that the assessee's taxable income had escaped. What is glaring is that the ACIT notes that income to the tune of Rs.27,60,838/- had escaped taxation whereas, in the order recording reasons, the taxable income has been quantified as

Rs.26,93,500/-. As noted above, based on the arguments of Mr. Singh that the escaped income should be related to unsecured loans, there is in play a third figure which is Rs.25,95,277/

10.5. As noted above, in the instant case, because of the failure on the part of respondent no.1 to correlate the information received with the ostensible formation of belief by him, respondent no.2 attempted to connect, via her counter-affidavit, that the escaped income with the "suspicious" unsecured loan entries reflected in the assessee's returns for AY 2010-2011 and 2011-2012. As correctly argued by Mr. Kochar, the counter-affidavit and the submissions made across the bar cannot be used to sustain the impugned actions. The order recording reasons and the order granting sanction should speak for themselves. (See observations made Commissioner Of Police, Bombay vs Gordhandas Bhanji AIR 1952 SC 16 and Mohinder Singh Gill and Ors. vs. The Chief Election Commissioner, New Delhi and Ors. (1978) 1 SCC 405)

10.8. This brings us to another ground raised in the writ petition, which is, that there was a huge time lag between the issuance of the impugned notice under Section 148 of the Act and the date when the order recoding reasons was furnished to the authorized representatives of the petitioner. While the assessee is, in our view, right in contending that if the time lag is huge, it does point in the direction that the order was ante-dated, a final view on this aspect could have only been taken if the original record was examined by us. Since the revenue has denied the allegation levelled against it and Mr. Kochar did not press this issue during the hearing, we can't reach a definitive view on this aspect of the matter based on the record available before us Therefore, this submission, made on behalf of the assessee, cannot be accepted. 11. Given the aforesaid, we are also of the view that since respondent no.1 was unable to link the information received with the formation of belief, a jurisdictional error did occur, which, this Court, is empowered to correct, by exercising its powers under Article 226 of the Constitution of India (See: Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Another, (1961) 2 SCR 241). 11.1. Although Mr. Singh did argue that the assessee should be relegated to statutory remedies, in our view, a case is made out for interference at this stage itself. According to us, relegating a party to an alternative remedy is a selfimposed limitation which, however, does not denude the court of its powers under Article 226. The Court is duty-bound to exercise its powers under Article 226 where ever it finds that a statutory authority has exercised its jurisdiction either irregularly or acted in a matter in which it had no jurisdiction or committed a breach of the principles of natural justice.

11.2. Before we conclude, we must also indicate that the order recording reasons neither discusses the contents of the report received from the investigation wing or the statements made by Mr. Pradeep Kumar Jindal and his associates. The order recording reasons, merely, indicates that the formation of belief is based on these sources. Furthermore, although, there is a reference to Shri Laxman Singh Satyapal and Ms. Meera Mishra in paragraph 3.14 of the counter-affidavit, as persons, whose statements were also recorded during the search, which formed the basis of initiation of proceedings under Section 147 of the Act, there is no reference to them in the order recording reasons. 11.3. Besides this, the revenue has taken the position that not only the report of the investigation wing but also the statements of Mr. Pradeep Kumar Jindal and his aforementioned associates were furnished to the authorized representative of the assessee in the proceedings held before respondent no.1 on 12.10.2018 (See para 3.6 of the counter-affidavit). The proceedings sheet of 12.10.2018 [which is appended with the counter-affidavit] does not refer to this fact. Therefore, apart from anything else, a case could have been made out also of breach of principles of natural justice. For the reasons best known, Mr. Kochar did not press this issue. We need

not elaborate any further on this aspect of the matter as our decision does not turn on whether or not there has been a breach of principles of natural justice.

Conclusion: - 12. Thus, for the foregoing reasons, we are inclined to quash the impugned notice dated 31.03.2018 issued under Section 148 of the Act as well as the order granting sanction issued by respondent no.2. It is ordered accordingly. Parties will bear their own cost"

Related Case law 14:

Delhi E bench of ITAT decision in case of Marble Art ITA No. 2478/Del/2013 order dated 08.03.2021 (**Section 148 concept of borrowed satisfaction and section 151- approval of competent authority analysed in detail)**

"15.1 It is seen that in the case of the assessee, proceedings had been initiated for the three assessment years i.e. AY 2002-03, 2003-04 and 2004-05 and except for the AY 2002-03, in remaining two years, assessment was also originally framed u/s 143(3) of the Act. In all the three assessment years, notice had been issued beyond a period of four years from the relevant assessment years. At this stage, it is relevant to refer the provisions of section 151 of the Act, which reads as under: "Sanction for issue of notice. 151. (1) In a case where an assessment under subsection (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice: Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice. (2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice." 15.2 Ergo, provisions of sub section (1) of section 151 of the Act deals with the cases wherein assessment was earlier framed u/s 143(3) or section 147 of the Act, whereas subsection (2) provides for the cases, wherein no assessment was framed earlier. Under sub section (1) of section 151, if the proceedings are initiated within four years, no notice shall be issued under section 148 , unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice. However, the proviso to the sub-section (1) provides for the approval in the cases where notice is issued after the expiry of four years from the end of the relevant assessment year. The proviso provides that if the notice is issued beyond four years, such notice shall be issued after taking approval from the Chief Commissioner or Commissioner on the reasons recorded by the Assessing Officer. Further under sub-section (2), it was provided that if no assessment was framed earlier u/s 143(3)(147, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. 15.3 Therefore, under the statutory provision, the Act provide for the safeguards for issuing notice u/s 148 of the Act. It is the intent of the legislature that superior authority should apply his mind and give his satisfaction before issuance of notice. In such circumstances, the approval should not be mechanical but should be objective

satisfaction and satisfaction recorded should reflect that there is application of mind. In fact, the issue is no more res integra. The Apex Court in the case of Chhugamal Rajpal vs. S.P. Chaliha & Ors reported in 79 ITR 603 (SC) has held that important safeguards are provided in sections 147 and 151 of the Act and same cannot be lightly treated by the Commissioner. It was held that while granting the approval, the Commissioner should give reason for coming to the conclusion that it is a fit case for the issue of a notice under section 148 of the Act. The jurisdictional High Court in the case of United Electrical Company Pvt. Ltd. vs. CIT reported in[2002] 258 ITR 317 (Delhi) has held that the Legislature has provided certain safeguards to prevent arbitrary exercise of powers by an Assessing Officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. In fact, in the case of CIT v. S. Goyanka Lime & Chemical Ltd. reported in 231 Taxman 73 (MP) it was held that sanction granted by merely recording "Yes, I am satisfied" is mechanical and same is unsustainable. In fact, SLP filed against the aforesaid judgment of Madhya Pradesh High Court is also dismissed and same is reported in 237 Taxman 378 (SC). In fact, in the case of Pr. CIT vs M/s N.C. Cables Ltd. reported in [2017] 391 ITR 11 (Delhi) jurisdictional High Court has held as under:……. 15.4 When the facts of this case are seen in the light of the aforesaid binding precedents, it is found that in this case also while according approval, the ld. Addl. CIT while granting approval has merely recorded "approved" and has not given any reason at all the reason for granting approval. In fact, this shows that while granting approval, he has not even examined whether the material referred in the reasons to believe is available with the AO and had he applied his mind, he would have found that even the material referred in the reasons to believe is not available with the AO. Now be that as may be, in the A.Y. 2002-03 even the reasons recorded do not clothe the AO with the jurisdiction to reopen the assessment, as he did not had the relevant material.

15.8 From the contents of aforesaid communication it is seen that ADIT (Inv.), Meerut had recommended the case of the assessee to be reopened without providing the AO any supporting material. It can thus be safely concluded and inferred that reopening proceedings had been initiated not on the basis of satisfaction of the AO, albeit on the basis of mere recommendation of ADIT (Inv.), Meerut. The 'reason to believe' has to be that of the AO who is initiating the proceedings and in absence of any independent application of mind and satisfaction of the AO the reason to believe falls in the realm of conjectures. The AO has to have tangible material with him and even if the information has come from Investigation wing, the AO must perused the material which has been referred in the said information and examine what is the income which has escaped assessment. Recommendation may come from any person or authority but it is the AO who has to entertain reason to believe based on material before him that income chargeable to tax has escaped assessment. The most crucial material here in this case is that assessee has removed goods without payment of duty and there were invoices which were later shown to be cancelled but nowhere there is any whisper about the invoices nor they have been produced. AO simply appears to have reopened to examine the claim of section 10B and what was the basis and premise before him as to how the claim on examine u/s 10B has incorrect is not coming fore. Mere intimation received from any authority cannot lead to immediate presumption but it needs to be verified by the AO and to apply his mind. Here in this case, even the documents pertaining to Custom & Central Excise Authorities was not available with the AO at the time of initiation of proceedings which fact has been surfaced before us.

Thus, we hold that the reasons recorded by the AO do not give jurisdiction to reopen the assessment u/s 147 read with section 148.

17. Since we have already quashed the assessment being without jurisdiction under section 147 on the ground that approval granted is mechanical and also for the AY 2003-04 and 2004-05, even the so called approval is not from the competent authority, therefore, other grounds raised by the assessee challenging the assumption of jurisdiction as well as the merits of additions have become purely academic."

Case law 4 *:* Hon'ble Delhi high court in case of PCIT vs Krishna Devi ITA 125/2020 order dated 15.01.2021 Citation : 431 ITR 361 **Entire conspectus of law on alleged penny stock issue discussed at length**

Facts as noted in Hon'ble high court order

The return was processed under Section 143(1) of the Act and thereafter the case was selected for scrutiny. During the scrutiny proceedings, the AO noticed that for the relevant year under consideration, the Respondent had claimed exempted income of Rs. 96,75,939/- as receipts from Long Term Capital Gain [hereinafter referred to as 'LTCG'] under Section 10(38) of the Act. He inter alia concluded that the assessee had adopted a colorable device of LTCG to avoid tax and accordingly framed the assessment order under Section 143(3) of the Act at the total income of Rs. 1,09,12,060/-, making an addition of Rs. 96,75,939/- under Section 68 read with 115BBE of the Act on account of bogus LTCG on sale of penny stocks of a company named M/s Gold Line International Finvest Limited. The appeal before the CIT(A) was dismissed and additions were confirmed with the observation that the Respondent had introduced unaccounted money into the books without paying taxes.

Hon'ble ITAT order as approved by Hon'ble High court order

Further appeal filed by the Respondent before the learned ITAT was allowed in her favour, and the additions were deleted vide the Impugned Order, relevant portion whereof reads as under*:*

"21. A perusal of the assessment order clearly shows that the Assessing officer was carried away by the report of the Investigation Wing Kolkata. It can be seen that the entire assessment has been framed by the Assessing Officer without conducting any enquiry from the relevant parties or independent source or evidence but has merely relied upon the statements recorded by the Investigation Wing as well as information received from the Investigation Wing. It is apparent from the Assessment Order that the Assessing Officer has not conducted any independent and separate enquiry in the case of the assessee. Even, the statement recorded by the Investigation Wing has not been got confirmed or corroborated by the person during the assessment proceedings. xx xx xx

23. It is provided u/s. 142 (2) of the Act that for the purpose of obtaining full information in respect of income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary. In our considered view the Assessing Officer ought to have conducted a separate and independent enquiry and any information received from the Investigation Wing is required to be corroborated and affirm during the assessment by the Assessing Officer by examining the concerned persons who can affirm the statements already recorded by any other authority of the department. Facts narrated above clearly show that the Assessing Officer has not made any enquiry and the entire assessment order and the order of the

first Appellate Authority are devoid of any such enquiry. 24. The report from the Directorate Income Tax Investigation Wing, Kolkata is dated 27.04.2015 whereas the impugned sales transactions took place in the month of March, 2014. The exparte ad interim order of SEBI is dated 29.06.2015 wherein at page 34 under para 50 (a) M/s. Esteem Bio Organic Food Processing Ltd was restrained from accessing the securities market and buying selling and dealing in securities either directly or indirectly in any manner till further directions. A list of 239 persons is also mentioned in SEBI order which are at pages 34 to 42 of the order the names of the appellants do not find any place in the said list. At pages 58 and 59 the names of pre IPO transferee in the scrip of M/s. Esteem Bio Organic Food Processing Ltd is given and in the said list also the names of the appellants do not find any place. At page 63 of the SEBI order-trading by trading in M/s. Esteem Bio Qrganic food Processing Ltd – a further list of 25 persons is mentioned and once again the names of the appellants do not find place in this list also. 25. As mentioned elsewhere the brokers of the assessee namely ISG Securities Limited and SMC Global Securities Limited are stationed at New Delhi and their names also do not find place in the list mentioned here in above in the SEBI order. There is nothing on record to show that the brokers were suspended by the SEBI nor there anything on record to show that the two brokers of the appellants mentioned here in above were involved in the alleged scam. The Assessing Officer has not even considered examining the brokers of the appellants. It is a matter of the fact that SEBI looks into irregular movements in share prices on range and warn investor against any such unusual increase in shares prices. No such warnings were issued by the SEBI. 26. There is no dispute that the statements which were relied by the Assessing Officer were not recorded by the Assessing Officer in the assessment proceedings but they were pre-existing statements recorded by the Investigation Wing and the same cannot be the sole basis of assessment without conducting proper enquiry and examination during the assessment proceedings itself. In our humble opinion, neither the Assessing Officer conducted any enquiry nor has brought any clinching evidences to disprove the evidences produced by the assessee. The report of Investigation Wing is much later than the dates of purchase / sale of shares and the order of the SEBI is also much later than the date of transactions transacted and nowhere SEBI has declared the transaction transacted at earlier dates as void. xx xx xx 30. Considering the vortex of evidences, we are of the considered view that the assessee has successfully discharged the onus cast upon him by provisions of section 68 of the Act as mentioned elsewhere, such discharge of onus is purely a question of fact and therefore the judicial decisions relied upon by the DR would do no good on the peculiar plethora of evidences in respect of the facts of the case in hand and hence the judicial decisions relied upon by both the sides, though perused, but not considered on the facts of the case in hand."

Revenue's contentions before Hon'ble High court

7. Mr. Zoheb Hossain, learned senior standing counsel for the revenue (Appellant herein), contends that the learned ITAT has completely erred in law in deleting the addition, and thus the Impugned Order suffers from perversity.

8. Mr. Hossain argues that in cases relating to LTCG in penny stocks, there may not be any direct evidence in the hands of the Revenue to establish that the investment made in such companies was an accommodation entry. Thus the Court should take the aspect of human probabilities into consideration that no prudent

investor would invest in penny scrips. Considering the fact that the financials of these companies do not support the gains made by these companies in the stock exchange, as well as the fact that despite the notices issued by the AO, there was no evidence forthcoming to sustain the credibility of these companies, he argues that it can be safely concluded that the investments made by the present Respondents were not genuine. He submits that the AO made sufficient independent enquiry and analysis to test the veracity of the claims of the Respondent and after objective examination of the facts and documents, the conclusion arrived at by the AO in respect of the transaction in question, ought not to have been interfered with. In support of his submission, Mr. Hossain relies upon the judgment of this Court in Suman Poddar v. ITO, [2020] 423 ITR 480 (Delhi), and of the Supreme Court in Sumati Dayal v. CIT, (1995) Supp. (2) SCC 453

9. Mr. Hossain further argues that the learned ITAT has erred in holding that the AO did not consider examining the brokers of the Respondent. He asserts that this holding is contrary to the findings of the AO. As a matter of fact, the demat account statement of the Respondent was called for from the broker M/s SMC Global Securities Ltd under Section 133(6) of the Act, on perusal whereof it was found that the Respondent was not a regular investor in penny scrips.

Consideration of revenue's contentions by Hon'ble high court

10. We have heard Mr. Hossain at length and given our thoughtful consideration to his contentions, but are not convinced with the same for the reasons stated hereinafter.

Important principles laid down

11. On a perusal of the record, it is easily discernible that in the instant case, the AO had proceeded predominantly on the basis of the analysis of the financials of M/s Gold Line International Finvest Limited. His conclusion and findings against the Respondent are chiefly on the strength of the astounding 4849.2% jump in share prices of the aforesaid company within a span of two years, which is not supported by the financials. On an analysis of the data obtained from the websites,

the AO observes that the quantum leap in the share price is not justified; the trade pattern of the aforesaid company did not move along with the sensex; and the financials of the company did not show any reason for the extraordinary performance of its stock. We have nothing adverse to comment on the above analysis, but are concerned with the axiomatic conclusion drawn by the AO that the Respondent had entered into an agreement to convert unaccounted money by claiming fictitious LTCG, which is exempt under Section 10(38), in a preplanned manner to evade taxes. **The AO extensively relied upon the search and survey operations conducted by the Investigation Wing of the Income Tax Department in Kolkata, Delhi, Mumbai and Ahmedabad on penny stocks, which sets out the modus operandi adopted in the business of providing entries of bogus LTCG. However, the reliance placed on the report, without further corroboration on the basis of cogent material, does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. We do notice that the AO made an attempt to delve into the question of infusion of Respondent's unaccounted money, but he did not dig deeper. Notices issued under Sections 133(6)/131 of the Act were issued to M/s Gold Line International Finvest Limited, but nothing emerged from this effort.** ***The payment for the shares in question was made by Sh. Salasar Trading Company. Notice was issued to this entity as well, but when the notices were returned unserved, the AO did not take the matter any further. He thereafter simply proceeded on the basis of the financials of the company to come to the conclusion that the transactions were accommodation entries, and thus, fictitious. The conclusion drawn by the AO, that there was an agreement to convert unaccounted money by taking fictitious LTCG in a pre-planned manner, is therefore entirely unsupported by any material on record. This finding is thus purely an assumption based on conjecture made by the AO. This flawed approach forms the reason for the learned ITAT to interfere with the findings of the lower tax authorities. The learned ITAT after considering the entire conspectus of case and the evidence brought on record, held that the Respondent had successfully discharged the initial onus cast upon it under the provisions of Section 68 of the Act. It is recorded that "There is no dispute that the shares of the two companies were purchased online, the payments have been made through banking channel, and the shares were dematerialized and the sales have been routed from de-mat account and the consideration has been received***

through banking channels." The above noted factors, including the deficient enquiry conducted by the AO and the lack of any independent source or evidence to show that there was an agreement between the Respondent and any other party, prevailed upon the ITAT to take a different view. Before us, Mr. Hossain has not been able to point out any evidence whatsoever to allege that money changed hands between the Respondent and the broker or any other person, or further that some person provided the entry to convert unaccounted money for getting benefit of LTCG, as alleged. In the absence of any such material that could support the case put forth by the Appellant, the additions cannot be sustained.

12. Mr. Hossain's submissions relating to the startling spike in the share price and other factors may be enough to show circumstances that might create suspicion; however the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The theory of human behavior and preponderance of probabilities cannot be cited as a basis to turn a blind eye to the evidence produced by the Respondent. With regard to the claim that observations made by the CIT(A) were in conflict with the Impugned Order, we may only note that the said observations are general in nature and later in the order, the CIT(A) itself notes that the broker did not respond to the notices. Be that as it may, the CIT(A) has only approved the order of the AO, following the same reasoning, and relying upon the report of the Investigation Wing. *Lastly, reliance placed by the Revenue on Suman Poddar v. ITO (supra) and Sumati Dayal v. CIT (supra) is of no assistance. Upon examining the judgment of Suman Poddar (supra) at length, we find that the decision therein was arrived at in light of the peculiar facts and circumstances demonstrated before the ITAT and the Court, such as, inter alia, lack of evidence produced by the Assessee therein to show actual sale of shares in that case. On such basis, the ITAT had returned the finding of fact against the Assessee, holding that the genuineness of share transaction was not established by him. However, this is quite different from the factual matrix at hand. Similarly, the case of Sumati Dayal v. CIT (supra) too turns on its own specific facts. The above-stated cases, thus, are of no assistance to the case sought to be canvassed by the Revenue*.

13. The learned ITAT, being the last fact-finding authority, on the basis of the evidence brought on record, has rightly come to the conclusion that the lower

tax authorities are not able to sustain the addition without any cogent material on record. We thus find no perversity in the Impugned Order. 14. In this view of the matter, no question of law, much less a substantial question of law arises for our consideration.

Above Delhi high court decision is applied and followed extensively by various itat benches across India , a list is given below for ready reference:

1) Lucknow bench of ITAT in case of Uma Shanker Dhandhania ITA 475 & 681/LKW/2019 (order dated 16.02.2021) wherein on Delhi high court Krishna devi decision (supra) hon'ble bench culled out ratio emerging therefrom which fully fits in present cases: *"10. In the above noted judgment, the Hon'ble court has held that startling spike in the share price and other factors may be enough to show circumstances that might create suspicion but the Court has to decide an issue on the basis of evidence and proof, and not on suspicion alone. The Hon'ble court further distinguished the judgment in the case of Suman Podar which was in favour of Revenue. The Hon'ble court further held that case of Sumati Dayal u/s CIT was also not applicable to the assessee. The Hon'ble court further held that reliance placed by the Assessing Officer on the investigation report of Investigation Wing without further corroboration on the basis of cogent material does not justify his conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries."*
2) Delhi ITAT Shivani Gupta G bench order dated 06.04.2021 in ITA 5204/Del/2019 – Para 7 & 7.1
3) Delhi ITAT Mukesh Mittal E bench order dated 26.03.2021 in ITA 761/Del/2020 Para 5.6 & 5.7, 5.11
4) Delhi ITAT G bench order dated 19.03.2021 in Tapas Kumar Mullick case para Para 16 to 21
5) Hyderabad A bench of ITAT in Tarun Kumar Goyal ITA 456/Hyd/20 order dated 20.04.2021
6) *Surat bench of ITAT in case of Mukesh Nanubhai Desai ITA 781/SRT/2018 order dated 06.05.2021*

Further reference may be made to Gujarat high court recent order in case of Parasben Kochar (dated 17.09.2020 approving Ahmedabad ITAT order dated 20.02.2020 (ita 549/ahd/2018).

Case law 5: Hon'ble Delhi high court in case of PCIT Central 1 vs Anand Kumar Jain HUF in ITA 23/2021 order dated 12.02.2021 Citation: 432 ITR 384 Entire law on evidentiary value of statement u/s 132(4) of the Act analysed and interplay of section 153A with section 153C discussed at length

Revenue's case

"4. The Revenue is aggrieved with the aforesaid impugned order and has filed the present appeal under Section 260A of the Act, proposing the following questions of law: a. Whether the ITAT is justified in deleting the additions made on account of bogus long term capital gain on the ground that the evidences found during search at the premises of entry provider cannot be the basis for making additions in assessment completed u/S. 153A in the case of beneficiary ignoring the vital fact that there was a common search u/s 132 conducted on the same day in both the cases of the entry provider and the beneficiary? b. Whether ITAT was justified in holding that mere failure of cross examination of entry operator is fatal when copy of statement was provided to the Assessee and Assessee failed to discharge the onus of providing the genuineness of LTCG especially in view of the apex court decision in the case of State of UP vs. Sudhir Kumar Singh [AIR 2020 SC 5215]?

5. Mr. Ajit Sharma, Sr. Standing Counsel submits that the ITAT has erred by holding that the Assessee's premises were not searched, and therefore notice under Section 153A could not have been issued. He submits that ITAT ignored that the assessment order itself reveals that a common search was conducted at various places on 18th November, 2015, including at the premises of the entry provider and the Assessee and thus assessment u/s 153A has been rightly carried out. He further argues that ITAT erred in setting aside the assessment order on the ground that no right of crossexamining Pradeep Jindal was afforded to the Assessee. He argues that there is no statutory right to cross-examine a person whose statement is relied upon by AO, so long as the Assessee is provided with the statement and given an opportunity to rebut the statement of the witness. The Assessee has been provided with a copy of the statement of Pradeep Kumar Jindal and the ITAT has wrongly noted to the contrary. Furthermore, the Assessee has failed to bring in any evidence to dispute the factual position emerging therefrom and has therefore failed to establish any prejudice on account of not getting the opportunity to cross-examine the witness. In view of the statement of Mr. Jindal, it was incumbent upon the Assessee to discharge the onus of proof which had been shifted on him. The revenue has sufficient material in hand in the nature of the statements recorded during the search and therefore, the Assessee ought to have produced evidence to negate or to contradict the evidence collected by the AO during the course of the search and assessment proceeding which followed thereafter. Mr. Sharma also emphasised that the statement recorded under Section 132(4) of the Act can be relied upon for any purpose in terms of the language of the Act and thus action under section 153A was justified.

6. We have considered the contentions of Mr. Sharma, however, we feel that the instant appeals do not raise any question of law, much less substantial question of law for our consideration.

The relevant portion of the impugned order reads as under:- "5. (...) We find that the Ld. Counsel for the assessee has drawn our attention towards the relevant portion of the judgment / decision of the Hon'ble Supreme Court of India, Hon'ble High Courts and various Benches of the Tribunal on the legal issue on which he argued, Ld. Counsel for the assessee further submitted that admittedly from assessee's own

premises during search u/s. 132 of the Act no incriminating material was found and no adverse statement is there on record of the assessee u/s. 132(4) of the IT Act and it is an admitted fact before us that mere basis of un-confronted statement of Sh. Pradeep Kumar Jindal recorded u/s. 132(4) of the Act in his own separate search action and on the basis of unconfronted material for the said search u/s. 132(4), which in our considered opinion, cannot be made as a sole basis for making the additions u/s. 153A of the IT Act without recourse of mandatory and exclusive provisions under the Act like u/s 153C of the Act which specifically covered the extant situation. In our opinion, the decision of the Hon'ble Supreme Court of India, Hon'ble High Courts and the various Benches of the Tribunal are directly applicable in the present case wherein they have adjudicated and decided the similar issue in favour of the assessee by accepting the similar arguments of the Ld. Counsel for the assessee. (...) xx ... xx ... xx 5.1. As regards the arguments advanced by Ld. CIT(DR) are concerned, the same are not applicable in the present case because keeping in view the assessment order passed by the AO we have not seen from the proceedings of the AO regarding providing any statement of Sh. Pradeep Kumar Jindal to the assessee meaning thereby the Revenue Authorities have not provided the statement of Sh. Pradeep Kumar Jindal to the assessee and also did not provide the opportunity of cross examination of Sh. Pradeep Kumar Jindal, on which basis the addition has been made and the provisions of ection 153A of the Act have been wrongly applied in the case of the assessee. Therefore, we do not find any cogency in the arguments advanced by the Ld. CIT(DR) and the case laws cited by him in support of his contention are not applicable here."

7. The preliminary question under consideration before us is whether a statement under Section 132(4) constitutes incriminating material for carrying out assessment under S. 153(A) of the Act. A reading of the impugned order reveals that the statement of Mr. Jindal recorded under Section 132(4) forms the foundation of the assessment carried out under Section 153A of the Act. That statement alone cannot justify the additions made by the AO. Even if we accept the argument of the Revenue that the failure to cross-examine the witness did not prejudice the assessee, yet, we discern from the record that apart from the statement of Mr. Jindal, Revenue has failed to produce any corroborative material to justify the additions. On the contrary we also note that during the course of the search, in the statement made by the assessee, he denied having known Mr. Jindal. Since there was insufficient material to support the additions, the ITAT deleted the same. This finding of fact, based on evidence calls for no interference, as we cannot re-appreciate evidence while exercising jurisdiction under section 260A of the Act

Revenue's case is hinged on the statement of Mr. Jindal, which according to them is the incriminating material discovered during the search action. This statement certainly has the evidentiary value and relevance as contemplated under the explanation to section 132(4) of the Act. However, this statement cannot, on a standalone basis, without reference to any other material discovered during search and seizure operations, empower the AO to frame the block assessment.

This court in Principal Commissioner of Income Tax, Delhi v. Best Infrastructure (India) P. Ltd., 2 has inter-alia held that: "38. Fifthly, statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal. 3"

9. In Commissioner of Income Tax v. Harjeev Aggarwal, 4 this Court had held as follows: "23. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act. 24. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation. 25. (...) However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded 26. In CIT v. Sri Ramdas Motor Transport Ltd., (1999) 238 ITR 177 (AP), a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. (...) 27. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment. 28. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to

ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee. 29. In Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T & AP), a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. (...)"

(foot notes by Hon'ble Delhi high court : 2 [***2017] 397 ITR 82: 2017 SCC OnLine Del 9591. This case was challenged in the Supreme Court and SLP No. 13345/2018 was admitted. But subsequently, it was dismissed as withdrawn. Thus, the decision in Best Infrastructure (supra) has not been disturbed. 3 & 4 Commissioner of Income Tax v. Harjeev Aggarwal, (2016) 290 CTR 263: 2016 SCC OnLine Del 1512. This case was subsequently referred to a larger bench in the case of CIT v. M.S. Aggarwal (ITA 169/2005), where subsequently the question was not answered as the referral court dismissed the same on account of law tax effect on 9th August 2019. Thus, the decision in Harjeev Aggarwal (supra) continues to be the prevailing legal position))***

Finally on interplay of section 153A vs 153C it is held by Hon'ble Delhi high court that "*10. Now, coming to the aspect viz the invocation of section 153A on the basis of the statement recorded in search action against a third person. We may note that the AO has used this statement on oath recorded in the course of search conducted in the case of a third party (i.e., search of Pradeep Kumar Jindal) for making the additions in the hands of the assessee. As per the mandate of Section 153C, if this statement was to be construed as an incriminating material belonging to or pertaining to a person other than person searched (as referred to in Section 153A), then the only legal recourse available to the department was to proceed in terms of Section 153C of the Act by handing over the same to the AO who has jurisdiction over such person. Here, the assessment has been framed under section 153A on the basis of alleged incriminating material (being the statement recorded under 132(4) of the Act). As noted above, the Assessee had no opportunity to cross-examine the said witness, but that apart, the mandatory procedure under section 153C has not been followed. On this count alone, we find no perversity in the view taken by the ITAT. Therefore, we do not find any substantial question of law that requires our consideration."*

Case law 6: **Hon'ble Bombay high court in case of Bhupinder Harilal Mehta vs PCIT in Writ Petition 586 of 2021 order dated 27.04.2021 (Revenue asking 125 % in DTVSV so called search matters analysed and discussed in context of alleged penny stock cases)**

Revenue's case

"19. On the other hand, Shri Sham Walve, learned counsel for the respondents seeks to rely on the Affidavit in Reply of the respondents dated 25th March 2021 to counter the submissions made on behalf

of petitioner. He submits that since the assessment order was framed based on search/survey enquiries conducted by the Directorate of Income Tax (Investigation), Kolkatta on 02.07.2013, the designated authority has rightly computed petitioner's liability under Vivad se Vishwas Act at Rs.2,57,67,714/- by adopting a rate of 125% of disputed tax applicable to search case in accordance with section 3 of the DTVSV Act. He would submit that the assessment order was framed based on the information shared by the investigation regarding manipulation of market price of shares of certain companies listed on BSE in order to provide entry of bogus long term gains to the beneficiaries including petitioner. The assessment order passed under section 143(3) of the Income Tax Act is on the basis of the search and seizure action and the statement recorded under section 132 (4) of the Income Tax Act coupled with post search enquiries and as the petitioner had failed to demonstrate the genuineness of the transactions, addition was made. 20. He submits that section 3(b) and section 9(a) (i) of the DTVSV Act refer to an assessment, where the tax arrear has been determined on the basis of search under section 132/132A of the Income Tax Act and therefore provisions of section 3(b) and section 9(a)(i) of the DTVSV Act apply to every assessment for which the basis is a `search' conducted under the Act. When search is conducted in case of an assessee, assessment pertaining to six assessment years preceding the assessment year of search and relevant assessment years are assessed under section 153A of the Act. If the search was conducted in case of any other person but money, bullion, jewellery, assets, books, documents belonging or pertaining to assessee are seized or information contained therein relate to the assessee, the assessment pertaining to six assessment years preceding the assessment year of search (i.e the year in which such seized asset/ books/ documents c. are handed over to the AO of assessee) and relevant assessment years is framed under section 153C read with section 153A of the Act. In any other case, the assessment is framed either under section 143(3) or section 147 of the Act depending on the time elapsed from the end of the relevant assessment year. Thus, the phrase `on the basis of search' used in the DTVSV Act has a broad connotation and covers all assessment orders. The principle of equity demands that similarly placed cases should be treated in a similar manner. It cannot be argued that a person whose assessment is framed under section 153C of the Income Tax Act on the basis of information contained in seized assets pertaining to him should be treated differently from a person in whose case information emanates from search but he is not covered by the provisions of section 153C of the Act. In petitioner's case, the basis for assessment was information emanating from a search conducted by the Directorate of Income Tax (Investigation), Kolkata. Had the assessment not been based on information emanating from a search, the question of clarification would not have arisen. However, in petitioner's case there is no doubt that the assessment was based on information emanating from a search and hence is required to be treated as a search case. Hence, designated authority has correctly applied the relevant rate of 125% of disputed tax to determine amount of tax payable as per the DTVSV Act. Further, the row no.2 and 3 in Form No.3 ssued by designated authority contains details as filled by the petitioner in the Form 1 and 2. Since petitioner had filed declaration and undertaking under DTVSV Act stating that his case is not a search case the same is reflected in row 2 and 3. The designated authority had correctly mentioned in the remarks that in the case of petitioner the assessment order was framed on the basis of search conducted by investigation wing and hence amount payable under Act is 125% of the disputed tax. Therefore, it is clear that there is no contradiction in the certificate issued by designated authority. 21. He submits that the market price of shares of M/s.Life Line Drugs and Pharma Limited being pennystock company was manipulated by operators to obtain bogus long term capital gain as has been revealed pursuant to statements under section 132(4) and post search enquiry. Had the search not happened, assessing Officer during assessment proceedings would not have conducted further analysis and recorded statement of the

assessee regarding pennystock. 22. He submits that FAQ 70 and its answer in circular No.21of 2020 was to clarify that the provisions of DTVSV Act apply uniformly to all cases where assessment is based on search. He submits that the assessment order describes modus operandi followed by the racket of accommodation of entry providers which was unearthed during the search proceedings. He stresses on the words "on the basis of search" to emphasis this point. 25. He submits that it is, therefore clear from the new circular that if search is conducted in the case of some persons and transactions pertaining to other persons have been found, then the other persons' case shall be treated as a search case. And would not be material that warrant under section 132 of the Income Tax is not executed, for a case to be treated as search case. 6. He, therefore, submits that there is no merit in the contentions of petitioner and the petition ought to be dismissed with costs and petitioner be directed to make payment of Rs.2,57,67,714/- being 125% of the disputed tax to the revenue."

Important principles laid down by Bombay high court in aforesaid order:

"30. The DTVSV Act is an Act to provide a resolution for pending tax disputes which have been locked up in litigation. Taxpayers can put an end to tax litigation by opting for the scheme and also obtain immunity from penalty and prosecution by paying percentages of tax as specified therein. This would bring peace of mind, certainty, saving of time and resources for the taxpayers and also generate timely revenue for the Government.

It is to be noted that the aforesaid clarification with respect to FAQ No. 70 has been issued after the petition had been filed. It clarifies that a "search case" means an assessment or reassessment made under Section 143(3)/144/147/153A/153C/158BC of the Income-tax Act in the case of a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD on the basis of search initiated under Section 132, or requisition made under Section 132A of the Income-tax Act. Answer to FAQ No.70 of Circular 21/2020 has been replaced by the above meaning. To be considered a search case, the assessment/re-assessment should be: (i) under 143(3)/144/147/153A/153C/153BC of the Income Tax; and (ii) be in respect of a person referred to in Section 153A or Section 153C or Section 158BC or Section 158BD Act; and (iii) should be on the basis of search initiated under Section 132, or requisition made under Section 132A of the Income-tax Act. If all the three elements/criteria as above are satisfied, the case is a search case.

…. It is not the case of the Revenue that action pursuant to sections 153A or 153C had been initiated in the case of petitioner. These facts are not disputed. Therefore, in our considered view, this criteria no. (ii) necessary for a case to be search case is not satisfied. 37. Let us examine criteria no. (iii) i.e whether the assessment is on the basis of search initiated under Section 132, or requisition etc. made under Section 132A of the Income-tax Act. Admittedly, no search has been initiated in the case of Petitioner. Assessment order dated 22nd December 2017 suggests that the case of petitioner was selected for scrutiny under "CASS" selection and notices under the Income Tax Act were issued to petitioner not pursuant to any search under section 132 or requisition under section 132A. Assessment refers only to section 143(3) of the Income Tax Act and is not read with any provision of the search and seizure contained in Chapter XIV-B of the Income Tax Act where the special procedure for assessment of search case is prescribed. The name of Petitioner nowhere figures in any of the statements under section 132(4) of the searches referred to in the assessment order nor in the statements pursuant to survey action of persons under

search or survey. Even the concluding paragraph referred to by counsel for Revenue refers only to the findings of the search/survey, inquiries conducted in the case of brokers, operators, entry providers and exit providers and on the basis of the SEBI and NSE findings, the nature of transaction entered into by the assessee for receiving LTCG. The statement of Petitioner recorded on 14.12.2017 at the time of assessment under section 131, nowhere suggests any incriminating material or admission of purported manipulation/rigging of scrips of Lifeline Drugs except saying that he had purchased the shares on advice of his brother nor it is elicited that the Petitioner had any knowledge of penny stock company, its financial position or about the activities of the company. In the scenario, the allegation that the assessee in collusion with the parties who had rigged the prices of shares artificially by manipulation and thereby introduced the amount received in the guise of LTCG/STCG is rather conjecturous. Nowhere in the statements recorded, referred to in the assessment order is there any allegation that Petitioner was one of the parties that had booked any artificial gains. There is no allegation that any incriminating material belonging to Petitioner was obtained in the course of the search. The assessment therefore does not appear to be on the basis of search initiated under Section 132, or requisitions made under Section 132A of the Income-tax Act. Having regard to aforesaid, it is difficult to agree with the submissions made on behalf of the counsel for the Revenue that the assessment order is on the basis of search.

42. Since petitioner's case cannot be regarded as a search case, consequently order dated 26th January 2021 in Form No.3, passed by Respondent No.1 being the Designated Authority, would be unsustainable 43. We accordingly set aside Order dated 26th January 2021 in Form No.3 passed by Respondent no. 1 and direct the Respondent no. 1 to pass a fresh order in Form No.3 determining tax payable by the Petitioner as a non-search case in accordance with the DTVSV Act read with Rule 4 of the DTVSV Rules, as per Circular no. 4/2021 dated 23rd March, 2021 within a period of ***six*** *weeks from the date of receipt of this order."*

Case law 7: **Hon'ble Bombay high court in case of Govindrajulu Naidu vs PCIT in Writ Petition 6903 of 2021 order dated 29.04.2021 (Manner of interpretation of DTVSV Act discussed in context of eligible assessee)**

Factual background:

"The assessment for the AY 2014-15 had been re-opened by notice issued under section 148 of the IT Act. The petitioner, as referred to above, had filed a return showing amount of Rs.5,76,00,000/- as his income and declared a total amount of Rs.6,43,69,719/- and on re-assessment, the total amount was assessed at Rs.6,44,09,400/- under assessment order dated 30.03.2019. 4. The petitioner aggrieved by the order dated 30.03.2019 passed by respondent No. 2 referred to above had filed an appeal under Section 246A of the IT Act before the Commissioner of Income Tax (Appeals). The petitioner had raised a ground that respondent No. 2 had erred in taxing the amount of Rs.5,76,00,000/- as income of petitioner for the relevant assessment year. The appeal had been pending."

Petitioner case (substratum) : "13. He submits that in the present case, it is undisputed that the petitioner has filed appeal and it is indisputable there exists dispute as defined under the Rules. He takes us through the relevant details referring to that the petitioner is disputing Rs. 5,76,00,000/- in the appeal and the specific ground in this respect has also been taken up. He submits, it is not the case of the revenue that the amount of Rs. 5,76,00,000/- is not disputed amount in the appeal before the appellate authority."

Revenue case: "14. Learned counsel for the respondents contends that the writ petition is not maintainable, as the appeal filed by the petitioner against the assessment order, does not involve any disputed issue arising out of the assessment order. The amount contested by the petitioner has been disclosed by the petitioner in his return of income and thus, the appeal itself being untenable and the same cannot be resolved under the DTVSV Act. It is being contended that the assessee cannot be aggrieved in respect of income voluntarily declared in return of income and the petitioner can be said to be aggrieved only to the extent of addition made of Rs. 42,840/- and not in respect of the amount which he declared in return filed."

Further reference made to : "15. Learned counsel for the petitioner during hearing had drawn our attention to a decision of this court dated 09.04.2021 in case of Saddruddin Tejani Vs. Income Tax Officer and another (W. P. No. 611 of 2021) decided on 9th April 2021, wherein the statement of object and the reasons for bringing in the DTVSV Act have been considered. This court had observed that the enactment has been brought in to address the urgent need to provide for resolution of pending tax disputes, wherein a huge amount of disputed tax arrears had been locked up. The DTVSV Act is aimed not only to benefit the Government by generating timely revenue but also to benefit the taxpayers by providing them peace of mind, certainty and saving time and resources enabling the taxpayers to deploy the time, energy and resources towards the business activities by opting for such dispute resolution. The act confers benefit on the tax payers who can put an end to tax litigation by paying specified percentage of tax and obtain immunity from penalty and prosecution and waiver of interest. It has also been observed that the preamble of the Act provides for resolution of disputed tax and the matter connected therewith or incidental thereto and the emphasis is on disputed tax and not on disputed income"

Important findings of Bombay high court: Held

"20. In the present case, the petitioner has specifically contended that there is a specific ground taken in the appeal and has specifically referred to those in the writ petitions as well as memorandum of appeal has also been a part of annexures to the petition. It has been submitted that a specific ground has been taken that the assessing officer has erred in taxing the amount of Rs. 5,76,00,000/- as income of the appellant. It is contended that it would not be a case that the petitioner has not disputed dis-allowance of the concerned figure. This position has not been disputed by revenue.

21. In Commissioner of Income Tax Vs. Shatrusailya Digvijaysingh Jadeja it appears to have been observed to the effect that while the act contemplates an appeal and its pendency, a qualification to the same as to competency of appeal is a matter of examination by the appellate forum. In said Judgment, decision of Tirupati Balaji Developers (P.) Ltd. Vs. State of Bihar, reported in [2004]5 SCC 1 has been referred to. It appears to have been observed that an appeal would be an appeal may be irregular or incompetent.

22. The petitioner had no idea that his appeal would be of no significance on the consideration underlying impugned order. He had not been heard on the same.

23. In the present matter, the petitioner has categorically contended that the revenue does not dispute that an appeal has been filed by the petitioner/declarant before the appellate forum. As such, there exists a dispute as referred to under the DTVSV Act and the rules. In such a scenario, the submission on behalf of the revenue, the petitioner had offered the income and as such, the tax on the same annot be considered as disputed tax, would not align itself with the object and the purpose underlying the bringing in of the DTVSV Act and the rules thereunder. It would have to be considered that the enactment and the rules have been brought out with specific purpose, object and intention to expedite realisation of locked up revenue providing certain reliefs to the tax payers who opt for applying under the Act and such an option is not available to only a few persons. The scheme appears to be an open scheme with specific exclusions as are referred to in section 9 which is as under :-

24. It is not the case of the revenue at all that in the petitioner's case, the provisions of the DTVSV Act would not apply to petitioner's case, being under the exclusionary category referred to under Section 9. The contention that the petitioner's tax liability cannot be construed as disputed tax, while going by the definition and the scheme of DTVSV Act, when those do not make any distinction and categorize the appeals. The act does not purport to go into the grounds of appeal or for that matter, inside the return.

25. The reasons given tend to go beyond the provisions of the DTVSV Act and rules and are at cross roads with intention and object of the enactment. The reasons are not compatible with the provisions of the Act and rules.

26. Learned counsel had submitted that the petitioner has not been offered any opportunity of hearing relying on Umanath Pandey Vs. State of U. P., reported in 2010(20) STR 268(SC) contending that may not be it is provided for, however, the same will have to be read into and the principles will have to be followed, while determining tax payable adverse to the assessee. He also refers to orders of this court in the case of Sabareesh Pallikere, Proprietor of M/s. Finbros Marketing vs. Jurisdictional Designated Committee (bearing Writ Petition No. WP(L)/5510/2020), wherein it is observed that it would be in defiance of logic and contrary to the very object of the scheme to reject a declaration on the ground of being ineligible without giving a chance to the declarant to explain its case.

27. Having regard to the provisions and the scheme of the DTVSV Act, it appears that the submissions on behalf of the petitioner carry lot of weight and it is difficult to consider the authority under the DTVSV Act would be able to go into the merits/grounds or legality of the appeal filed by the declarant. 28. The Petition is allowed. The rejection of declaration of the Petitioner is set aside. The declaration of petitioner be processed in accordance with the DTVSV Act and the rules thereunder."

Case law 8 : **Hon'ble Delhi high court in case of Bharat Bhushan Jindal vs PCIT in W.P. (C) 3921/2021 order dated 26.04.2021(Relating back theory discussed in context of misc. application recall at ITAT vis a vis DTVSV eligibility discussed)**

"Analysis and Reasons: 8. We have heard the learned counsel for the parties and also perused the record. What emerges, and qua which there can be no dispute, is the following: (i) The AO passed the assessment order on 21.03.2014 for the AY 2011- 2012. Via this order, there was an appreciable

enhancement, as noticed above, in the taxable income of the petitioner-assessee. (ii) The petitioner-assessee preferred an appeal, for the said AY, before the CIT(A), which was allowed on 29.01.2016. The revenue filed an appeal on 10.03.2016 before the Tribunal. The appeal was, however, dismissed by the Tribunal on 22.06.2018, based on a mistake of fact. Revenue"s appeal was dismissed by the Tribunal under the mistaken belief that in the earlier AYs, it had taken a view against the revenue and in the favour of the assessee. (iii) This obvious mistake, once brought to the notice of the Tribunal, via a MA preferred by the revenue, was rectified vide order dated 11.05.2020. (iv) The MA was filed before the specified date, i.e., 31.01.2020. As per the information available on the Tribunal"s portal, the MA was filed on 13.11.2018. (v) The Tribunal, realising the mistake that had been made, recalled its order dated 22.06.2018 and restored the revenue"s appeal and directed that the appeal be heard afresh. As a matter of fact, the Tribunal fixed the date of hearing, via the very same order, in the appeal, on 06.07.2020. (vi) The appeal preferred by the revenue is pending disposal.

9. Given these undisputed facts, the argument advanced by Mr. Hossain, that the order dated 22.06.2018 was an order on merits, does not find favour with us. The expression "in limine", which is, very often used as a part of Court lingo by judges and lawyers, simply, means "preliminarily". [See: Black"s Law Dictionary, 9th edition, Bryan A. Garner, page 85.] 9.1. A careful perusal of the order dated 22.06.2018 would show that the revenue's appeal was dismissed, at the threshold, based on a mistaken impression, perhaps, given by the departmental representative, that the Tribunal had taken a view against the revenue. As noticed hereinabove by us, on 22.06.2018, on the date, the revenue's appeal was dismissed. the petitioner-assessee was not represented. 9.2. This obvious error, which was apparent from the record, was corrected by the Tribunal, on 11.05.2020. Therefore, if we were to apply the response given to FAQ no. 61, as contained in the revenue's Circular No. 21 of 2020, dated 04.12.2020, in our opinion, the petitioner-assessee should succeed. For the sake of convenience, FAQ 61 and the response given, qua the same is set forth hereafter: "Q.No.61. Whether Miscellaneous Application (MA) pending as on 31 January 2020 will also be covered by the scheme? Answer: If the MA pending on 31" Jan 2020 is in respect of an appeal which was dismissed in limine (before 31" Jan 2020), such MA is eligible. Disputed tax will be computed with reference to the appeal which was dismissed." [Emphasis is ours] 9.3. A plain reading of the response to FAQ no. 61 would show that it requires fulfilment of two prerequisites for an appeal to be construed as pending on the specified date [i.e., 31.01.2020] as per the provisions of the 2020 Act. i. First, the MA should be pending on the specified date, i.e., 31.01.2020. ii. Second, the said MA should relate to an appeal, which had been dismissed "in limine" before 31.01.2020. 9.4. Insofar as the first aspect is concerned, there is no dispute that the MA was filed, and was pending on the specified date, i.e., 31.01.2020. As regards the second aspect, in our view, the order of the Tribunal dated 22.06.2020 can only be construed as an order that dismissed the revenue"s appeal in limine. In our opinion, the decision taken to dismiss the revenue"s appeal was based on a preliminary assessment of the facts, i.e., the outcome of the revenue"s appeal preferred with the Tribunal qua the same issues in earlier AYs. There was no discussion on the merits of the case. Therefore, in our view, the petitioner-assessee should succeed on this ground alone.

9.5. Besides this, we are also of the view, that in the given facts and circumstances, the order dated 11.05.2020 would have to be construed, metaphorically, as one breathing life into a dead appeal, in the light of the doctrine of relation back1 [See: Commissioner of Income-Tax vs. Haryana Sheet Glass Ltd., 2009 SCC OnLine Del 4226]. As alluded to above, the order dated 11.05.2020 rectified the Tribunal"s earlier order dated 22.06.2018, as according to the Tribunal, a mistake, apparent on the face of the

record, had occurred2 . The Tribunal, in its operative directions, while recalling the order dated 22.06.2018, not only restored the revenue's appeal but also posted it for a fresh hearing. Therefore, if the doctrine of "relation back" were to be applied, and given its logical application, it would have to be said that the revenue's appeal was pending on the specified date, i.e., 31.01.2020. Conclusion: - 10. Given the foregoing, we are inclined to allow the prayer made in the writ petition. The impugned orders are set aside. 11. The revenue will accord due consideration to Form no. 1 and 2, filed by the petitioner-assessee, and thereafter take the next steps in the matter, as per the provisions of the 2020 Act, keeping in mind the timelines given therein."

Case law 9: Hon'ble Delhi High court in case of Shyam Sunder Sethi vs PCIT in W.P. 2291/2021 order dated 03.03.2021 (Meaning of *pending* appeal discussed in context of delayed appeals filed with condonation pending on cut off date whether eligible under DTVSV Act analysed)

17. We have heard learned counsel for the parties and perused the record. The dates and events which have been set out hereinabove, are not in dispute. What has emerged, though, from the record is the following: (i) That the petitioner filed an appeal with respondent no.3/CIT(A) concerning the assessment year 2011-2012 on 11.07.2019. ii) This appeal included a plea for condonation of delay which was filed by the petitioner in the prescribed format. (iii) Because the petitioner was seeking condonation of delay in filing the appeal, quite obviously, the limitation provided for instituting the appeal had expired. The limitation, even according to the petitioner, had expired on 03.02.2019. (iv) The plea for condonation of delay, as noticed above, was incorporated in the appeal and was preferred before issuance of the circular dated 04.12.2020. (v) Respondent no.3/CIT(A) as on the date of rejection, i.e., 12.06.2020 had not dealt with the plea for condonation. 18. Therefore, what we are required to delve into is: whether the response given to FAQ 59 circumscribed the power of the designated authority to process forms 1 and 2 filed by the petitioner. It would be relevant in this context to advert to Section 2 (1) a (i) and Section 2 (1) a (n) of the Act. For the sake of convenience, the same is extracted hereafter: "2. (1) (a) (i) a person in whose case an appeal or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by both, before an appellate forum and such appeal or petition is pending as on the specified date;" "2. (1) (a) (n) "specified date" means the 31st day of January, 2020" 19. A perusal of the aforesaid provisions and the attendant provisions of the Act would show that the request should have been made in the prescribed format, i.e., form 1 and 2 before the specified date, i.e., 31.01.2020 and that the appeal (we are not concerned with other forms of action) should be pending before the appellate forum, [i.e., respondent no.3/ CIT(A) in this case] on the specified date. 20. These provisions do not advert to what has been contended before us by Mr. Singh. 20.1 To shed light on what has been submitted before us by Mr. Singh, it would be necessary to extract FAQ 59 and the response provided thereto. "Q 59. Whether the taxpayer in whose case the time limit for filing of appeal has expired before 31st January, 2020 but an application for condonation of delay has been filed is eligible? Answer: If the time limit for filing appeal expired during the period from 1st April, 2019 to 31st January, 2020 (both dates included in the period), and the application for condonation is filed before the date of issue of this circular, and appeal is admitted by the appellate authority before the date of filing of the declaration, such appeal will be deemed to be pending as on 31st January, 2020." 21. As would be evident, the response was not only beyond the provisions of the 2020 Act but also qua the query raised. Simply put, the query raised in the form of FAQ 59 was: if an appeal had been filed before the specified date, i.e., 31.01.2020 along with an application for condonation of delay, would such assessee (i.e., the taxpayer) be eligible for availing benefits available under the 2020 Act? 22. However, in response to this query,

several facets have been alluded to, which are not found in the 2020 Act. For instance, the respondent states that if the limitation or the time limit for filing the appeal expires during the period 01.04.2019 and 31.01.2020 (both dates included) and the application for condonation is filed before the date of issuance of the said clarification, i.e., 04.12.2020, the appeal can be construed as pending on the specified date i.e. 31.01.2020, only if it is "admitted" by the appellate authority before the filing of the declaration in the form prescribed under the 2020 Act. 23. Insofar as the petitioner is concerned, as noted, the appeal which included the condonation of delay application, was filed on 11.07.2019, that is, well before the specified date; the specified date under the 2020 Act being 31.01.2020. 23.1 We were not referred to any provision under the 2020 Act, which provided that limitation qua the subject appeal should be expired within the period spread out between 01.04.2019 and 31.01.2020 (both dates included) and it ought to have been admitted for it to be considered as "pending" under the 2020 Act. 24. The fact that the appeal included a plea of condonation of delay is not in dispute. Therefore, the appeal could not have been admitted unless the delay was condoned. But that by itself does not efface the fact that the appeal was pending. An appeal would be "pending" in the context of Section 2 (1) (a) of the 2020 Act when it is first filed till its disposal1 . Section 2(1)(a) of the 2020 Act does not stipulate that the appeal should be admitted before the specified date, it only adverts to its pendency. Respondent no.1 seems to have, in our view, wrongly equated admission of the appeal with pendency. In our view, as noted above, the appeal would be pending as soon as it is filed and up until such time it is adjudicated upon and a decision is taken qua the same. We could have appreciated the stand of the respondents if a plea made for condonation of delay would have been rejected by respondent no.3/CIT(A) before the petitioner had filed Forms 1 and 2. If that situation obtained, the respondents could have, possibly, taken the stand that nothing was pending before the appellate forum 25. As indicated above, when Forms 1 and 2 were filed by the petitioner, respondent no.3/CIT(A) was seized of the appeal, which included, a plea for condonation of delay. 26. Therefore, in our opinion, the order of rejection dated 28.01.2021 is bad in law. It is, accordingly, set aside. Respondent no.1 is directed to process the forms filed by the petitioner, i.e., Forms 1 and 2 under the provisions of the 2020 Act.

(IMPORTANT FOOT NOTE: See Prem's Judicial Dictionary, Vol. III 196: "The word pending is thus defined in Stroud"s Judicial Dictionary Ed. 3, vol. 3, p.2141: (1) A legal proceeding is „pending" as soon as commenced and until it is concluded i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Similar are the observations of Jessel, M.R. In Re Clagett"s Estate Fordham v. Clagett, (1882) 20 Ch. D. 637 at p. 653. ")

Case law 10: **Mumbai *A* bench of ITAT in case of Arch Pharmaceuticals in ITA 6656/Mum/2017 order dated 07.04.2021 (Entire law on approval u/s 153D discussed in context of approvals in search assessment cases)**

"4. At the commencement of hearing, Ld. AR representing both the assessee pointed out that both assessee captioned above have also filed the additional grounds of appeal whereby legality of approval granted by the designated superior authority u/s 153D have been challenged….4.3 We have considered the rival submission on admission of additional ground. Ld. DR objects on the pretext that the relevant documents were misplaced in the department. Further, the argument of the revenue that assessee has raised the legal grounds belatedly, alone cannot be reasons to deny the legal right of the assessee to raise the additional grounds. The Courts have consistently held that Income tax proceedings are not strictly adversarial in nature. It is trite that a fundamental error of law can be pointed out at any stage. There

cannot be any estoppel available to Revenue on the ground that the assessee did not made the legal question before lower authorities. The legal issue is capable of being adjudged on the basis of material on record. An assessee in a pending proceeding, is entitled to raise legal grounds where relevant facts are discernible from the existing records. We, therefore reject the objections of the revenue in this regard. 5. In short, the prayer for admission of additional ground noted above which are not set forth in memorandum of appeal deserves to be entertained and thus are being admitted for adjudication in terms of Rule 11 of Income Tax (Appellate Tribunal) Rules 1963 owing to the fact that objections raised in additional ground is legal in nature for which relevant facts are stated to be emanating from existing records. Similarly, the cross objections filed by the Assessee seeking to inter alia challenge the legal sustainability of search assessments are also admitted for adjudication as such issue is cardinal and goes to the root of the search assessments impugned in this appellate proceedings.

8.1 The content of forwarding letter of AO dated 29/12/2010 to the designated authority seeking approval of draft assessment orders for various assessment years is reproduced hereunder;

"OFFICE OF THE ASSTT. COMMISSIONER OF INCOME TAX, CENTRAL CIRCLEC32 R. N. 32(3), AAYKAR BHAVAN, M K ROAD, MUMBAI-400 020 No. ACIT-32/Appr. u/s 153D/2010-11 Dated: 29.12.2010 To, Addl. Commissioner of Income tax, Central Range -VIII, Mumbai. Sir, Sub : Draft assessment orders under section 143(3) rws 153A in the case of M/s Arch Pharma Labs Ltd. For A.Ys 2003-04 to 2008-09 and 143(3) for A. Y. 2009-10 - reg. (Arch Group) Kindly refer to the above. 2. I am submitting herewith a draft assessment order u/s 143(3)/153A for A.Ys. 2003-04 to 2008-09 and 143(3) for A.Y. 2009-10 in the case of M/s Arch Pharma Labs Ltd 3. Further, it is submitted that all seized materials and data on electronic devices copied during the search operation have been considered while framing assessment order. 4. Your kind approval is solicited as per provision of section 153D of the IT. Act, 1961 for completing the search assessments in the above mentioned case Yours faithfully, Asstt. Commissioner of Income tax Central Circle-32, Mumbai Encl: As above:"

*8.2 The approval memo of the designated authority on such draft assessment orders, which is subject matter of serious challenge, is also reproduced hereunder: OFFICE OF THE ADDL. COMMISSIONER OF INCOME-TAX CENTRAL RANGE -VIII, Room No.3, Ground Floor, Aayakar Bhavan, M.K. Marg, Mumbai - 400 020. (022) 22030602 No.Addl. CIT/CR. VIII/153D./2010-11 Dated: 31/12/2010 To, The Asstt. Commissioner of Income-tax, Central Circle-32, Mumbai. Sub : Approval u/s,153D of the I.T. Act in the cases of of Arch Group - Order u/s 143(3) r.ws. 153A for A.Ys. 2003-04 to 2008-09 & Order u/s 143(3) for A.Y.2009-10 - Reg. Ref.: letter No.ACIT-32/Appr. u/s. 153D/2010-11 dated 29.11.2010. *** Please refer to the above. 2. Approval is hereby accorded u/s.153D of the Income-tax Act, 1961 to complete assessments u/s. 143(3) r.w.s. 153A of the I.T. Act in the following case on the basis of draft assessment orders for the A.Ys. 2003-04 to 2008-09 and A.Y. 2009-10 u/s. 143(3) forwarded by you, vide your letter No.ACIT-32/ Appr. u/s. 153D/2010-11 dated 29-12-2010:*

1. M/s. Arch Pharma Labs Ltd. 2003-04 to 2008-09 143(3) rws 153A 3. Approval is also accorded to complete the assessment u/s.143(3) of the I.T. Act in the above case for A.Y. 2009-10. 4. You are requested to ensure that suitable office notes are prepared and put on record in each case where necessary and also remedial action or consequential action in the form of passing on the relevant

information to other Assessing Officers / agencies (if any) is taken expeditiously in each case. Addl. Commissioner of Income-tax, Central Range-VIII, Mumbai"

Held

11. We have carefully considered the rival submissions and material placed on record and case laws cited. The legal objection of transgression of requirements of approval under section 153D is in controversy. Pursuant to search carried out in the premises of the Assessee and other connected group cases, the assessment was carried out under S. 153A/ 143(3) of the Act. The Assessing officer has forwarded the draft assessment orders for 7 years (AY 2003-04 to AY 2009-10) for endorsement and approval of the superior authority at the fag end of the limitation period on 29/12/2010 to meet the legal requirement imposed by section 153D of the Act. The Addl. CIT i.e. the superior authority has, in turn, granted a combined and consolidated approval for all 7 assessment years in promptu on 31/12/2010.

11.1 It may be pertinent to observe at this stage that the impugned assessment orders were passed u/s. 143(3) rws 153A of the Act for the AY 2003-04 to AY 2008-09 and for the AY 2009-10 u/s. 143(3) of the Act pursuant to search carried out under s.132 of the Act. For passing such assessment orders, the Assessing Officer is governed by s.153D of the Act whereby the Assessing Officer should complete the assessment proceedings and prepare a draft assessment order which need to be placed before the approving authority i.e. Joint / Addl. Commissioner (designated authority giving approval to search assessments u/s. 153D of the Act). The approving authority is necessarily required to objectively evaluate such draft assessment order with due application of mind on various issues contained in such order so as to derive his/ her conclusive satisfaction that the proposed action of AO is in conformity with subsisting law. The AO is obligated to pass the assessment order exactly, as per approval/ directions of the designated authority. Inevitably, this evaluation is to be made on basis of material gathered at time of search as well as obtained in the course of the assessment proceeding. The requirement of law is to grant approval not merely as a formality or a symbolic act but a mandatory requirement.

1.2 In the backdrop of facts narrated in the preceding paras, it is the contention on behalf of the asssessee that approval granted under S. 153D does not meet the requirement of law and hence assessment orders passed in consequence of such non-est approval is a nullity in law. The assessment orders thus passed is vitiated in law which illegality cannot be cured. In support of charge of nonest approval, several contentions have been raised viz (i) the approval accorded under section 153D is without any occasion to refer to the assessment records and seized material, if any, incriminating the assessee and hence such approval is in the realm of an abstract approval of draft assessment orders which was unsubstantiated and unsupported and consequently suffered from total non-application of mind (ii) approval granted hurriedly in a spur involving voluminous assessments spanning over 7 assessment years and thus only a symbolic exercise to meet the requirement of law (iii) Total lack of objectivity in drawing satisfaction on objective material while giving a combined approval for 7 assessments and also without evaluating the nuances of each assessment year involved (iv) the mundane action of Addl. CIT under S. 153D in a cosmetic manner gives infallible impression of approval on dotted line and thus defeats the purpose of supervision of search assessments (iv) initialed draft assessment orders not available in office records.

1.3 As observed, Section 153D bestows a supervisory jurisdiction on the designated authority in respect of search related assessment and thus enjoins a salutary duty of statutory nature. The designated superior authority is thus expected to confirm to the statutory requirement in letter and spirit. It is evident from the communication of AO and consequent approval thereon under S. 153D that no assessment record for any assessment year in question or any seized material had traveled to the authority concerned for his objective consideration of the same qua the draft assessment orders. No reference in this regard is made in the approval note either which may discard such allegation as untrue. No other material or order sheet in assessment proceedings etc. were placed before us either to establish otherwise. Except these two documents namely, a solitary communication from AO to the Addl. CIT dated 29/12/2010 and an in turn approval by Addl. CIT dated 31/12/2010, there is nothing else before us to gauge the facts differently. A bare glance at the approval so accorded makes it evident that such approval is generic and listless and accorded in a blanket manner without any reference to any issue in respect of any of the 7 assessment years. Apparently, the approval has been granted on a dotted line without any availability of reasonable time which firms up the belief towards non application of mind. Besides, the approval has been granted in a consolidated manner for all assessment years for which volumnous assessment orders were prepared. The whole sequence of action apparently appears to be illusory to merely meet the requirement of law as an empty formality. It is also alleged on behalf of assessee that the draft assessment orders are not available on record which allegation has not been rebutted. The draft assessment orders showing some marking / intials etc. could have given a valuable input on the applicability of mind and could throw light on objectivity applied owing to total silence on any delineation on these aspects in the approval memo. The records before us are totally muted.

11.4 Based on solitary communication placed before us, it is ostensible that draft assessment orders were placed before the Addl. CIT on 29.12.2010 for the first time. It is axiomatic from the plain reading of approval memo that various assessment orders and the issues incorporated in the assessment orders, were never subjected to any discussion with the authority granting approval prior to 29.12.2010. It is evident from the CBDT Circular No. 3 of 2008 dated 12.03.2008 that the legislature in its highest wisdom made it obligatory that the assessments of search cases should be made with the prior approval of superior authority, so that the superior authority apply their mind on the materials and other attending circumstances on the basis of which the Assessing officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authority is required to accord approval the respective Assessment order. Solemn object of entrusting the duty of Approval of assessment in search cases is that the Additional CIT, with his experience and maturity of understanding should at least minimally scrutinize the seized documents and any other material forming the foundation of Assessment. It is elementary that whenever any statutory obligation is cast upon any statutory authority, such authority is required to discharge its obligation not mechanically, not even formally but after due application of mind. Thus, the obligation of granting Approval acts as an inbuilt protection to the taxpayer against arbitrary or unjust exercise of discretion by the AO. The approval granted under section 153D of the Act should necessarily reflect due application of mind and if the same is subjected to judicial scrutiny, it should stand for itself and should be self-defending. There are long line of judicial precedents which provides guidance in applying the law in this regard .

11.5 At the cost of repetition, it may be reiterated that in the instant case, approving authority did not mention anything in the approval memo towards his/ her process of deriving satisfaction so as to exhibit his/her due application of mind. We may observe that Para 2 of the above approval letter merely says that

"Approval is hereby accorded u/s. 153D of the Income-tax Act, 1961 to complete assessments u/s. 143(3) r.w.s. 153A of the I.T. Act in the following case on the basis of draft assessment orders..."which clearly proves that the Addl. CIT had routinely given approval to the AO to pass the order only on the basis of contents mentioned in the draft assessment order without any application of mind and seized materials were not looked at and/or other enquiry and examination was never carried out. From the said approval, it can be easily inferred that the said order was approved, solely relying upon the implied undertaking obtained from the Assessing Officer in the form of draft assessment order that AO has taken due care while framing respective draft assessment orders and that all the observations made in the appraisal report relating to examination / investigation of seized material and issues unearthed during search have been statedly considered by the AO seeking approval. Thus, the sanctioning authority has, in effect, abdicated his/ her statutory functions and delightfully relegated his/her statutory duty to the subordinate AO, whose action the Additional CIT, was supposed to supervise. The addl. CIT in short appears to have adopted a short cut in the matter and an undertaking from AO was considered adequate by him/ her to accord approval in all assessments involved. Manifestly, the Additional CIT, without any consideration of merits in proposed adjustments with reference to appraisal report, incriminating material collected in search etc. has proceeded to grant a simplicitor approval. This approach of the Additional CIT, Central has rendered the Approval to be a mere formality and can not be countenanced in law.

11.6 There are several decisions, which supports the view that approval granted by the superior authority in mechanical manner defeats the very purpose of obtaining approval u/s 153D. Such perfunctory approval has no legal sanctity in the eyes of the law. The decision of the co-ordinate bench in Shreelekha Damani vs. DCIT 173 TTJ 332(Mum.) and approved by jurisdictional High Court subsequently as reported in 307 CTR 218 affirms the plea of the Assessee.

1.7 Very recently, the co-ordinate bench in Sanjay Duggal & ors (ITA 1813/Del/2019 & ors; order dated 19.01.2021 has also echoed the same view after a detailed analysis of similar facts and also expressed a discordant note on such mechanical exercise of responsibility placed on designated authority under section 153D of the Act. Hence, vindicated by the factual position as noted in preceding paras, we find considerable force in the plea raised by the Assessee against maintainability of hollow approval under S. 153D totally devoid of any application of mind. The approval so granted under the shelter of section 153D, does not, in our view, pass the test of legitimacy. The Assessment orders of various assessment years as a consequence of such inexplicable approval lacks legitimacy. Consequently, the impugned assessments relatable to search in captioned appeals are non est and a nullity and hence quashed."

Case law 11 : Mumbai C bench ITAT in case of Impact Retailtech Fund Pvt Ltd in ITA 2050/Mum/2018 order dated 05.03.2021 (Issue of taxability of share premium discussed with role of legislative intent in interpreting such provision)

"13. The assessing officer noticed that the assessee has received final tranche of advances on 30.03.2013 and assessee has treated the whole advances as an liability in its balance sheet. He noticed that assessee had issued share capital in the subsequent assessment year at the rate of ₹ 3000 per share (with a premium of ₹ 2990 per share). The assessing officer invoked the provisions of section 56 (2) (viib) since the advance received by the assessee were in excess of fair market value of the shares as on the final date of receipt of advances towards share capital ie., on 30.03.2013. The assessing officer rejected the event of actual issue of shares in the subsequent assessment year. The question before us is whether the advances

against share capital is a liability or it is receipt towards share capital. The next question will be, whether the legislature actually intended to tax the investment in the sick or capital eroded companies. At this stage, we notice that the net worth of the assessee company is nil or negative until the final tranche of receipt of advance towards share capital. Because of this situation, the assessing officer invoked the provisions of section 56(2)(viib) and he not only brought to tax the share premium, he also brought to tax the face value of the share capital. In our view, this is a bizarre situation in which the company with the eroded capital can never receive any investment from its holding company nor planned to receive any investment.

14. At this stage, we notice that AO invoked the provision of section 56(2)(viib) merely because the fair market value of the shares are NIL and the advances received towards share capital over above the fair market value is taxable under section 56(2)(viib). The argument of the tax authorities are that no prudent investor will invest more than fair market value. Yes, we agree that no prudent investor will invest but prudent businessman will invest in order to safeguard the investment in the subsidiary or to revive the subsidiary company. The tax authorities invoked the provision u/s 56(2)(viib) without bringing on record whether the investment received by the assessee are genuine or not. We notice that the provision introduced by the legislature in order to curb the practice of generation and circulation of unaccounted money. In the current case, the tax authorities have not brought on record any generation or circulation of unaccounted money. Rather they acknowledged that the funds were invested by the holding company and received by the subsidiary company as advance towards share capital. It is not disputed that the net worth of the company is NIL because of investment in step down subsidiary company (due to provision towards revaluation of investment). It is also not disputed that the funds were moved from the holding company to the assessee and the funds were re-invested in the step down subsidiary company in order to revive the step down subsidiary in that process, the investment in such step down company is safeguarded.

15. Here is the situation, the funds intended for investment in the step down subsidiary company routed through the subsidiary company (i.e. assessee) and merely because the fair market value of the assessee is NIL or negative, the tax authorities are invoking the deeming provisions to tax the advance towards share capital in the hands of the assessee merely because the deeming provision is attracted. 16. The tax authorities i.e. Ld. CIT(A) and Ld. DR argued that the terms of proposed issue of shares are finalized and a document inviting application for shares containing the said terms were issued to prospective shareholders before issue of share application. We find facts on record are different. The advances were received by the assessee only to refinance the same to step down subsidiary, it is evident from the resolution passed by the holding company way back in FY 2010 and evident from the pattern of transfer of funds. It was unsecured loan and later converted into advance towards share capital. The terms were finalized by the holding company and intended for investment in the loss making subsidiary, the assessee company is only pass through entity. The holding company is willing to accept any terms as long as the intended purpose is achieved. The holding company accepted the terms of issuing shares at premium of Rs. 2990/- and accordingly, assessee issued the shares at Rs. 3000/- per share. This is based on the actual valuation of shares after the write back of the provision created to reduce the value of the investment

made in the subsidiary TMSL. All these activities are preferably within the legal framework of Company"s Act and other related allied laws and procedures.

17. The AO and Ld. CIT(A) interpreted the provisions of section 56(2)(viib) by strictly on literal meaning as below:- "A company, not being a company in which the public are substantially interested, receives in any previous year, from a person being a resident, any consideration for issue of shares which exceeds the face value of such shares."

8. The Ld. CIT(A) has stressed the interpretation of the words in the above definition i.e. „receives in any previous year" and the expression „any consideration for issue of shares". Ld. CIT(A) stressed the point that "where any amount is received during the previous year towards consideration for issue of shares", then the provision of section 56(2)(viib) are attracted to ascertain whether such consideration the face value of the shares or aggregate consideration exceeds the fair market value of the shares. Based on the above interpretation, he came to the conclusion that assessee has received advance towards share capital during this year to the extent of Rs. 282 crores and the assessee has finalized the terms of issue of such shares during this assessment year only. Further, Ld. CIT(A) relied on the Revised Schedule VI to Companies Act, in which assessee has to declare the portion of share application separately and declaration of unsecured loan etc. to sustain the receipt of advance towards share capital as the addition under section 56(2)(viib). We notice that Ld. CIT(A) has interpreted the section 56(2)(viib) without any finding on the generation and circulation of black money in the assessee"s case and further, he interpreted the words „receipts of consideration for issue of shares during the previous year". We do not agree with the above interpretation. The receipt of consideration for issue of shares to mean the proceeds for exchange of ownership for the value. The term consideration means "something in return" i.e. Quid Pro Quo". The receipt is exchanged with the ownership in the company. In the given case, the holding company passed the resolution to finance TMSL through the assessee and the funds intended for TMSL, which is step down subsidiary and the funds were remitted to the assessee as an advance towards share capital during this impugned assessment year (we do not intend to discuss the quantum of actual receipt of the advance during this assessment year at this stage. It is a separate discussion since assessee has only passed journal entries to convert the unsecured loan into advance towards share capital). The consideration means the promise of the assessee to issue shares against the advances received. In our view, the receipt of advances are a liability and will never take the character of the ownership until it is converted into share capital. The assessee can never enjoy the receipt of money from the investor until the ownership for the money received is not passed on i.e. by allotment of shares. The receipt of consideration during the previous year means the year in which the ownership or allotment of shares are passed on to the allottee in exchange for the investment of money.

19. The tax authorities interpretation that when the receipt of money and mere agreement for allotment of shares without actual allotment of shares will make the consideration complete as per the contractual laws. In our view, unless and until the event of allotment of shares takes place, the assessee cannot become the owner of the funds invested in the company. The event of allotment will change the colour of funds received by the assessee from liability to the ownership. In our considered view, the provision of section 56(2)(viib) are attracted only in the year of allotment of shares i.e. assessment year 2014-15. We rely on the decision of Hon"ble Bombay High Court in the case of Sesa Goa Ltd (supra).

20. In case we accept the proposition of tax authorities then any fund received by the sick or capital eroded subsidiary companies will be more than the fair market price of the shares. In that case, such companies will never intend to receive any funding from any person not even from the holding company because any funds received against expansion or plan to revive the business will automatically get attracted to the deeming provision under section 56(2)(viib). In normal condition, all the required funds were first invested in such subsidiary companies and subsequently the terms are finalized only when such subsidiaries are in the process of recovery. By merely transferring funds as unsecured loan or advances towards share capital will not trigger the deeming provision under section 56(2)(viib). We do not foresee that the legislature must have intended to tax such legitimate investment under section 56(2)(viib). This is a peculiar case where not only share premium are brought under the deeming provision but including face value of shares. In our view, the tax authorities have mechanically invoked the deeming provision without actually investigating whether the assessee has actually indulged in any money laundering activities. The tax authorities are not expected to act mechanically without appreciating the soul and purpose of introduction of the particular and specific provision.

Reference made to: In the case of Cinestaan Entertainment P. Ltd. vs. ITO (2019) (177 ITD 809) (Delhi)(hitherto approved by Delhi high court in ITA 1007/2019 order dated 01.03.2021); DCIT vs. Pali Fabrics P. Ltd. (2019) (no taxmann.com 310) (Mum); Rameshwaram Strong Glass Put. Ltd. vs. ITO (2018) (172 ITD 571) (Jpr); ACIT vs. Subhodh Menon (2019) (175 ITD 449) (Mum))

Case law 12: **Kolkata A bench of ITAT decision in case of Wearit Global Ltd in ITA 55/Kol/2020 order dated 13.04.2021 (Section 68 additional onus in light of new/first proviso to section 68 explained that is as to what extent stated company receiving share capital is supposed to discharge its onus in terms of newly added proviso)**

"32. As we noted (supra) the AO has made addition of Rs. 7,69,71,990/- i.e. share premium collected by assessee during this AY 2014-15 whereas he has accepted the share capital of Rs. 1,11,46,100/- collected by them and on appeal the Ld. CIT(A) has deleted the same and when we have to adjudicate the legality of the action of Ld. CIT(A), first of all, let us have a look at section 68 of the Act. And we note that the relevant assessment year [A.Y] before us is A.Y 2014-15 wherein we note that a Proviso has been inserted by Finance Act 2012 w.e.f. 01.04.2013 in section 68 of the Act which is applicable for this relevant AYand for ready reference relevant and applicable in this case of section 68 of the Act with the aforesaid proviso is reproduced as under:

Cash Credits Section 68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. "[Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless - (a) The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and (b)

Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:"

33. We note thateven though the Parliament has inserted by the Finance Act, 2012, w.e.f. 01.04.2013 the proviso to section 68 of the Act, we must bear in mind that there is no change or amendment in the substantive provision of section 68 of the Act wherein if any sum is found by the AO to have been credited in the books of an assessee in the relevant financial year, then when called upon by him (AO) to the assessee to explain the nature and source of the credit; and pursuant to which if the assessee fails to explain to the satisfaction of AO the nature and source of the credit, then the AO may treat the credit as income chargeable to tax. In other words, if the assessee is able to explain the nature and source of the credit to the satisfaction of AO, then AO cannot use this provision to charge the credit appearing in the books of the assessee as income for the purpose of taxation under the Act. It is settled position of law that 'satisfaction' contemplated in section 68 of the Act is that of a reasonable prudent person (AO) and not that of an unreasonable person. So, when the AO calls upon the assessee to explain the nature and source of the credit found in assessee's book, then initial burden is on the assessee to bring material on record to show the nature and source of the credit i.e. identity, creditworthiness and genuineness of the transaction in question. And once an assessee is able to discharges the initial burden which liesupon it, then the onus shifts to the AO to disprove/rebut the material adduced by the assessee to substantiate the nature and source of the credit transaction. And if the AO is not able to disprove/rebut the evidence brought on record by the assessee to prove the nature and source of the credit entry, then section 68 of the Act cannot be used by the AO to charge the credit appearing in the books of the assessee as income for taxation. This position of law we note remains the same even after the insertion of Finance Act 2012, wherein additional requirement/burden is brought in by the Parliament in the cases of an assessee which is a corporate entity (not being a company in which the public are substantially interested) claims to have received share application money, share capital, share premium or any such amount, then with effect from 01.04.2013, while giving the explanation to the AO regarding the nature and source of such sum credited in its books, the share subscribors has to offer the proof of 'source of source' of the share application money, share capital, share premium. So, we note that till AY 2012-13, the requirement of law as per section 68 of the Act was that when there is a credit entry in the books, then assessee was required to satisfy the AO in respect of the nature and source (i.e. First source from which it received) and that position of law remains in force till now also, except that after 01.04.2013 (i.e. AY 2013-14) onwards when an assessee company (not public company) if they collect share application money, share capital, share premium then an additional burden is imposed by the first proviso to bring to the notice of AO the "source of source" of the credit entry i.e. source of the share applicant which had been invested in the assessee company. In other words from AY 2013-14 onwards, in the event if an assessee company when called upon by the AO to explain the nature of the credit in its books claims that the credit entry is share application money, share capital and share premium, then the additional requirement of law as per the proviso to section 68 of the Act kicks in and share subscriber

should be able to show the source from which it was able to invest in the assessee company. And if the 'source of source' of share application/capital/premium is shown to AO and if he is satisfied with the explanation, then the deeming provision will not apply.

38. So, from a perusal of the above chart, we note that the assessee and the shareholders have brought to the notice of AO&CIT(A) that they (share subscribers)have enough net worth to invest in the assessee company and moreover the share subscribers have also filed the source from which they subscribed to shares of assessee (bank statement, audited balance sheet etc) Thus the assessee has discharged the onus on it about the creditworthiness of the share- holders. . So we note that the source of the investments i.e, source of source of share subscribers to subscribe for share premium in assessee's company as required by proviso to section 68 of the Act stands satisfied since it is clearly discernible from the bank statement& confirmation filed in the PB filed. These bank statements revealed that that share capital and premium have been subscribed by them through banking channel (NEFT or cheque) which goes on to show that the assessee has discharged the onus in respect of genuineness of the transaction…"

(Also refer Delhi C bench decision in angel cement pvt ltd ITA 4691/2016 order dated 18.03.2021 Held in paragraph 59 "59. Now proviso to Section 68 cast an additional onus on the assessee company for proving the source of the source of share capital/share premium which has been effective from 01.04.2013 and memorandum explaining the Finance Bill, 2012 while introducing the proviso was with an object to curve out the pernicious practice of conversion of unaccounted money through masquerade of investments in the share capital of a company especially in the cases of closely held companies. In fact, the very purpose of introduction of Section 68 in the Income-tax Act, 1961 was to bring to tax bogus credits recorded in the regular books of account maintained by the assessee for any previous year in order to camouflage black money as white money (mostly introduced into the regular books of account in the form of capital receipts such as share capital, loans, advances etc. or in the form of bogus income chargeable to tax at a lower rates) without having to pay taxes thereon or paying taxes at a lower rate. Section 68, thus has no applicability where there is no involvement of any unaccounted or undisclosed funds of the assessee which have been introduced into the books of the assessee by way of cash credit. It does not apply to cash credits which appear merely on account of rotation or movement of accounted or disclosed funds between group entities as has happened in the instant case. For section 68 to apply, the receipts should essentially be of income nature. As per trite law, section 68 cannot be made applicable to capital receipts.")

Case law 13: Ahmedabad B Bench of ITAT decision in case of Himalyan Darshan Developers (Gujarat) Pvt Ltd in IT(SS)A No. 264/AHd./2018 order dated 12.04.2021 (Section 153C/153A various shades of off quoted incriminating material phrase)

"….8. We have heard the rival contentions of both the parties and perused the materials available on record. The 1st controversy that arises before us for the adjudication is as to whether the proceedings initiated under section 153C of the Act are valid and sustainable in the eyes of law in the given facts and circumstances. In this regard we note thatprior to amendment by Finance Act 2015 i.e. before 1-06-2015, section153C(1) provided that if any valuable assets (any money, bullion, jewellery or other valuable article or thing) or books of accounts or documents found and seized/requisitioned during the search and

AO of the person searched (PS, in short) is satisfied that such valuable assets or books of accounts or documents seized/requisitioned belongs or belong to a person other than person searched (other person or OP in short).Then the AO of the PS will hand over the valuable assets/books of accounts/documents to the AO of the OP after recording satisfaction to that effect. The AO of the OP after receiving the search material records his satisfaction to the effect that the material seized/ requisitioned have bearing on the income of the assessee i.e. OP before proceeding with section 153C of the Act. Thus, the very first criteria to invoke the provision of section 153C is that there should be material seized/requisitioned during search 132/132A and such material belongs or belong to the OP, thereafter the AO of OP have to reach to the conclusion that weather the search material have any bearing on the income of the assessee or not.

8.3 The 1st question that arises for our adjudication whether the document in the form of tally and Balance sheet as discussed above found during the course of search belong to the assessee. To our mind, the documents found during the search in the given facts and circumstances, were of the 'SJSL' where the transactions for the impugned land were recorded. Thus, these were the documents which were not belonging to the assessee but to M/s SJSL. Hence, in the absence of any document found belonging to the assessee, the proceedings under section 153C of the Act cannot be initiated against the assessee. In holding so we draw support and guidance from the judgment of Hon'ble jurisdictional High Court in case of Anil Kumar Gopi Kishan Agarwal vs. ACIT reported in 418 ITR 25.

8.4 Besides the above, the AO has also made reference to the statement of the director of 'SJSL' namely Shri Lalit K Rathod recorded under section 132(4) of the Act and statement of another director namely Partik R Shah under section 131(1A) of the Act wherein it was admitted that the company namely 'SJSL' is engaged in providing accommodation entries. Thus the same is a paper company. On perusal of the statement recorded under section 133(4) reproduced by the AO in his order we do not find any remarks made by such director to the effect that material/document seized during the search does not belong to the PS i.e. 'SJSL' or belong to the assessee company. In this regard, we also note that there were no incriminating material against OP was found in the search. Further section 153C emphasize that there should be material or document seized which belong to the OP. As such statement recorded during search is not a material or document found and seized. Therefore the statement recorded under section 132(4) cannot be construed as material/document for invoking proceeding under section 153C of the Act specially, in the circumstances where no material of incriminating in nature found belonging to OP. In this regard we find support and guidance from the order Mumbai Tribunal in case of DCIT vs. National Standard India Ltd. . reported in 85 taxmann.com 87 where it was held as under: Further, the Statement of 'AL' recorded under section 132(4) in the course of search and seizure proceedings conducted in the case of 'L' group cannot be construed as a 'seized document', therefore, the reliance placed by the Assessing Officer on the same to justify the validity of jurisdiction assumed under section 153C in the hands of the assessee company, cannot be accepted. Even otherwise as the disclosure of additional income made by AL in his statement recorded under section 132(4), in the hands of the assesseecompany is relatable to Assessment year 2011-12, and does not pertain to any of the years in respect of which jurisdiction had been assumed by the Assessing Officer under section 153C in the case of the assessee company, therefore, the same on the said count also shall in no way go to confer validity to the assumption of jurisdiction by the Assessing Officer under section 153C. [Para 12]

8.5 Without prejudice to the above, we note that the purpose of the search or seizure operation is to unearth the undisclosed or unaccounted income. Normally during the search proceeding different types of

material or document seized and requisitioned by the search party and information collected. Thereafter those information collected and seized materialsare examined weather the same is having bearing on the income which is not disclosed. Accordingly assessment proceeding under section 153A or 153C of the Act as the case may carried out by the Revenue. ***Now the question arises what could be documents having bearing on the determination of the total income of the person searched or other person****. The documents/ any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not enuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute the documents sufficient to make assessment for the purposes of the Act. The Hon'ble courts have referred such documents as an 'incriminating material'. While going through a large number of the decision rendered in the context of search assessment, it was observed that the word 'incriminating material' has been used very often, but the point here is that what is the meaning of 'incriminating material' or in other words what meaning can be attributed to 'incriminating material', as the same is the main bone of contention while framing the search assessment order U/s 153A/C of the Act and the same has not been defined under the Act. Therefore, it is imperative to understand the meaning of the word 'incriminating material'. Practically stating it can be stated that the 'incriminating material' can be in any form such as a document, content of any document, entry in the books of accounts, an asset etc. 8.6 In short, any fact/evidence which could suggest that the documents/transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/make belief based on non-existent facts or suppressed/misrepresented facts, fulfilling the ingredients of undisclosed income, would constitute an 'incriminating material' sufficient to make assessment for the purposes of the Act.***

8.7 In the light of the above stated discussion, the question that arises for our adjudication whether the document in the form of tally and balance sheet found during the course of search is an incriminating document in nature. In our considered view such document are not an incriminating material, as such those documents are part of the books of account maintained by the 'SJSL' wherethe transactions for the purchase and sales of the lands were duly disclosed. Likewise, the corresponding entries in the books of accounts of the assessee and corresponding capital gain was offered to tax in the income tax returns. Thus the impounded documents were belonging to the 'SJSL' and not the assessee company where all the material facts were disclosed. Hence the same cannot be termed as incrimination document found against the assessee company"

Case law 15: Surat bench of ITAT in case of Ashish Natvarlal Vashi in ITA 3522/AHD/2016 order dated 19.04.2021 (Reopening to verify source of cash deposit is held invalid after analyzing entire labyrinth of law)

"....12. In order to examine the validity of reopening the assessment under section 147/148 of the Act, let us, first of all, we should examine the reasons for reopening the assessment, which is placed at paper book page no.5, and the same is reproduced below:

"11. Reasons for the belief that income has escaped assessment: In this case the assessee has cash deposit Rs.22,77,550/- in ICICI Bank. A ***query letter was issued to the assessee on 03.01.2014 requesting the assessee to furnish copy of return of income filed for AY.2007-08 with necessary evidence of cash deposit. The letter was duly served upon the assessee. The***

assessee has not replied till this date. In this case the A.Y. for 2009-10, 2010- 11 & 2011-12 has been finalized and unexplained cash has been added in his total income. Considering the above facts, the assessee has no comments for reply. It is seen that assessee's cash-deposit is genuine or not since no evidence on records. *Therefore, I have reason to believe that income of the assessee exceeding Rs.1 lacs for the accounting period 2006-07 relevant to A.Y. 2007-08, has escaped assessment within the meaning of section 147 of the I.T. Act, 1961 Place: Navsari Date: 24.03.2014 (J.C. Dhorawala) Income –tax Officer, Ward-1 Navsari"*

13. Now, we shall analyze the above reasons recorded by the Assessing Officer. We note that in the reasons recorded by the Assessing Officer it is mentioned that assessee has deposited cash to the tune of Rs.22,77,550/- in ICICI Bank. ***The assessee did not file necessary evidence of cash deposit, therefore assessing officer presumed that income has escaped assessment to the extent of cash deposit of Rs. 22,77,550/-.***

We note that Assessing Officer has opined that an income of Rs. 22,77,550/- has escaped assessment of income because the assessee has Rs 22,77,550/- in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. The amount deposited in the bank account may be out of sale proceeds of investments, property or agricultural income of the assessee which may be exempted under the Income Tax Act. Of course, it may be desirable, from the point of view of revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment. Thus, just to reopen the assessment, based on the cash deposits would not make the Revenue's case strong, because mere fact that these cash deposits have been made in a bank account, which according to us do not indicate that these deposits constitute an income which has escaped assessment. Such cash deposit may be out of past savings. The above reasons recorded for reopening the assessment do not make out a case that the assessee was engaged in some business and has not been filed return of income. Therefore, the cash deposit in the bank account could not be basis for holding the view that income has escaped assessment. The assessee may have deposited the cash out of his sale of capital asset, sale of property and sale of investment etc. Therefore, reasons recorded by the Assessing Officer are not valid and hence the reassessment proceedings initiated based on the reasons recorded is bad in law*. We note that on the similar facts the Co-ordinate Bench of Surat in the case of Rinakumar A. Shah (in ITA No.172/AHD/2017 for AY.2007-08, order dated 30.04.2019, held the reassessment proceedings an invalid. On the similar facts, the reassessment proceedings was quashed by the Co-ordinate Bench in the case of Shri Hashmukhbhai B. Patel (in ITA No. 193/SRT/2019 for AY.2012-13) order dated 24.07.2019…* ***Besides, mere cash deposit in the bank account would not disclose escapement of income. The assessee might have deposited the cash out of his sale of capital asset, sale of property and sale of investment, agricultural income etc. Therefore, we***

<u>are inclined to hold the reassessment proceedings under section 147 of the Act as bad in law and hence, we quash the reassessment proceedings."</u>

Case law 17: Hon'ble Bombay high court decision in case of Mr. Peter Vaz in Tax Appeal 19 .21,22,23,24 & 25 of 2017 order dated 05.04.20201 (Powers of ITAT under rule 27 of ITAT rules – jurisdictional issue raised first time before ITAT- and delay condonation principles analysed at length)

"….5. After these appeals were heard for some time, we were satisfied that these appeals involve an additional substantial question of law. Accordingly, by our order dated 30th March 2021, we framed the additional substantial question of law and adjourned the matter to enable the learned counsel for the parties to address us on such additional substantial question of law. The additional substantial question of law framed by us reads as follows:- "Whether in the facts and circumstances of the present case, it was open to the appellant/assessee to have supported the orders of the Commissioner (Appeals), based on the ground that the jurisdictional parameters prescribed under Section 153C of the I.T. Act were not fulfilled, even without the necessity of filing any cross objections ?"

Question of law number 4. Whether on the facts and circumstances of the case and in law, the Appellate Ld. Tribunal was correct in rejecting the cross objections filed by the appellant solely on the ground of delay, when admittedly, the Appellate Ld. Tribunal in the impugned order has come to the conclusion that the issues raised in the cross objection are legal issues?

24. According to us, it will be appropriate to consider the additional substantial question of law as framed by us in our order dated 30.03.2021 together with the substantial question of law No.4 since both these questions concern the issue of very jurisdiction to proceed under Section 153C of the IT Act against the Appellants/Assessees. As noted earlier, such a jurisdictional issue was not permitted to be raised before the ITAT, inter alia on the ground that there was a necessity of filing cross-objections expressly raising such a jurisdictional issue and because there was no sufficient cause shown for condoning the delay of 248 days in raising such jurisdictional issue by filing cross-objections.

5. At this stage, therefore we are not concerned with the issue as to whether the jurisdictional parameters for invoking the provisions of Section 153C of the IT Act were fulfilled or not. However, at this stage, we are concerned with the issue as to whether the ITAT was right and justified in preventing the Appellants/assessees from raising this jurisdictional issue either for want of cross-objections or because the delay in filing the cross-objections was not sufficiently accounted for.

26. To begin with therefore we propose to consider the issue as to whether there was any necessity for the Appellants/assessees to file cross-objections before the ITAT to raise the jurisdictional issue of compliance with jurisdictional parameters before any proceedings could be initiated under Section 153C of the IT Act. 27. In this case, admittedly, the CIT (Appeals) had decided the matters in favor of the assessees and even set aside the orders made by the Assessing Officers. Therefore, the assessees did not have to institute any further appeals to the ITAT. The Revenue in this case had appealed to the ITAT against the orders made by the CIT (Appeals). Therefore, the issue is, whether the assessees could have raised the issue of noncompliance with jurisdictional parameters set out under Section 153C of the IT Act, before the ITAT, even without filing any cross-objections before the ITAT.

31. In this case, the assessees merely wanted to support the order made by the CIT (Appeals), which was entirely in their favor. The assessees wished to raise an issue, that was at least prima facie going to the root of jurisdiction to initiate proceedings under Section 153C of the IT Act. Having regard to the provisions of Rule 27 referred to above, the ITAT in our opinion should have permitted the assessees who were Respondents before it, to support the orders of CIT (Appeals) on this ground, even without the necessity of filing any cross-objections.

38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 as also the provisions of Section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in S. Nazeer Ahmed (supra) we think that the ITAT should not have precluded the assessees from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross- objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assessees and against the Revenue.

39. Even otherwise in the context of the substantial question of law No.4, we think that sufficient cause was made out by the Appellants to seek condonation of delay of 248 days in filing cross-objections. The application for condonation of delay was accompanied by an affidavit and there was no necessity of filing an affidavit of a legal advisor or Chartered Accountant to the effect that they had tendered some incorrect advice to the assessees. Besides, if the impugned judgment and order made by the ITAT is perused, then, it is apparent that the ITAT has not focused on the issue of whether there was sufficient cause for explaining 248 days delay in instituting cross-objections, but rather the ITAT has faulted the assessees for not raising the issue of non-compliance with jurisdictional parameters, either soon after they received notices under Section 153C of the IT Act or before the Assessing Officer in the first instance. According to us, these were not relevant considerations at the stage of deciding whether sufficient cause was shown to explain 248 days delay in instituting cross-objections

40. In N. Balakrishnan Vs M. Krishnamurthy 15 the Hon'ble Supreme Court has held that as long as the conduct of the applicant does not, on the whole, warrant to castigate him as an irresponsible litigant, generally, the delay can be condoned. The Hon'ble Supreme Court has observed that during these days when everybody is fully occupied with his avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences. 41. The Hon'ble Supreme Court has also held that it is axiomatic that the condonation of delay is a matter of discretion and Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. The length of the delay is no matter, acceptability of the explanation is the only criterion. 42. The Hon'ble Supreme Court has reasoned that the primary function of the Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the right of parties but they are meant to see that parties do not resort to dilatory tactics. The Hon'ble Supreme Court has also held that in every case of delay there can be some lapse on the part of the litigant concerned. However, that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.

43. The ITAT in the present matters, has not deferred to the above principles explained by the Hon'ble Supreme Court in considering applications for condonation of delay. This was a case where the final order made by CIT(appeals) was entirely in favor of the assesses. They had nothing to gain by delaying the filing of cross-objections. According to us, even without filing cross-objections, the assesses could have supported the order appealed by the revenue by urging an issue mainly of law that, at least prima facie went to the root of jurisdiction. All these aspects were not taken into account by the ITAT while refusing to condone the delay in filing the cross-objections.

44. The ITAT with respect has misconstrued the provisions of Section 124 of the IT Act. Sections 120 to 124 of the IT Act no doubt refer to the jurisdiction of the Income Tax Authorities. However, from the scheme of these provisions, it is apparent that reference is to the territorial jurisdiction of the authorities. Section 124(1) refers to direction or order issued under Section 120 vesting with jurisdiction in the Assessing Officer over any area, limits of an area, etc. Section 124(2) provides that where a question arises under this Section as to whether the Assessing Officer has jurisdiction to assess any person, the question will have to be determined by the authorities specified which will include, in a given case the Board. Section 124(3) then provides that no person shall be entitled to call in question the jurisdiction of an Assessing Officer, where an action has been taken under Section 132 or 132A after the expiry of one month from the date on which he was served with a notice under Section 153C or after the completion of the assessment, whichever is earlier. Now, this provision refers to mainly the territorial jurisdiction of the Assessing Officer. This provision cannot be interpreted to mean that an assessee is left without a remedy where the Assessing Officer invokes the provisions of Section 153C of the IT Act without fulfillment of the jurisdictional parameters prescribed therein.

48. The ITAT, in this case, has failed to advert to the principles laid down by the Hon'ble Supreme Court in N. Balakrishnan (supra) and misinterpret the provisions of section 124 of the IT act. For all these reasons even the substantial question of law No.4 is required to be answered in favor of the assessees and against the Revenue. This is assuming that there was any necessity of filing the cross-objections to raise a jurisdictional issue only to support the order of CIT(appeals) that was entirely in favor of the assesses."

Case law 18: **Hon'ble Delhi high court decision in case of International Tractors Ltd vs DCIT LTU in ITA 35/2019 order dated 07.04.2021 (Scope of rule 46A power of first appellate authority to admit additional evidence and power of remanding back case by ITAT how to be exercised)**

*"**3. The following substantial questions of law are framed for consideration by this Court: (i) Whether in the facts and circumstances of the case and law, the Income Tax Appellate Tribunal [in short 'Tribunal'] misdirected itself in setting aside the order of the Commissioner of Income Tax (Appeals) [in short "CIT(A)"] granting deduction, under Section 80JJAA of the Act and qua prior period expenses? (ii) Whether the Tribunal erred in law in remanding the assessee's claims to the Assessing Officer (in short "AO") for verification and satisfaction although that exercise had been carried out by CIT(A) as mandated under the Act?***

Preface:

4. This is an appeal directed against the order of the Tribunal dated 23.07.2018 passed in ITA No.5756/Del/2013 concerning the assessment year [in short 'AY'] 2007-2008. 5. Pithily put, the assessee is aggrieved by the impugned order passed by the Tribunal, for the reason, that the Tribunal has

remanded the matter to the AO to verify the details of the claims placed by the assessee before the CIT(A) and allow the same, subject to satisfaction. The direction of remand issued by the Tribunal is accompanied with a further direction that, before the AO reaches any conclusion, he shall give the assessee an opportunity hearing and only thereafter, decide the issue, as per the facts obtaining in the case and, in accordance with the law.

he evidence produced by the assessee before the CIT(A). Reasons and Analysis: 9. We have heard the learned counsel for the parties and perused the record. As indicated in the opening, what is not in dispute are the following facts: (i) The assessee had not made the claims, under Section 80JJA of the Act and qua prior period expenses, in the original return. (ii). The assessee did not move the AO with a revised return for claiming deductions under Section 80JJAA of the Act and for prior period expenses. (iii) The assessee for the first time made these claims before the AO by way of a statement/communication dated 14.12.2009. The said communication was, concededly, accompanied by the auditor's report prepared in the prescribed form and also contained details of the prior period expenses. (iv) The AO while framing the assessment declined to entertain these claims on the ground that they did not either form part of the original return or the revised return. In support of his approach, the AO has placed reliance on the judgment of the Supreme Court rendered in Goetze (India) Ltd v. CIT, (2006) 284 ITR 323 (SC). (v) However, the CIT(A) ruled that the fresh claims made by the assessee could be entertained, and in this context, relied upon the judgments of various Courts and Tribunals. (vi) The CIT(A) thereafter, examined the evidence placed on record by the assessee concerning both the claims, i.e., deductions claimed under Section 80JJAA of the Act and for prior period expenses. The discussion concerning these two claims are set out in paragraphs 6.7.2 and 6.7.3 of the CIT(A)'s order. (vi) The Tribunal via the impugned order, while sustaining the view taken by the CIT(A) that a fresh claim could be entertained by it, has remanded the matter to the AO, as indicated above, for a fresh verification in respect of both the claims. 10. Given the foregoing, what is required to be noticed is that under Section 80JJAA of the Act, the assessee claimed a deduction amounting to Rs.1,07,33,164/- while in respect of the prior period claim, the assessee claimed a deduction amounting to Rs.51,21,024/-. The CIT(A), however, allowed the deduction qua prior period expenses, only to the extent of Rs.25,40,305/-. The remaining amount was disallowed largely on the ground that expenses had been incurred to the extent of Rs.24,78,391/- without deduction of withholding tax. There were also certain expenses of a cumulative value of Rs.1,02,328/- which were disallowed, for the reason that they did not concern the period in issue, i.e., AY 2007-2008.

12. A perusal of the aforementioned extract would show that the CIT(A) insofar as the deduction claimed under Section 80JJAA was concerned, not only had before him the chartered accountant's report in the prescribed form, i.e., Form 10DA but also examined the details concerning the new regular workmen, numbering 543, produced before him. In this context, the CIT(A) examined the details concerning the dates when the said workmen had joined the services, the period, during which they had worked, relatable to the AY in issue, as also the details concerning the bank accounts in which remuneration was remitted. 13. Based on the aforesaid material, the CIT(A) concluded that the deduction under Section 80JJAA was correctly claimed by the assessee. 13.1. Likewise, insofar as prior period expenses were concerned, as noticed above, out of a total amount of Rs.51,21,024/- claimed by the assessee, a sum of

Rs.24,78,391/- was not allowed, for the reason, that withholding tax had not been deducted by the assessee.

13.2. It is pertinent to note that the assessee had disclosed the same in its statement/communication dated 14.12.2009 placed before the AO. The other amounts, which did not concern the period in issue, amounting to a cumulative value of Rs.1,02,328/- was also disallowed.

14. Therefore, to our minds, once the Tribunal accepted the view taken by the CIT(A) that it could entertain fresh claims; a view which the CIT(A) has expressed in paragraph 6.6.2 of its order, all that the Tribunal was required to examine was: as to whether the CIT(A) had, scrupulously, verified the material placed before it before allowing deductions claimed by the assessee. The Tribunal, however, instead of examining this aspect of the matter, observed, and in our view, incorrectly, that because an opportunity was not given to the AO to examine the material, therefore, the matter needed to be remanded to the AO for a fresh verification.

15. In our view, unless the Tribunal would have reached to a conclusion and expressed its clear view, in that respect, as to what was wrong or missing in the examination made by the CIT(A), a remand was not called for. We agree with Mr. Seth's contention that the CIT(A) in the exercise of its powers under Section 250(4) of the Act was entitled to seek production of documents and/or material to satisfy himself as to whether or not the deductions claimed were sustainable/viable in law. This was, however, a case where the details were placed before the AO, who declined to entertain the claims only on the ground that they did not form part of assessee's original return and that the assessee had not made a course correction by filing a revised return.

15.1. This view was based, as noticed above, on the judgment of the Supreme Court rendered in Goetze (India) Ltd. (Supra). The CIT(A), squarely, dealt with this and concluded, that a fresh claim could be entertained. Therefore, the Tribunal, as noticed above, has accepted this view of the CIT(A) and the revenue has not come up in appeal before us assailing this conclusion of the Tribunal.

16. In any event, we are of the view that, if a claim is otherwise sustainable in law, then the appellate authorities are empowered to entertain the same. This view finds reflection in a judgment of the coordinate bench of this Court dated 28.11.2011, passed in ITA No.1233/2011, titled CIT vs. Aspentech India Pvt. Ltd.

Conclusion: 17. Therefore, in our view, the judgment of the Tribunal deserves to be set aside. The fresh claims made by the assessee, as allowed by the CIT(A), will have to be sustained. It is ordered accordingly. *18. The questions of law are answered in the favour of the assessee and against the revenue."*

Case law 19: Vizag bench of ITAT in case of Hirapanna Jewellers in ITA 253/Viz/2020 order dated 12.05.2021 (Entire issue of addition u/s 68 and section 115BBE in AY 2017-2018 (demonetization period) for cash sales etc analysed in extension)

Factual background of the case:

DDIT (Investigation wing) & survey proceedings u/s 133A

All the grounds of appeal are related to deleting the addition of Rs.4,71,35,500/- made u/s 68 r.w.s 115BBE of the Income Tax Act, 1961 (in short 'Act').

Brief facts of the case are that the assessee is a firm with two partners i.e. Sri Mahendra Kumar Jain and his son Sri Rajendra Kumar Jain engaged in the business of jewellery trading has filed it's return of income on 04.11.2017, admitting total income of Rs.95,59,210/-.

A survey u/s 133A of the act, was conducted in the business premises of the assessee on 27.03.2017 by the Deputy Director of Income Tax (Investigation) [DDIT(Inv)], Unit-III(2), Visakhapatnam and found that the assessee had deposited the sum of Rs.5,72,00,000/- in high denominations of specified bank notes (SBNs) post demonetization. The assessee has explained the sources of cash deposits as cash sales and the advances received on 08.11.2016 against the sales. In support of it's explanation, the assessee also produced the sale bills and books of accounts before the DDIT(Inv.). However, the DDIT was not satisfied with the assessee's explanation of sales, since, the assessee could not furnish proper KYC documents of the buyers during the course of survey, the average sales of the firm was not matching with peak and non-peak season. Even on special occasions like Akshaya Tritiya, Dhanteras, Ugadi etc. the average sales were Rs. 1.5 to 2.0 crores and whereas on 08.11.2016, on a single day, the sales were increased by Rs.4.72 crores during 7.50 P.M to 12 A.M consisting of 270 bills and the cash was received only in high denomination notes which were hitherto banned by Govt. of India from 09.11.2016. Further, there were no details of the customers like phone number, address etc. and no signatures were obtained in sale acknowledgements of the ornaments. There were no tag number details for some bills and CCTV footage was also not available to support the entry of large number of customers on 08.11.2016. Since, the Managing Partner was unable to produce the above details to support the sales of Rs.4.72 crores increase, the DDIT(Inv.) viewed that the assessee has taken shelter of sales to divert the black money of the assessee as well as his friends.

Assessment Proceedings before Ld AO

3. During the assessment proceedings, the AO has conducted one more survey on 16.09.2019 and examined Sri M.K.Jain who had explained that the sale of jewellery on 08.11.2016 was Rs.5.50 crores and business was done till midnight and the shop was closed at 1.00A.M and made separate counters to meet the increased demand of customers. He stated that the CCTV camera footage automatically gets deleted after 15 days, therefore, not possible to supply the CCTV footage of 08.11.2016. With regard to KYC and mobile numbers, Managing Partner stated that they do not insist for mobile numbers or addresses of customers, since, it was not mandatory in the case of sales below Rs.2 lakhs and all the sales that were made on 08.11.10216 was below Rs.2 lakhs only. He further explained to a question that the sales after 8.00 P.M to 12 A.M on 08/11/2016 were extraordinary due to the announcement of demonetization. Since, the assessee failed to furnish the evidences of CCTV footage, KYC documents etc. for abnormal

sales on 08.11.2016 the AO believed that the sales stated to have been made between 8.15 p.m. to 11.58 p.m. amounting to Rs.4.71 crores consisting of 270 bills are nothing but unexplained cash credits representing unaccounted money brought in to the business in the guise of jewellery sales and the paper work was done, merely to give the colour of authenticity of sales and accordingly made the addition of Rs.4,71,31,500/- u/s 68 r.w.s.115BBE of the Act and taxed the same @60%. The AO also relied on the decision of Durga Prasad More 82 ITR 540, wherein, Hon'ble apex court held that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. The AO also relied on the decision of Sumati Dayal Vs. CIT (1995) 214 ITR 801 (SC).

Proceedings before Ld CIT-A (first appellate authority)

4. Against the order of the AO, the assessee went on appeal before the CIT(A) and made written submissions and submitted that there was huge rush on 08.11.2016 for sale of jewellery not only in the assessee's shop, but also in all the shops in Visakhapatnam as well as throughout the country, since, the citizens intended to liquidate the old notes in view of the demonetization and made invalid from the mid night of 08.11.2016 i.e. 09.11.2016. The assessee further submitted before the Ld.CIT(A) that the assessee has made the sales and the same was offered as revenue receipt in the return of income. The Ld.A.R argued that since, the sale proceeds were offered and admitted as income, hence the AO is not permitted to make the same amount as addition u/s 68 of the Act, which amount to double addition once as sales and secondly as unexplained cash credit. The assessee further argued that since the assessee is engaged in the jewellery business and having no other source of income, the AO is not permitted to tax the same u/s 115BBE of the Act as income from other sources. The assessee relied on the decision of Hon'ble Gujarat High Court in ITA No.2471 of 2009 dated 03.07.2012 in CIT Vs. Vishal Exports Overseas Ltd and in the case of CIT Vs.Kailash Jewellery House in ITA No.613/2010. The assessee also submitted that the day 08.11.2016 is an exceptional day in view of demonetization of old notes, therefore, the public were in fanatic move and were anxious to convert the SBNs into some other form and felt wiser to make investment in jewellery. The assessee being one of the reputed shops having long time presence, the customers have stepped into their show room in large numbers. Since large number of customers have stepped into the showroom within a short span of time of 4 to 5 hours, the assessee made necessary arrangements in cannot but conditions for attending the customers for sale of gold jewellery, however, could not take the details which were not mandatory in respect of the sales below Rs.2 lakhs. In support of the argument that there was huge rush for sales, the assessee placed certain newspaper clippings before the CIT(A).

4.1. The Ld.CIT(A) after having considered the submissions of the Ld.A.R found merit in the arguments of the assessee and agreed with the assessee's argument that due to unexpected announcement of demonetization on the night of 08.11.2016 the public largely purchased the the jewellery as alternative for exchange of currency, and held since, the sales were credited in the assessee's books of accounts as revenue receipt and offered for taxation, the same amount cannot be taxed again u/s 68 of the Act as unexplained cash credit. The Ld.CIT(A) relied on the

decisions of Vishal Exports Overseas Ltd (supra) of Hon'ble Gujarat High Court. The Ld.CIT(A) further observed that the decisions of Hon'ble Supreme Court in the case of SumatiDayal Vs. CIT and Durga Prasad More's case (supra) has no application in assessee's case. The ld. CIT(A) also observed that there was ample evidence to show that there were large number of public thronged the jewellery shops on 08/11/2016, and thus held that there is no justification for the AO to treat the sum of Rs.4,71,35,000/- as unexplained cash credit and accordingly deleted the addition and allowed the appeal of the assessee.

Proceedings before ITAT and ITAT decision/analysis

5. Against the order of the Ld.CIT(A), the department is in appeal before us. During the appeal hearing, the Ld.DR heavily placed reliance on the findings of the AO and the DDIT (Inv) which was discussed in detail in the assessment order and also discussed in this order in the earlier paragraphs.

Revenue arguments before ITAT

The Ld.DR argued that it is impossible to believe that the assessee had prepared 270 bills in short span of time and made the sales to the extent of Rs.4.71 crores when the daily sales of the assessee was Rs.10 – 16 lakhs in normal period and Rs.40-50 lakhs per day in the peak time and Rs.1.5 to 3 cores on specific occasions like Dhanteras etc. The Ld.DR further argued that in the absence of CCTV footage, details of KYC of customers, non availability of details of tag numbers of the jewellery, non identification of the customers, the AO rightly held that the sum of Rs.4.72 crores was nothing but sham transaction to bring unaccounted money in the guise of jewellery, sales and paper work is nothing but a device. Therefore, argued that the AO rightly made the addition and the deletion of addition by the Ld.CIT(A) is bad in law. The Ld.DR relied on the decisions of Naresh Kumar Tulshan Vs. 5th ITO, ITAT Bombay reported in [1985] 11 ITD 537 (Bombay), the decision of coordinate bench of ITAT in J.M.J. Essential Oil Company Vs. ITO, the decision of Hon'ble Supreme Court of India in the case of Kale Khan Mohammad Hanif [1963] 50 ITR 1 (SC), CIT Vs. P.Mohanakala, 161 Taxman 169 (SC), CIT Vs. Devi Prasad Vishwanath Prasad, 72 ITR 194 SC,, the decision of Hon'ble High Court of Bombay & Goa in CIT Karnataka (Central), Bangalore Vs. Sadiq Sheikh, Tax Appeal No.18 of 2014, the decision of High Court of Kerala in Oceanic Products Exporting Co. Vs. CIT, 241 ITR 495 (Kerala), Anil Kumar Singh Vs. CIT [1972] 84 ITR 307 (Calcutta)

Respondent assessee arguments before ITAT

6. On the other hand, the Ld.AR heavily placed reliance on the order of the Ld.CIT(A) and argued that in the instant case, the assessee has made the sales of Rs.5.5 crores on 08.11.2016 which included Rs.4.72 crores treated by the AO as unexplained cash credits. The entire sum of Rs.5.5 crores sales made on 08.11.2016 was credited in the books of accounts and offered for taxation. The AO had accepted the books of accounts and also the sales, hence, the AO cannot make the addition of the same amount u/s 68 which amounts to double addition. The assessee

produced the newspaper clippings of The Hindu, The Tribune and demonstrated that there was huge rush of buying the jewellery in the cities consequent to declaration of demonetization of Rs.1000 and Rs.500 notes on 08.11.2016. The Ld.AR also distinguished the case laws relied upon by the Ld.DR stating that facts are not identical and none of the case laws relied upon by the DR are applicable in the assessee's case. In none of the cases, sales that were offered for taxation, was brought to tax again u/s 68 and hence argued that the Ld.CIT(A) has rightly deleted the addition and no interference is called for in the order of the Ld.CIT(A)

ITAT decision and analysis of rival arguments

7. We have heard both the parties and perused the material placed on record. In the instant case, the assessee has admitted the receipts as sales and offered for taxation. The assessing officer made the addition u/s 68 as unexplained cash credit of the same amount which was accounted in the books as sales. In this regard, it is worthwhile to look into section 68 which reads as under:

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

From the perusal of section 68, the sum found credited in the books of accounts for which the assessee offers no explanation, the said sum is deemed to be income of the assessee. In the instant case the assessee had explained the source as sales, produced the sale bills and admitted the same as revenue receipt. The assessee is engaged in the jewellery business and maintaining the regular stock registers. Both the DDIT (Inv.) and the AO have conducted the surveys on different dates, independently and no difference was found in the stock register or the stocks of the assessee.

Purchases, sales and the Stock are interlinked and inseparable. Every purchase increases the stock and every sale decreases the stock. To disbelieve the sales either the assessee should not have the sufficient stocks in their possession or there must be defects in the stock registers/ stocks. Once there is no defect in the purchases and sales and the same are matching with inflow and the outflow of stock, there is no reason to disbelieve the sales. The assessing officer accepted the sales and the stocks. He has not disturbed the closing stock which has direct nexus with the sales. The movement of stock is directly linked to the purchase and the sales. Audit report u/s 44AB, the financial statements furnished in paper book clearly shows the reduction of stock position and matching with the sales which goes to say that the cash generated represent the sales. The assessee has furnished the trading account, P& L account in page No.7 of paper book and we observe that the reduction of stock is matching with the corresponding sales and the assessee has not declared the exorbitant profits. Though certain suspicious features were noticed by the AO as well as the DDIT (Inv.), both the authorities did not find any defects in the books

of accounts and trading account, P&L account and the financial statements and failed to disprove the condition of the assessee. Suspicion however strong it may be, it should not be decided against the assessee without disproving the sales with tangible evidence.

7.1. In the case of CIT v. Associated Transport (P.) Ltd. [1996] 84 Taxman 146 (Cal.) the Tribunal found that the assessee had sufficient cash in hand in the books of account of the assessee, therefore, held that there was no reason to treat this amount as income from undisclosed sources and it was not a fit case for treating the said amount as concealed income of the assessee. The revenue moved to Calcutta High Court against the order of the tribunal and the Hon'ble High Court has confirmed the order of the Tribunal while deleting the penalty, Hon'ble Calcutta high court held as under: "8. The Tribunal was of the view that the assessee had sufficient cash in hand. In the books of account of the assessee, cash balance was usually more than Rs. 81,000. There is no reason to treat this amount as income from undisclosed sources. It is not a fit case for treating the amount of Rs. 81,000 as concealed income of the assessee and consequently imposition of penalty was also not justified in this case."

In the case of Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC), the Hon'ble Apex Court decided the matter in favour of assessee of the ground that it was clear on the record that the assessee maintained the books of accounts according to the mercantile system and there was sufficient cash balance in its cash books and the books of account of the assessee were not challenged by the Assessing officer. If the entries in the books of accounts are genuine and the balance in cash is matching with the books, it can be said that the assessee has explained the nature and source of such deposit.

In the case of Lakshmi Rice Mills v. CIT [1974] 97 ITR 258 (Pat.) Hon'ble Patna High court held as under: "It is, in my view, a fundamental principle governing the taxation of any undisclosed income or secreted profits that the income or the profits as such must find sufficient explanation at the hands of the assessee. If the balance at hand on the relevant date is sufficient to cover the value of the high denomination notes subsequently demonetised and even more, in the absence of any finding that the books of account of the assessee were not genuine, the source of income is well disclosed and it cannot amount to any secreted profits within the meaning of the law."

All the decisions cited supra suggest that once, the assessing officer accepts the books of accounts and the entries in the books of accounts are matched, there is no case for making the addition as unexplained. Hon'ble Delhi High court considered the issue of taxing the opening stocks in the case of Principal Commissioner of Income Tax, 20, Delhi. v. Akshit Kumar, [2021] 124 taxmann.com 123 (Delhi),and upheld the order of the ITAT in deleting the addition related to sales. The Hon'ble High Court has extracted the relevant part of the order of the ITAT which reads as under: "17. Thus, in our opinion the sale made by the assessee out of his opening stock

cannot be treated as unexplained income to be taxed as 'income from other sources'; firstly, the stock was available with the asssessee in his books of account and trading in such stock including purchase, sale, opening and closing stock (quantity wise and value wise) has been accepted by the department year after year and in some years under scrutiny proceedings, therefore, non existence of stock or business cannot be upheld; secondly, the sale of stock in the earlier years and the sale of balance left out stock in subsequent years has been accepted or has not been disturbed, then to hold that no stock was sold in this year and remained with the assessee will be difficult proposition; thirdly, inquiry and inspection by the AO done much after the closure of business may not be persuasive for the past events especially in wake of facts as discussed above; and lastly, once neither any item in the trading account, nor gross profit has been rejected, then one part of credit side of the trading account, that is, sales cannot be discarded completely so as to hold that it is unexplained money."

7.2. In the instant case the assessee has established the sales with the bills and representing outgo of stocks. The sales were duly accounted for in the books of accounts and there were no abnormal profits. In spite of conducting the survey the AO did not find any defects in sales and the stock. Therefore we do not find any reason to suspect the sales merely because of some routine observation of suspicious nature such as making sales of 270 bills in the span of 4 hours, non availability of KYC documents for sales, non writing of tag of the jewellery to the sale bills, non-availability of CCTV footage for huge rush of public etc. The contention of the assessee that due to demonetization, the public became panic and the cash available with them in old denomination notes becomes illegal from 09.11.2016 and made the investment in jewellery, thereby thronged the jewellery shops appear to be reasonable and supported by the newspaper clippings such as The Tribune, The Hindu etc. It is observed from the newspaper clippings that there was undue rush in various jewellery shops immediately after announcement of demonetization through the country.

8. The Ld.DR placed reliance on various decisions. In the case of Sumati Dayal Vs. CIT (supra), CIT vs Durga Prasad More 82 ITR 540) both the cases are related to the circumstantial evidences in the absence of direct evidence. In the instant case, the facts clearly support that the assessee has made the sales and there were sufficient stocks to meet the sales. Thus, the facts of the assessee's case are clearly distinguishable. The Ld.DR further relied on the decisions of Kale Khan Mohammad Hanif, 50 ITR1 (SC), wherein, the Hon'ble Supreme Court held that the AO is permitted to make addition of unexplained cash credits even though the income is estimated on sales. In the instant case, the AO had accepted the sales and no unexplained cash credits were found, thus, the case law relied upon by the Ld.DR is also distinguishable on the facts of the case. The Ld.DR relied on the decision of CIT Vs P.MohanaKala, 161 Taxmann 169, CIT vs Devi Prasad Vishwanath Prasad 72 ITR 194(SC) both the cases refer to the sums found credited in the books of account but not offered as income, whereas in the instant case the assessee admitted the same as sales and offered for taxation, hence, the case laws has no application in the assessee's case. The Ld.DR also relied on the decision in Naresh Kumar Tulshanvs. 5th ITO,

ITAT Bombay (supra), the decision was related to the addition u/s 69A representing huge deposit of cash in bank for which the initial source was declared as past profits and subsequently explained as withdrawal from partnership firm without relevant matching entries in the banks, therefore, the coordinate bench of ITAT held that withdrawal of such huge amount in high denomination was not practicable. The Ld.DR also relied on the decision of J.M.J.Essential Oil Company Vs. ITO, 100 taxmann.com 181 in the cited case, the assessee effected large sales in one month of each year continuously for two years and the assessee is eligible for deduction u/s 80IC and the AO observed that the assessee was inflating the sales and claiming the huge deductions. No such cash inflow is involved due to demonetization. Whereas in the assessee's case there were no such deduction or the exempt income and the profits were also not abnormal. The assessee explained the reason for huge sales with evidence and thus the case law relied up on by the DR is distinguishable. The Ld.DR relied on various case laws and all the case laws more or less are related to the additions made u/s 68 as unexplained cash credit and in none of the ases the assessees have admitted the same as income. Therefore, we find that the case laws relied up on by the Ld.DR has no application in the instant case and the same are distinguishable.

Denouement paragraph of this landmark ITAT order

9. In view of the foregoing discussion and taking into consideration of all the facts and the circumstances of the case, we have no hesitation to hold that the cash receipts represent the sales which the assessee has rightly offered for taxation. We have gone through the trading account and find that there was sufficient stock to effect the sales and we do not find any defect in the stock as well as the sales. Since, the assessee has already admitted the sales as revenue receipt, there is no case for making the addition u/s 68 or tax the same u/s 115BBE again. This view is also supported by the decision of Hon'ble Delhi High Court in the case of Kailash Jewellery House (Supra) and the Hon'ble Gujarat High Court in the case of Vishal Exports Overseas Ltd. (supra),Hence, we do not see any reason to interfere with the order of the Ld.CIT(A) and the same is upheld.

Further refer following decisions of various benches of ITAT on applicability of section 115BBE/Sec. 68 to 69D etc in myriad of situations:

S.No	***Particulars***	***Remarks***
1.	Gauhati bench ITAT decision in case of Abdul Hamid ITA 46/Gau/2019 order dated 17.07.2020	Paragraph 14, 15, 18, (in context of section 263 revision proceedings by PCIT) – also refer vizag bench host of orders on section 263 for applying sec 115BBE dated 23.11.2020 Deccan Tobacco Company case etc
2.	Jaipur bench ITAT Decision in case of Nawal	For AY 2017-2018 refer

	Kishore Soni ITA 1256/Jpr/2019 order dated 15.09.2020	paragraph 26 to 36 (demonetization period case- crux in para 35)
3.	Chandigarh bench ITAT decision in case of Bhuwan Goyal ITA 1385/CHD/2019 order dated 28.09.2020 & Harish Sharma ITA 327/CHD/2020 order dated 11.05.2021	AY 2017-2018 matter refer paragraph 10 (business related income – surrendered in search statement u/s 132(4))
4.	Lucknow bench of ITAT decision in case of Kanpur organics Pvt Ltd ITA 675/LKW/2018 order dated 10.01.2020	Para 7.1 to 7.4 (AY 2016-2017) business receipt vs unexplained income u/s 69A/115bbe issue answered in assessee favor
5.	Ahmedabad bench of ITAT decision in case of Shree Sanand Textiles ITA 1166/Ahd/2014 order dated 06.01.2020	Paragraph 9.3 to 9.7 on Addition of sales u/s 68 etc
6.	**Latest Gujarat high court decision in case of 430 ITR 253 in case of PCIT VS Shitalben Saurabh Vora order dated 19.09.2020**	**Adding 2% income on undisclosed business receipts related deposits made in unaccounted bank account**

Humble request at denouement: Please excuse for type/other errors if any left and we seriously trust and hope our above compilation is found useful.

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(please bear with us if we are not able to respond to personalized and factual queries in expected manner)