DIGEST OF

INCOME TAX APPELLATE TRIBUNAL AHMEDABAD & RAJKOT BENCHES

FROM

2002 TO FEBRUARY, 2009

I. ACCOUNTS - ACCOUNTING

(a) **CLOSING STOCK - VALUATION OF**

Average cost or actual cost – When the shares and their cost of acquisition are identifiable and no details of sale of shares were furnished by assessee, AO was justified in proceeding on the basis of material on record and value the closing stock as per actual cost of acquisition as against average cost applied by the assessee.

Panchmahal Cement Co. Ltd., Asstt. CIT
(2008) 118 TTJ 145 = 115 ITD 193 = 13 DTR 1 (Ahd)

(b) **METHOD OF ACCOUNTING - REJECTION**

1. Alleged unaccounted sales – Assessee maintaining regular books of account which are subject to tax audit under s. 44AB - AO made the impugned additions on account of unaccounted sales merely on certain presumption / assumption as the assessee had failed to reply a peculiar type of query from the AO regarding consumption – Not justified – AO has not pointed out any specific defect in the books of account maintained by the assessee – Also, AO did not find any material or evidence indicating that the assessee had made sales out of the books of account - Process gain or shortage/process loss shown by the assessee in other years has been accepted by the Department – Additions cannot be sustained on the basis of conjectures, surmises and guesswork – Same deleted.

Surat District Co-operative Milk Producers Union Ltd. v/s. Jt. CIT
(2006) 99 TTJ 390(Ahd)

2. Whether where assessee was maintaining regular books of account and complete details with respect to opening stock, purchases and closing stock of various raw materials and accounts were duly audited, rejection of books by Assessing Officer was not correct – Held, yes.

Rinkesh Prints (P) Ltd., ITO v/s.
(2006)151 Taxman 44 = (2007) 199 Taxation 120 (Ahd)

3. Estimation of income – Burden of proof, scope and validity – Before rejecting the books of account, the Department has to prove that accounts are unreliable, incorrect or incomplete - The accounts regularly maintained in the course of business, duly audited under the provisions of IT Act and free from any qualification by the auditors, should be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable – For rejecting the books of account, it is the Revenue's onus to prove that either the books of account maintained by the assessee are not correct and complete or the method of accounting adopted is such that true profit cannot be deduced therefrom – As the onus to make out a case for rejection of books of account is on the Revenue, the assessee cannot be burdened with the responsibility of proving a negative aspect of the matter meaning thereby, the assessee cannot be held responsible for not having earned the profit at a particular rate – By rejecting book result, the AO does not get absolute and unbridled powers to estimate whatever profit he wants, as per his sweet will – No mistake having been found by the AO either in the books of account or in the statement of purchases, sales and stock maintained quantitatively on day to day basis. AO was not justified in rejecting the books of assessee merely on the ground that in respect of some of the cash sale transactions, the names and addresses of the buyers were not recorded fully and merely by comparing the assessee's GP rate with another dealer, which was standing entirely on different footing than the assessee.

Girish M. Mehta, ITO v/s.
(2006) 99 TTJ 394 = 153 Taxman 41 =(2007) 105 ITD 585 =
(2008) 296 ITR 125 (Rajkot)

4. Books found incomplete – All transactions not found recorded correctly – This fact is supported by the enquiry and investigation made by the sales-tax department – Books of account rightly rejected by invoking s. 145(2) – AO has accepted GP rate of 0.76 per cent in the following assessment year while assessee has declared a GP rate of 0.55 per cent in the year under consideration – Thus, income is estimated by applying the GP rate of 0.76 per cent and addition is confirmed to that extent.

Addition – Rejection of accounts – Assessee has declared better GP rate in the relevant year as compared to earlier and subsequent years – No justification for making any trading addition though facts and circumstances justified rejection of assessee's books of account.

Patel & Co. & Anr. V/s. ITO
(2003) 81 TTJ 445(Ahd)

5. Assessee a building contractor – A.O rejecting books & applying net profit rate of 10% - CIT(A) reducing it to 8% & directed to allow remuneration of directors out of profit so determined – Revenue filing appeal - Held, CIT(A) extending logic of proviso to section 44AD(2) to the assessee Co. & his view upheld – Revenue's appeal dismissed.
Neptune Builders Pvt. Ltd., ACIT v/s.
(2003) 177 Taxation 75(Ahd)

6. Change bona fide and consistently followed – Assessee having changed its method of accounting from mercantile to cash w.e.f 1st April, 2001 and having consistently adopted cash system for asst. yrs. 2001-02 to 2003-04, mercantile system of accounting cannot be imposed on it on the ground that it had not appealed against block assessment for the period 1st April, 1995 to 27th Sept. 2001 in which AO had adopted mercantile system of accounting.
Kisan Discretionary Family Trust v/s. Asstt. CIT
(2008)113 TTJ 918 = 2 DTR 363(Ahd)

7. Rejection of accounts - Assessment year 1995-96 – Assessee company in its book result had declared a GP rate of 43.74 per cent compared to 48.88 per cent in preceding year on ground of hike in cost of raw material and stiff competition in market – Having been dissatisfied with explanation of assessee, Assessing Officer rejected book results of assessee and adopted GP rate of 48.88 per cent of the last year and made an addition – On appeal, Commissioner (Appeals) deleted addition made – Whether since Assessing Officer had not pointed out any specific defect in maintenance of books of account, rejection of book results only on ground of fluctuation in GP was not tenable and Commissioner (Appeals) had rightly deleted additions so made – Held, yes.
Keystone India (P) Ltd. v/s. Dy. CIT
(2007)16 SOT 64 = (2006) 99 TTJ 386 (Ahd)(URO)

8. Assessee company was engaged in business of twisting of yarn - In process of twisting antistatic oil was required to be applied on yarn for smooth running of yarn and that use of oil resulted in gain in weight of yarn – Assessee in process had consumed 1488 kgs. Of oil and had shown production of 72,156kgs. of yarn and it had shown oil gain at 0.59 per cent – Assessing Officer on basis of expert's report that oil gain should be in between 2 per cent t 2.35 per cent held that assessee had not disclosed proper oil gain in output of its product and adopting oil gain figure at 2.35 per cent and worked out addition accordingly – On facts, Assessing Officer was rightly directed to calculate addition after taking oil gain figure at 1 per cent instead of 2.35 per cent taken by him.
Twi-N-Tex (P) Ltd. , ITO v/s.
(2006)154 Taxman 37(Ahd)

9. Rejection of accounts – Assessee was engaged in business of trading of sale and purchase of tractors and related accessories and spare parts – Assessing Officer observed that assessee had shown gross profit rate at 5.06 per cent as against 6.75 per cent of last year – Further, assessee had not maintained daily quantitative stock registers of inventory for tractors and spare parts and there was difference in sale of one tractor in quantitative tally – It was found that marginal decline in gross profit rate had been duly taken care of by increase in turnover and difference in sale of one tractor was due to sale and return and Commissioner (Appeals) had himself looked into reconciliation of shortage of one tractor – Non-maintenance of quantitative details of spare parts could not be a ground for rejection of books of account – Assessing officer was not justified in rejecting books of account without pin-pointing specific defects and thereby making an ad hoc addition when discrepancies were duly reconciled before lower authorities.
L M P Tractors (P) Ltd., Asstt. CIT v/s.
(2005) 148 Taxman 52(Ahd)

10. Estimation of profit rate – Assessee making a disclosure of Rs. 17,17,500 in his statement under s. 132(4) – Out of this, Rs. 8 lakhs were on account of unaccounted commission income, etc. – After telescoping the amount of Rs. 8 lakhs, the net disclosure comes to Rs. 9,17,500/- - This disclosure is for all the assessment years under consideration – Reducing a sum of Rs. 2,62,855 as finally determined by the Tribunal in some of the appeals for these years, the balance amount to be considered comes to Rs. 6,54,645 – On the total turnover of Rs. 1,53,33,533 as adopted by the AO net profit rate comes to 4.27 per cent - On the turnover of Rs. 1,07,86,821 as shown by assessee the net profit rate comes to about 6 per cent – Therefore, the contention of assessee that net profit rate of 5 per cent should be applied, is acceptable – However, in order to cover other deficiencies and aspects and current year's profits, net profit rate of 6 per cent would be fair and reasonable to both sides.
Choudhry D.L , Asstt. CIT v/s.
(2004) 85 TTJ 481(Ahd)

11. Assessee maintaining complete books of account & sales & purchases were vouched – Stock registers maintained – A.O noting that GP rate declared was 5.56% against 6.29% in last year – A.O rejecting books and making addition of Rs. 67345 – CIT(A) upholding – Held A.O not pointing out any specific mistake or discrepancy in books & stock register – Purchases & sales were vouched – Books duly audited – As per data furnished purchase price increased by 1.18 paise per Kg against average increase in sale price of 0.73 per Kg - On facts no addition warranted -addition deleted.
Mustaffa Abbas & Brothers v/s. ITO
(2002) 171 Taxation 74 = 121 Taxman 330 (Ahd)

II. ADVANCE TAX

(a) **INTEREST UNDER S. 215**

1. Interest under s. 234C – Chargeability - Assessment of company under s. 115JA – Since assessee company's normal income liable to tax was nil, assessee was not liable to pay advance tax for asst. yr. 1997-98 as per the provisions of ss. 208 to 211 – Provisions of s. 115JA were introduced by Finance (No. 2) Bill, 1996 on 22nd July, 1996, after the expiry of due date for paying the first installment of advance tax i.e, 15th June, 1996 – Thus, assessee was not liable to pay first installment of advance tax due on 15th June, 1996, on the basis of its income finally computed under s. 115JA and is not liable to pay interest under s. 234C for non payment of first installment.
Mitsu Industries Ltd. v/s. Dy. CIT
(2005)98 TTJ 990 (Ahd)

2. Regular assessment – Revision of income as a result of reassessment under s. 147 – Sec. 147 has been incorporated for the purpose of enhancement of interest chargeable under s. 215 in the amended sub-s. (3) of s. 215 – Therefore , interest under s. 215 is chargeable with reference to the revised income as determined under s. 147 – However, interest is chargeable only upto the date of regular assessment.
Jayendra K. Doshi (Indl.), Asstt. CIT
(2003) 79 TTJ 482 = 132 Taxman 222 (Ahd)

(b) **PENALTY UNDER SS. 271(1)(C) AND 273(1)(B)**

Concealment – Income disclosed in revised return under Amnesty Scheme – No finding that it was not true or not in good faith and no incriminating material found against the assessee in search of one S – Penalty not leviable.
Sharadkumar U. Patel & Anr. V/s. ITO
(2004) 84 TTJ 367(Ahd)

III. APPEAL

(a) **POWERS OF TRIBUNAL**

1. Claim for exemption/non-taxability of particular income – Claim for exemption/ non-taxability of particular income can be entertained by Tribunal.
Kisan Discretionary Family Trust v/s. Asstt. CIT
(2008)113 TTJ 918 = 2 DTR 363(Ahd)

2. Additional ground - Admissibility – Assessee having itself stated and claimed that it was engaged in finance lease and not operational lease, no more facts were required to entertain this new ground, hence allowed.
Gujarat Gas Financial Services Ltd., Asstt. CIT v/s.
(2008)119J 73= 307 ITR 370 = 115 ITD 218 = 14 DTR 481(Ahd)

3. Tribunal directing Assessing Officer to apply relevant High Court decision – Order valid - Income Tax Act, s. 254.
   Industrial Machinery Manufacturing P. Ltd., CIT vs/.
   (2006) 282 ITR 595 (Ahd)

4. Appeal (Tribunal) - Condonation of delay – Reasonable cause – Assessee made bona fide attempt to file the appeal on the last day of the prescribed period but was unable to do so as it was a holiday (Saturday) – It filed the appeal on the next working day – Thus, assessee was prevented from filing the appeal within the prescribed period by reasonable cause – Delay condoned.
   Star Electroplaters v/s. ITO
   (2006) 99 TTJ 640(Ahd)

5. Appeal to High Court - Summary dismissal – Effect – When the High Court dismisses the appeal by stating that no substantial question of law arises, it cannot be said that it was a decision of the High Court on merits - It only means that the High Court has declined to entertain the appeal in the absence of any substantial question of law which is the pre-requisite for assuming the jurisdiction by the High Court.
   Nirma Industries Ltd., Dy. CIT v/s.
   (2005) 95 TTJ 867 =95 ITD 199 = 146 Taxman 90 (Ahd)(SB)
   This decision is reversed by the Gujarat High Court in (2006) 202 CTR 198(Guj) holding that it is the decision of the High Court.

6. Additional Evidence - Assessee was having agencies of two chemical Cos. which were terminated all of a sudden on 8-2-1992 – Assessee filing suits against Cos. & Cos. against assessee – Bank etc. also filing suits against assessee who on account of various difficulties/problems shifted to Surat from Ahmedabad – Assessee on account of various worries / problems could not attend before AO to explain & tender proofs before AO – AO making exparte assessment on very heavy income - CIT(A) also in exparte order upholding AO's order – Assessee filing before Hon'ble Tribunal various documents / evidences which were not produced before lower authorities & prayed for its admission – Held orders passed / confirmed by AO / CIT(A) show various additions made would not have been made if assessee had appeared to explain the return - On facts & circumstances cause of substantial justice deserves to be preferred & order of CIT(A) set aside & matter restored to AO for fresh adjudication as per evidence filed.
   Divya Chemicals v/s. DCIT
   (2005) 187 Taxation 98 (Ahd)

7. Adjudication - Notice – Requirement to give both parties to appeal an opportunity of being heard – Not an empty formality but a valuable right available to parties – Revenue showing total apathy in matter of service of notice of hearing in Department's appeal – In the absence of service of notice upon assessee – Department's appeal dismissed with liberty to get this order recalled within reasonable time in case assessee traced by revenue.

Aditya Organisers P. P. Ltd., CIT (Deputy) v/s.
(2005) 275 ITR 11 (2004) 91 ITD 342 = 85 TTJ 686 (Ahd)

8. Rectification under s. 254(2) – Rejection of appeal under s. 260A(1) by High Court against Tribunal's order under s. 254(1) – Doctrine of merger – High Court dismissing appeal under s. 260A on the ground that no substantial question of law was involved – It is not a dismissal of appeal on merits but dismissal at threshold on the ground that appeal was not maintainable – Such an order is on maintainability of appeal and not an order on appeal - Order of Tribunal will not merge in the order of High Court in such a case and hence would remain amenable to rectification jurisdiction of Tribunal under s. 254(2).

Connection, Dy. CIT v/s., Electopack, Dy. CIT v/s.,Megnatherm, Dy. CIT v/s.
(2005) 94 TTJ 973 = 94 ITD 227 = 145 Taxman 29 (Ahd)(TM)
This decision is reversed by the Gujarat High Court in (2006) 202 CTR 198(Guj) holding that it is the decision of the High Court.

9. Maintainability – Small tax effect - Since 1987, CBDT is consistently instructing its officers not to file appeals where the tax effect is below the monetary limit as prescribed – Appeals under consideration have been filed by the Revenue contrary to CBDT Instruction No. 1979, dt. 27th March, 2000 – If appeals contrary to said instructions are admitted, it would frustrate the purpose of issuing such instruction – Hence, appeals are not maintainable and are dismissed in limine.

Chetnaben J. Shah (Smt.) L/H of Late J.K Shah v/s. WTO
(2005) 95 TTJ 939 (Ahd A)

10. Powers of Tribunal - Additional Evidence -Revenue not asking for evidence for work done by partner but disallowing salary paid to him – Assessee filing such evidence & requesting for its admission – On facts it was admitted.

Assessee raising additional grounds & requesting for deletion of disallowance of 1/5 of vehicle expenses & depreciation for personal use & also Rs. 3,000 out of telephone expenses - Additional grounds admitted but on merits considering the no. of partners being 4 & the amount of expenditure etc. disallowance held justified.

Associated Rasayan Agencies v/s. ITO
(2005) 187 Taxation 40 (Ahd)

11. Rectification under s. 254(2) – Limitation – No order can be amended through rectification after four years from the date of the order - Amendment may be carried out by the Tribunal on its own motion or if the mistake is brought to its notice by the parties to the order - Condition of exercise of power including period of limitation is common in both the situations is a part of jurisprudence and cannot be brushed aside or ignored to grant relief on the prayer of the assessee or the Revenue after the expiry of said period of four years.
Arvindbhai H. Shah v/s. Asstt. CIT
(2004)84 TTJ 725 = 270 ITR 125=91 ITD 101=(2006)193 Taxation 206 (Ahd)(SB)

12. Whether in an appeal filed by revenue, if notice of hearing, cannot be served on assessee by Tribunal at address given by revenue in memorandum of appeal, it is obligatory on part of Income Tax Authority to effect service of such notice - Where service of notice of hearing on assessee could not be effected by post at address given by revenue in memorandum of appeal, Tribunal was well within its powers to direct Income Tax Department to effect service on assessee subsequently Tribunal could take help on procedural aspect as laid down under relevant provisions of CPC where Income Tax Act and rules thereunder are not able to meet particular situation.
Aditya Organisers (P) Ltd. v/s. Dy. CIT
(2004) 91 ITD 342 = 85 TTJ 686= (2005)275 ITR 11 (Ahd)

13. Appeal - Powers of Tribunal - Restoration of appeal dismissed by CIT(A) for non-compliance of s. 249(4) – Defect arising due to non-compliance of s. 249(4) is a curable one and in a given case if the Tribunal is satisfied that there exist sufficient reasons for curing such defects after the expiry of limitation, it would be in the realm of Tribunal's discretion to restore such matters to the CIT(A) for deciding the controversy on merits - In the instant case, assessee kept on making the payment of tax along with interest in instalments – This clearly indicates that the assessee was not having sufficient funds at the relevant time for compliance of s. 249(4), which rendered the appeals of the assessee defective - Impugned order of the CIT(A) is set aside and the appeals are restored to the first appellate authority for adjudication on merits.
Chaturvedi , J.K v/s. Asstt. CIT
(2004) 82 TTJ 284(Ahd)

14. CIT(A) dismissing the appeal being out of time & not condoning delay – Assessee contending that his ITP ill advised that appeal could be filed within 60 days against 30 days – Held, on facts CIT(A) directed to decide the appeal after opportunity to the assessee (AIR 1981 SC 1400 & 43 TTJ 331 followed.)
Jagit Steel Industries v/s. ITO
(2003) 173 Taxation 70(Ahd)

15. Power of – Apropos facts stated under Head Note 'Business Expenditure – Year in which deductible", department urged that no direction could be given by Tribunal in relation to assessment year 1991-92 which was not before it – Tribunal by virtue of powers vested upon it under provisions of section 254(1) for disposal of an appeal may pass such orders thereon as it thinks fit and only limitation on powers of Tribunal to give directions or finding in relation to another assessment year would be that these are necessary for disposal of appeal and are not merely incidental –Ambit of appellate jurisdiction of Tribunal is governed by provisions contained under section 254(1) and not by provisions in Chapter XIV – In view of above , Tribunal could give direction in relation to any assessment year which is not before it but necessary for disposal of appeal – Tribunal was justified.
    Perfect Equipments v/s. Dy. CIT
    (2003) 85 ITD 50(Ahd)

16. Dismissal for default – Absence of service of notice of hearing on respondent assessee – Service of notice of hearing issued by Tribunal could not be effected by post at the address given in the memorandum of appeal – It was obligatory on the part of IT authority to effect service of notice – It has been the established practice and accepted procedure that in case notices of hearing cannot be served on the respondent assessee in Revenue's appeal, such notices are got served through IT authorities – Such practice and procedure has been long established and is fully in conformity with the judicial powers and jurisdiction of the Tribunal – Since the Revenue has shown scant regard for serving the notices and has come up challenging the power of the Tribunal to direct the Revenue for service, the appeal of the Revenue is liable to be dismissed.
    Marco Roadways, Income Tax Officer v/s.
    (2003)81 TTJ 275 = (2004) 137 Taxman 64(Ahd)

17. Appellate (Tribunal) - Additional evidence - Admissibility - Additional evidence can be permitted only subject to just exception, if the Tribunal feel the necessity of evidence, enabling it to decide the appeal , and not in a routine manner on the asking of the party.
    Ashokkumar Zinzuwadia v/s. Asst. CWT
    (2003) 80 TTJ 563(Rajkot)

18. Additional grounds -Admissibility – Grounds involving substantial questions of law should be entertained provided there is material on record for taking a decision in respect of the said additional grounds of appeal and that there are good reasons as to why such grounds which are different facets of the ground raised earlier should be admitted as additional grounds – Ground involving a finding of fact for which evidence is not on record did not qualify for admission in the absence of satisfactory explanation as to why this ground was not raised before the lower authorities – Law relating to levy of interest under s. 234B was not clear when the assessee filed the appeal - Ground against levy of interest admitted in view of subsequent enunciation of law by the Supreme Court.
M.B Stock Holding (P) Ltd. v/s. Asstt. CIT
(2002) 75 TTJ 898

19. In computation of deduction under section 80HHC, Tribunal directed that surplus of service charges over expenses attributable to it, should be excluded from profit of business' as well as 'total turnover' as appearing in formula of computation – On a miscellaneous application under section 254(2), assessee contended that only ground before Tribunal as raised by respondent for consideration was whether service charges had to be included or not in 'turnover' for computing claim under section 80HHC and issue whether some service charges had to be included as part of 'profit of business' was never in dispute as both applicant and respondent had included said service charges as part of profits and gains of business for working out deduction under section 80HHC – Assessee submitted that in given case when controversy was precisely limited to a narrow compass of deciding issue whether service charges shall be included in 'turnover' for computing claim under section 80HHC, Tribunal was not competent to go wider so as to traverse beyond subject matter which was in dispute before it –Whether impugned order passed by Tribunal was well within scope and ambit of jurisdiction and powers of Tribunal conferred under section 254(1) and there was no mistake in impugned order – Held, yes – Whether Tribunal is entitled to entertain and adjudicate an issue which relates to subject matter of appeal before first appellate authority and it is competent to allow a new ground which relates to subject matter of appeal - Held, yes.
Abhinav Finance & leasing Co. Ltd. V/s. Dy. CIT
(2002) 81 ITD 339 = 75 TTJ 917

IV. <u>CIT(A) - APPEALS</u>

1. Competency of appeal – Order to give effect to appellate order on assessment – Appeal maintainable from such order.
Industrial Machinery Manufacturing P. Ltd., CIT v/s.
(2006) 282 ITR 595 (Guj)

2. Competency of appeal on interest – Order refusing interest under section 214 - Appeal maintainable from such order.
Industrial Machinery Manufacturing P. Ltd., CIT vs/.
(2006) 282 ITR 595 (Guj)

3. Appealable orders - Assessing authority withdrew interest allowed to assessee under section 244A – Commissioner (Appeals) held that no appeal lay before him against impugned order – Appeal was maintainable before Commissioner (Appeals) against withdrawal of interest granted under section 244A.
Kanubhai A. Patel v/s. Asstt. CIT
(2004) 89 ITD 255(Ahd)

4. Form of appeal and limitation – Whether expression 'sufficient cause' for condonation of delay should receive a liberal construction so as to advance substantial justice – Where reason for delay in filing first appeal was attributed to negligence or inaction on part of tax consultant and there was no mala fide imputable to assessee, delay could be condoned.
Shakti Clearing Agency (P) Ltd. V/s. ITO
(2003)127 Taxman 49 = 80 TTJ 668(Rajkot)

5. Additional evidence – Refusal to admit – Assessee had sufficient opportunity to produce the evidence in the form of conformity letters from some creditors before the AO in the first assessment and then when the matter was remanded back to the AO for fresh decision – In the absence of any satisfactory explanation for non-production of evidence before the AO in two proceedings, CIT(A) was justified in not entertaining the fresh evidence at this late stage.
M.B Stock Holding (P) Ltd. v/s. Asstt. CIT
(2002) 75 TTJ 898 = 84 ITD 542 = (2003) 84 ITD 542 (Ahd)

V. ASSESSMENT

(a) **S. 44AD - CIVIL CONSTRUCTION BUSINESS**

Assessment year 1997-98 – Whether while computing income of assessee under section 44AD Assessing Officer does not have power to assess anything in excess of returned income if return income is more than 8 per cent of total receipt/sale consideration – Held, yes - Whether no evidentiary value can be attached to a statement recorded under section 133A unless it is supported by some material – Held, yes – Assessee, a partnership firm, was carrying on business of civil construction – During course of a survey under section 133A at premises of assessee, a diary was found in which receipt of on money was recorded and one of partners of assessee firm by a statement agreed to pay tax on that on money' – For relevant assessment year, assessee filed return of income as per provision of section 44AD declaring net profit at rate of 9.56 per cent of total sale consideration – Assessing Officer on basis of aforesaid statement of partner made addition of entire 'on money' to returned income of assessee - Whether since there was no material with department to make addition of 'on money' and assessee had shown income of more than 8 per cent of total sale consideration, no addition of 'on money' to income of assessee could be made while working under section 44AD – Held, yes.

Abhi Developers v/s. ITO
(2007) 12 SOT 444(Ahd)

(b) **SECTION 143 OF THE INCOME TAX ACT, 1961**

1. Additional tax – Assessment year 1990-91 – Where a return was correct on date on which it was filed on basis of documents and material accompanying return and prima facie adjustments are made on basis of retrospective amendment of a statutory provision which assessee could not foresee, additional tax can not be levied under section 143(1A).

Kiran Corpn. V/s. Asstt. CIT
(2006) 98 ITD 119 = 102 TTJ 375 (Ahd)(TM)

2. Assessment years 1999-2000 and 2000-01 – Whether while processing return under section 143(1), Assessing Officer has no jurisdiction to compute income by allowing or disallowing an expenditure including depreciation not claimed or claimed in return nor to vary amount of claim by assessee in any other way, his powers are restricted only to determine tax on basis of return of income filed by assessee – Held, yes.

Packers (India) v/s. ITO
(2006) 99 ITD 383 = 101 TTJ 232(Ahd)

3. Assessment - Prima facie adjustment - Assessment year 2002-03 – Cumulative effect of section 143(1), as substituted by Finance Act, 1999 with effect from 1-6-1999, is that neither any prima facie adjustment can be made, nor any levy of additional income tax can be made on or after 1-6-1999 – Therefore, powers of Assessing Officer under section 143(1) are very limited and restricted only to return of income filed by assessee – Therefore, Assessing Officer has no authority to visit beyond return except to compute tax or interest after adjustment of prepaid taxes – What cannot be done under section 143(1) cannot be also done taking resort to section 154(1)(b) – In absence of power under section 143(1) to make any adjustment in returned income, Assessing officer had rightly rejected application filed by assessee under section 154 – Held, yes.

Choice Aquaculture (P) Ltd. v/s. ITO

(2006)7 SOT 187 = 100 ITD 143 = 283 ITR 18 (Ahd)

VI. <u>ASSOCIATION OF PERSONS</u>

1. For an income to be assessed in hands of an AOP, it must be derived from a process in which AOP has some control facilitating contribution of its members for earning income, profits or gains, for which it is formed – Assessees, three brothers, acquired certain agricultural land from their father on inheritance – Said land was acquired by Government and compensation was awarded which was subsequently enhanced along with interest – Assessing Officer assessed interest income in hands of assessees in status of AOP – Since there was no mutual intention to acquire land by three brothers nor was there any intention to sell it or to earn profit, there was no AOP in existence at all, especially when there was no scope for individual brothers to control/monitor over acquisition process of land of Government consequent to which compensation and interest was awarded to them - Therefore each of three brothers would be having one-third share over interest and would be taxed individually on one-third of interest income.

Govindbhai Mamaiya , ITO v/s.

(2006) 100 ITD 265 = 102 TTJ 712 (Rajkot)

2. Tax on BOI / AOP - Section 167A - Firm – Charge of tax – Assessee trust was created for benefit of five beneficiaries – Trustees of assessee trust however, decided to distribute a portion of corpus of trust to a BOI of two out of five beneficiaries to be held jointly - Since direction in trust deed was to distribute entire corpus of trust fund and no discretion was left to trustees to distribute lesser portion thereof distribution of part of it was contrary to terms of trust deed – By distribution assessee trust was converted in two trusts, one for original beneficiaries with reduced trust and second for BOI of two out of five beneficiaries and trust which originally remained partner in a firm for five beneficiaries had become partner for BOI of beneficiaries which was not permitted and was hit by provisions of section 8 of Indian Trust Act – Distribution was invalid as part of trust fund could not be given to BOI which was not a beneficiary of trust and was an entity separate from beneficiaries of assessee - Even though distributees were called BOIs, they were in fact AOP within wider meaning given to term association of persons by section 167A and even assuming that above distribution was valid a maximum marginal rate was to be applied for assessment of income in hands of BOI.
   Rama K. Shah Trust v/s. ITO
   (2004) 88 ITD 477(Ahd)

3. Charge of tax –Whether provision of section 167B is not non-obstante clause and it does not override provisions of section 112 – Assessee was a BOI – Commissioner (Appeals) was justified in holding that in respect of long term capital gains included in total income, provisions of section 112(1)(d) apply and on balance maximum marginal rate as provided under section 167B would apply.
   Niranjan Narottam, Asstt. CIT v/s.
   (2003) 128 Taxman 25

VII. BAD DEBTS

1. Bill discounting business - Bad debt accruing in the course of bill discounting business is allowable deduction.
   Gujarat Gas Financial Services Ltd., Asstt. CIT v/s.
   (2008)119 TTJ 73 = 307 ITR 370 = 115 ITD 218= 14 DTR 481 (Ahd)

2. Whether in case of assessee engaged in money-lending business, amount of money used for business of money lending, is not debited to trading account and is not charged as expenditure and, therefore, there is no reason to put a condition that such amount of loan has to be already accounted for as income in previous year – Held, yes - Whether if assessee prudently decides as a businessman that there is no hope of realization of debt and writes off said debt in books of account, it would be sufficient compliance for claiming deduction under section 36(1)(vii) – Held, yes.
   Ajar Entrade (P) Ltd. v/s. Asstt. CIT
   (2005) 2 ITAT 511

3. Transfer of undertaking - Amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for any previous years is to be allowed as a deduction under s. 36(1)(viii) subject to the provisions of s. 36(2) – By virtue of Explanation below s. 36(1)(vii) any bad debt or part thereof written off as irrecoverable would not include any provision for bad and doubtful debts made in the accounts of the assessee – Assessee made provision for doubtful debts and transferred the same as such at the time of transfer of the undertaking – Not entitled to deduction of this amount.

Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 = 97 ITD 125(Ahd)(TM)

VIII. BODY OF INDIVIDUALS

Assessee a body of individuals having income from interest dividend & capital gains etc. – A.O noticing shares of beneficiaries indeterminate & taxing whole income at maximum marginal rate – CIT(A) directing to tax the capital gain at rates specified in section 112(1)(d) – Held, provisions of section 167B not obstante clause & does not override the provision of section 112(1)(d) – CIT(A) correct, his order calls for no interference – Appeal dismissed.

Niranjan Narotham , ACIT v/s.
(2003) 174 Taxation 82 = 128 Taxman 25(Ahd)

IX. BUSINESS – SETTING UP

Preparatory activities vis-à-vis commercial operations – Assessee company incorporated on 29th Aug. 1991, with main object to render technical oil field services - Technical collaboration agreement with foreign collaborator ZNGF executed on 25th Oct. 1993 and MOU executed on 28th October, 1993 for formation of a joint venture with GPC of USA – Another MOU signed with HOEC on 8th October, 1993, and approval of Govt. of India for availing suppliers' credit from ZNGF received vide letter dt. 14th Feb., 1994 – Thus, all the important agreements and MOU were executed in financial year 1993-94 falling in asst. yr. 1994-95 and the assessee can be said to have set up its business of starting activity of seismic survey only in asst. yr. 1994-95 and not 1993-94 – Further, very first tender to ONGC was given on 12th Nov. 1993, which also falls in asst. yr. 1994-95 – Bid for 'B' gas field was also approved by Govt. on 27th Dec., 1993, which also falls in asst. yr. 1994-95 – The activity of export of medicines though not authorized business activity of the assessee company, also took place in February, 1994 – Thus, on a totality of facts and circumstances, business of the assessee was set up in asst. yr. 1994-95, and assessee will be entitled to grant of deduction of revenue expenditure incurred for asst. yr. 1994-95 onwards and to set off business loss against income from other sources and to carry forward the unabsorbed loss to subsequent years.

Interlink Petroleum Ltd., Dy. CIT
(2004)83 TTJ 274(Ahd)

X. BUSINESS EXPENDITURE

(a) ACCRUAL OF LIABILITY – CUSTOMS DUTY

1. Expenditure relating to earlier year – Since the assessee is following mercantile system of accounting, its income and expenditure are to be considered based on such system - Therefore, expenditure which relates to the year consideration as per the mercantile system alone is allowable – Also, expenditure which has crystallized in the year under consideration, though relating to earlier year is to be allowed as deduction.

Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

2. Year in which deductible - Debit notes for commission issued by selling agent was received by assessee in assessment year 1991-92 but deduction was claimed in assessment year 1992-93 – Claim was disallowed without considering alternative contention of assessee that claim may otherwise be allowed for assessment year 1991-92 – Assessee could not produce any evidence in support of its claim that commission had fallen due in assessment year 1992-93 after settlement of some disputes - Whether in view of this and since debit notes were received in earlier assessment year, Commissioner (Appeals) was justified in disallowing claim in assessment year 1992-93 – Claim of deduction was, however, allowable for assessment year 1991-92.

Perfect Equipments v/s. Dy. CIT
(2003)85 ITD 50(Ahd)

3. Allowability – Customs duty on imported goods against export benefit – Assessee company, a manufacturer exporter, following mercantile system of accounting and treating income and expenditure on accrual basis – Under the DEPB Scheme it is entitled to import specified raw material without payment of customs duty on the basis of credit granted on exports – Assessee credited its P & L a/c. on the basis of the duty benefit accruing to it as per DEPB book on the export – Purchase account is debited by customs duty utilised while importing duty free raw material - Debit to purchase account was an integral and indivisible part of the method of accounting followed by the assessee and could not be considered as an isolated and single transaction – It was intimately and inextricably linked with the credit entry on account of accrued export benefit credited to the duty benefit account and ultimately taken to the P & L a/c. – Entire system of accounting the customs duty benefit as well as utilization of the duty benefit for the purpose of making imports is to be considered in a composite manner as method of accounting of the assessee – Once the method of accounting followed by the assessee had been accepted by the AO as correct, there was absolutely no justification for the AO to disallow the deduction of debit to purchase account – Such system of accounting is also in conformity with the accepted principles of commercial accounting as well as accounting standard 9 formulated by the ICAI – Adjustment of liability against duty benefit receivable by assessee constituted actual payment – Said payment not hit by the mischief of s. 43B – Assessee was therefore entitled to deduction.

Pratibha Syntex Ltd., CIT v/s.
(2002) 75 TTJ 124 (Ahd)

(b) **ADVERTISEMENT EXPENDITURE**

1. Advt. Sales Promotion - Expenses - Assessee incurring expenses on advertisement & sales promotion Rs. 16,71,560 and claiming it as deduction although full amount not debited to profit & loss account – AO treating it as expenditure of enduring nature & disallowing assessee's claim – CIT(A) allowing assessee's claim – Revenue filing appeal & assessee the C.O supporting CIT(A)'s order – Held assessee following mercantile system of accounting – Expenditure wholly & exclusively for business & liability incurred during the year – On facts & circumstances CIT(A) justified & his order upheld - (82 ITR 363 & 36 ITD 102 – Ahd etc. relied upon).

Gujarat Ambuja Apparels Ltd. , ACIT
(2006) 191 Taxation 6(Ahd)

2. Capital or revenue expenditure or deferred revenue expenditure – Assessee treating the expenditure on sales promotion as deferred revenue expenditure, taking 1/5th of it to P & L a/c but claiming the entire expenditure as revenue expenditure for the relevant previous year - Not justified – CIT(A) was justified in directing the AO to allow deduction in respect of the aforesaid amount in the same manner as has been adopted by the assessee for purpose of debiting the said expenditure in its P & L a/c prepared as per the books of account regularly maintained by the appellant company.

Amtrex Appliances Ltd. v/s. Dy. CIT
(2005)94 TTJ 396

3. Expenditure on products manufactured and marketed by subsidiary company – Assessee had assigned rights in respect of its trade mark "Maaza" to its 100 per cent subsidiary G which manufactured and marketed the product by itself and through a network of bottlers – Assessee had neither licensed its brand to G nor charged any royalty from its franchisees for the "Maaza" line of products – Thus, it could not be said that it was in the business of manufacture of marketing of said products, even though it was the legal owner of the trade mark and the brand name associated therewith – Incurrence of expenditure on the advertisement campaign of the 'Maaza', therefore could not be in response to assessee's business needs though it indeed promoted its brand value – Fact that the expenditure was also able to pay short term dividends by improving the sales of G and its bottlers is of no significance – Therefore, expenditure on the special advertisement campaign by the assessee company is not a business expenditure in its hands as it was not incurred in its capacity as a businessman in the course of carrying on or to facilitate its business – Disallowance justified for want of commercial expediency.

Acqua Minerals (P) Ltd. V/s. Dy. CIT
(2005) 97 TTJ 658 = 96 ITD 417 = 279 ITR 106 (Ahd)

(c) **AMORTISATION OF PRELIMINARY XPENSES UNDER S.35D**

Public issue expenditure – Fees to Registrar and Manager of the issue, trustee fees, legal and listing fees, stamp duty, out of pocket and traveling expenses – CIT(A) affirming disallowance on the ground that expenditure was not strictly necessary for public issue of shares – Not justified - Desirability or necessity of expenditure in relation to public issue is solely within the domain of the assessee company - Deduction allowed.

Capital employed - Amount of debenture application money is includible for computing capital employed for purposes of s. 35D.

Amtrex Appliances Ltd. v/s. Dy. CIT
(2005)94 TTJ 396

(d) **CAPITAL OR REVENUE**

1. Deferred revenue expenditure - Deferred revenue expenditure is essentially revenue in nature though it is written off in the books of account over a period of time for various reasons like quantum and expected future benefit – Expenditure relating to corporate advertisement, exhibition, public relation/cultural programme, quota and sales promotion expenses and expenses incurred for obtaining fixed deposits are allowable as revenue expenditure – In the absence of relevant finding on record as regards the nature of software and the expenditure incurred thereon, matter is restored back to the AO.

Ashima Syntex Ltd., Asstt. CIT v/s.
(2009) 120 TTJ 721(Ahd)(SB)

2. Expenditure on repairs and maintenance – Expenditure on ceiling board material, carpentry work at seminar room, false ceiling, electrical rewinding being all items of repair and maintenance, is allowable revenue expenditure.

National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(2009)310 ITR 384 (Ahd)

3. Payment to ward off competition – Non come fee paid to ward off competition for a period of 15 years was capital expenditure.

Deversons Industries Ltd. , Jt. CIT
(2007)106 TTJ 314 = 104 ITD 171 = 290 ITR 287 (Ahd)

4. Expenditure on issue of convertible debentures – If expenditure is incurred for raising capital base it is capital expenditure even if the funds so received have been raised for business purposes – In the case of convertible debentures, capital is raised by issue of equity shares through the media of debentures – Loans or borrowings are not repaid but retained by converting it into equity shares and hence, it is not a borrowing – Therefore, expenditure on issue of convertible debentures is to be converted into share after 15 months, part of money received on the issue of debentures is a loan or advance towards allotment of shares – No allowance even on proportionate basis can be allowed as the nature of such retention is akin to share application money pending allotment of shares.

Ashima Syntex Ltd. v/s. Asstt. CIT
(2006) 102 TTJ 177 = 100 ITD 247 = 195 Taxation 82 (Ahd)

5. Capital or revenue expenditure - Financial charges , legal and professional charges and upfront fees in connected with setting up of new unit – In determining the nature of expenditure (revenue or capital) incurred for obtaining loan, it is irrelevant to consider the purpose of loan – Amount spent for obtaining loan is revenue expenditure - Upfront fee is also related to loan for expansion of the business - Thus, the financial charges, legal and professional charges and upfront fees incurred in relation to loan obtained for expansion of the business were allowed as revenue expenditure.

Capital or revenue expenditure - Debenture issue expenses - Deductible as revenue expenditure - Board has clarified that provisions of amortisation are not intended to supersede any other provisions of IT Act under which it is admissible as deduction – CIT v/s. East India Hotel Ltd. (2001) 171 CTR (Cal) 614: (2001) 252 ITR 860(Cal) relied on.

Capital or revenue expenditure - Stamp duty and professional fee incurred for obtaining term loan – Not to be amortised – Entire expenditure as revenue expenditure.

Shri Ram Multi Tech Ltd. v/s. Asst. CIT
(2005) 92 TTJ 568

6. Payment of non-compete fee – Assessee acquired a plant for producing nitric acid and ammonium nitrate belonging another company VBC for a specified consideration and also paid a separate amount under a 'non-compete agreement' to the said company and its founder – AO rejected assessee's claim for deduction of non-compete fee as revenue expenditure mainly on the ground that the assessee was not carrying on the business of dealing in these two chemicals prior to the incurring of the expenditure and that the benefit procured by assessee was of enduring nature – Not justified - Carrying on of the same business prior to entering into non-compete agreement is not relevant to appreciate as to whether the agreement would enhance assessee's profitability or not – Increase in profitability is to be seen subsequent to entering into such agreement and not before that – Even otherwise, it is duly accepted by the AO as well as the CIT(A) that the assessee was doing trading business in said chemicals prior to entering into this agreement - Consequently, the very basis for rejecting assessee's claim is non-existent - Said expenditure satisfies the tests of business necessity and commercial expediency – Further, the benefit is available to the assessee for a period of five years and hence it could not be said to be a enduring nature – Presence of other manufacturers in the same area was a potential threat to the assessee's business and thus it could not be said that there was no fear of competition after making the said payment – Therefore, non-compete fee paid by assessee was deductible as revenue expenditure.

Smartchem Technologies Ltd. V/s. ITO
(2005)97 TTJ 818 = (2006) 150 Taxman 63 (Ahd)

7. Trial production expenses – Two units of the assessee company were already working and producing goods – New unit was an expansion of the same business of manufacturing sponge iron – It was a clear case of same and integrated business with complete interconnection and interlacing – Since the assessee is already in the same business and various units of the assessee amounts to same business, expenditure on start up, establishment and folio maintenance as also interest pertaining to new unit incurred during the trial production constituted revenue expenditure.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

8. Debentures issue expenses and incentive to debenture holders – Payments were made by assessee company by way of loyalty coupon as a reward to debenture holders for holding fully convertible debentures after a period of three years from the date of initial allotment upon conversion of such debentures into shares – Liability of the assessee arises only on expiry of the third year and on subscription of the shares and therefore expenditure was capital in nature - However, debentures were redeemed within three years and therefore expenditure is both for raising finance by way of debentures and for retaining the debentures for certain period and ultimately those debentures into shares – therefore, the expenditure is to be bifurcated over three year period and the expenditure relatable to three month period which fell in the relevant previous year is to be allowed.
Debenture issue expenditure – Right debentures were issued which were to be converted into shares within a period of 15 months – Expenditure, when incurred, was for raising loan - Conversion was only mode of repayment of loan raised by issue of debentures - Therefore proportionate expenditure pertaining to the year under consideration is to be allowed as deduction – It cannot be treated as an expenditure falling under s. 35D as it was not capital expenditure when it was incurred.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

9. Expenditure incurred on repairs of compound wall and the rented premises – Is allowable revenue expenditure.
Gujarat Small Industries Corporation , Dy. CIT
(2004) 84 TTJ 22(Ahd)

10. Technical now how fees – Payments were made for obtaining technical know how for the purpose of setting up new units for the manufacture of hydrogen peroxide and caustic soda prills – Expenditure in question had a close and proximate connection with the setting up of new plants and obviously, the expenditure would contribute to augmentation and expansion of the profit earning apparatus of the assessee company – Since the basic frame work of the capital structure of the business was being extended and expanded, the expenditure was of capital nature which is outside the purview of s. 37(1) – Assessee acquired irrevocable rights for setting up manufacturing plants under the terms and conditions of the collaboration agreements – Thus, the technical know how fees paid by the assessee was fully covered under the provisions of s. 35AB and 1/6th of the expenditure is allowable for each of the assessment years under appeal.

Interest on borrowed capital and commitment charges – Once the condition for deduction of interest as stipulated under s. 36(1)(iii) is fulfilled and the capital is borrowed for the purpose of business, the amount of interest has to be treated as revenue expenditure – Interest and commitment charges in connection with the projects which were being set up by the assessee were closely connected with the existing business of the assessee owing to inter dependence, interconnection inter-lacing, common management and unity of control, etc. – Projects in question did not constitute independent business – New units were expansion of the existing business carried on by the assessee – Therefore, the interest and commitment charges were clearly covered under s. 36(1)(iii) and were deductible as revenue expenditure – Expln. 8 to s. 43(1) would not in any manner dilute or override the express provisions contained under s. 36(1)(iii).

Consultancy fees – Expenses incurred for procuring feasibility study report for power generation – Captive power plant would be a capital asset for the purpose of asessee's business and, therefore the expenditure for obtaining the feasibility study report, which was inextricably linked with the setting up of the power plant, was clearly a capital expenditure.

Telephone expenses for new project – Project in the process of setting up and production has not commenced – Expenditure incurred by the assessee in connection with expansion of the profit earning apparatus – Rightly disallowed as capital expenditure.

COFACE charges in connection with foreign currency loans – Procurement of goods and services from France for setting up a new project as extension of present business of assessee company, requiring payment of COFACE expenses as finance charges – Same similar to interest – Deductible in view of specific provisions contained under s. 36(1)(iii).

Gujarat Alkalies & Chemicals Ltd. v/s. Dy. CIT
(2002) 77 TTJ 245

(e) **CASH EXPENDITURE**

Cash payment exceeding prescribed limits - Assessment year 1993-94 – Assessing Officer made addition under section 40A(3) in respect of cash payments made to two parties – Commissioner (Appeals) deleted said addition on ground that cash payments were made to sub-contractors for giving wages to labourers in exceptional and unavoidable circumstances and, therefore, were covered by provisions of rule 6DD(j) and CBDT Circular No. 220 dated 31-5-1997 – Whether there was no error in order of Commissioner (Appeals) and, therefore, same was to be confirmed – Held, yes.

Project Technologists (P) Ltd., Dy CIT v/s.
(2007) 17 SOT 20 = (2006) 192 Taxation 16=(2005)98 TTJ 471 (Ahd)

(f) CONTRIBUTIONS TO CHARITY

Allowability – Donation to public charitable trust – Donations having no direct nexus with the business of the assessee would not qualify for deduction under s. 37(1) – There is nothing on record to establish that donation made by the assessee to the charitable trust was directly connected with and related to carrying on of its business – Deduction not allowable - Assessee cannot get deduction simply by contending that as a prudent businessman such donation in his opinion might help the business in the long run - Mere opinion of the businessman is not binding on the IT authorities - AO directed to consider the alternative claim of the assessee for deduction under s. 80G in accordance with law.

Himson Textile Engg. Industries Ltd. V/s. Dy. CIT
(2002) 75 TTJ 576 = 82 ITD 362

(g) DAMAGES FOR DEFAMATION

Assessee's activities include publication of Newspaper also – In a defamation Civil Suit assessee ordered to pay Rs. 1,44, 880 by the Distt. Court – Assessee claiming deduction – AO disallowing holding that it was for contravention of law – CIT(A) upholding - Held, assessee paying compensation / damages for Civil action & not for breach of law & amount being for defending goodwill of assessee allowable as business expenditure.

Kohinoor Tobacco Co, v/s. ITO
(2006)191 Taxation 5(Ahd)

(h) DEDUCTION ON ACTUAL PAYMENT - S. 43B

1. Disallowance under s. 43B - Contribution to provident fund – Delayed contribution to provident fund was rightly disallowed under s. 43B.

National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

2. Assessee collecting excise duty & Addl. Excise duty but contesting the levy – As per Hon'ble SC orders furnishing Bank guarantee to Excise authorities by depositing the whole amount in fixed deposit with the Bank – Claiming deductions of the amounts so deposited in fixed deposits for both the year under section 43B – Hon'ble members of the Bench held difference of opinion and the matter referred to Hon'ble Third member - Held, furnishing of bank guarantee for securing payment of Excise Duty/Addl. Excise duty pursuant to an order of Hon'ble SC, on facts could not be regarded as actual payment of duty in term's of section 43B – Hon'ble third member agreeing with Hon'ble member (J) – Matter directed to be sent back to regular Bench.

Mugat Dyeing & Printing Mills , ACIT v/s.
(2003) 176 Taxation 29 = 87 ITD 215= 261 ITR 69=
(2002) 77 TTJ 696=125 Taxman 261 (Ahd)

3. Disallowance under s. 43B – Delayed payments of PF, FPF and ESI – Words "during the previous year" occurring in the second proviso to s. 43B were omitted by Finance Act, 1989 with a view to mitigate the hardship caused to taxpayers because of wide amplitude of substantive provisions contained in s. 43B – Second proviso does not override the main provisions of s. 43B which provides for deduction in respect of any tax, duty or PF contribution, etc. in the year of actual payment - Thus amount of PF contribution, etc. remaining outstanding as on the close of the accounting year and paid in the next year before the due date prescribed under the PF Act, etc. would however be allowed as deduction in the next year when it is actually paid - Declaration of the assessee as a sick company under the provisions of SICA will not override the provisions of s. 43B – AO directed to examine the date of actual payment for grant of deduction in respect of PF, FPF and ESI, etc.

Shree Vallabh Glass Works Ltd., Dy. CIT v/s.
(2002) 76 TTJ 652

4. Disallowance under s.43B– Disputed excise duty vis-à-vis bank guarantee – Furnishing of bank guarantee for payment of entire disputed amount of excise duty/additional excise duty collected by the assessee in the relevant years cannot be considered equivalent to "actual payment" of duty in the relevant years – Giving of bank guarantee on the basis of fixed deposits made with the bank cannot be regarded as actual payment of excise duty also for the reason that the assessee continues to own the said fixed deposits and is entitled to receive interest on such deposits– Actual payment of duty will take place only when the amount of such duty reaches the coffers of the Government – Amounts of excise duty/additional excise duty collected by the assessee represent its trading receipts–There being no actual payment of duty in terms of s. 43B, assessee was not entitled to deduction of excise duty liability.

Mugat Dyeing & Printing Mills, Asstt. CIT v/s.
(2002) 77 TTJ 696 = 125 Taxman 261=(2003)176 Taxation 29= 87 ITD 215= 261 ITR 69(Ahd)

(i) ENTERTAINMENT EXPENDITURE

1. Expenditure on lunch, dinner, etc. on staff as well as on outsiders – No separate accounts maintained by assessee – CIT(A) was justified in disallowing a sum of Rs. 1,25,000 out of total claim of assessee of Rs. 20,01,453 as against Rs. 2,00,00 disallowed by AO.

Cadila Laboratories Ltd. , DY. CIT v/s.

(2004) 83 TTJ 758 (Ahd)

(j) EXPENSES FOR EXEMPTED INCOME

Section 14A, read with sections 10(33) and 115-O of the Income Tax Act, 1961 – Expenditure incurred in relation to income not includible in total income - Deductions – Assessment year 1999-2000 – Permissible deductions enumerated in sections 15 to 59 are to be allowed only with reference to income which is brought under one of heads of section 14 which forms part of total income – If any income is not part of total income, expenditure/deductions though of a nature specified in sections 15 to 59 but related to income not forming part of total income, cannot generally be allowed or considered against other income which are includible in total income for purpose of chargeability to tax – Therefore, deduction for interest paid in respect of capital borrowed for purpose of acquiring shares held as investment, can be allowed only against dividend income, only if dividend income is includible in total income for purpose of chargeability to tax under act and not otherwise - Assessee borrowed money on interest and utilized same in purchase of shares held as investment – With effect from assessment year 1998-99 dividend income was exempted from tax by virtue of section 10(33) – During relevant year assessee derived dividend income and also claimed deduction of interest paid as an expenditure under section 57(iii) - Interest by assessee being expenditure incurred in relation to dividend income exempted from tax could not be allowed as a deduction – Further, tax payable by a company under section 115 – O on amount of dividend declared, distributed or paid, is not tax paid for and on behalf of shareholders on dividend income received by shareholders –Interest liability is recurring liability or expenditure of revenue nature from year to year starting from date of acquisition of shares onwards and fact that dividend income was taxable when investment was made, would have no effect - Capital gain on shares would not form part of total income until they would be sold or transferred and interest only for period prior to date of acquisition, and not impugned interest, would be deductible from capital gains – Since assessee had made investment in shares out of borrowed money not for carrying on any business, there was no question of any indivisibility of various sources of income – Since scrutiny assessment was made in instant case under section 143(3), it could not be a case of increasing liability of assessee in reassessment under section 154 and assessee would not be saved by proviso to section 14A – Therefore, dividend income received by assessee did not form part of his total income and would be exempt from tax by virtue of provisions contained in section 10(33) and, as such

expenditure incurred in relation thereto could not be allowed as deduction from other taxable income .

Harish Krishnakant Bhatt v/s. ITO
(2004) 91 ITD 311= 85 TTJ 872 (Ahd)

(k) FOREIGN TOUR EXPENSES

1. Capital or revenue expenditure – Travel of managing director to explore possibility of exports – Exports made to foreign country – Genuineness of export sales not disputed – Deletion of addition justified - Income Tax Act, 1961, s. 37.

Krishnonics Ltd., ITO v/s.
(2009) 308 ITR 8 = 120 TTJ 650 = 15 DTR 366(Ahd)

2. Expenditure incurred for exploring the possibility of exports and attending exhibition in France, would be for the purpose of assessee's business and the entire expenditure is to be allowed irrespective of whether the assessee was able to get export orders or make any export in this year or in the subsequent year.

Vehicle expenses – Directors having been authorized to use the vehicles of the company, vehicle expenses were allowable business expenditure.

Omkar Textile Mills (P) Ltd., Asstt. CIT
(2008)115 TTJ 716 =28 SOT 12 = 5 DTR 187 (Ahd)

3. Foreign tour by director and his wife – Expenditure disallowed by AO on the ground that details of visit not supported by vouchers and other documentary evidence – Not justified Director of the assessee company is said to have visited various stock exchange abroad – Thus, the visit of the director was not purely personal and had some element of business – Hence, entire expenses relating to the director could not be disallowed - However, expenses relating to his wife cannot be allowed, same being not wholly and exclusively incurred for the purpose of business of the assessee – Hence, 25 per cent of total expenses are allowed on estimate basis.

Parkar Securities v/s. Dy. CIT
(2006) 102 TTJ 235 = 8 SOT 257 (Ahd)

(l) GENERAL

1. Amount paid to Government as per Court order – Amount paid by assessee to Ministry of Forest and Environment under order of High Court representing compensation for pollution caused by industries including assessee is allowable business expenditure.

Deversons Industries Ltd. , Jt. CIT
(2007)106 TTJ 314 = 104 ITD 171 = 290 ITR 287 (Ahd)

2. Expenditure incurred by a corporation – Grant -Grant given by National Dairy Development Board – Grants given by assessee NDDB to various co-operative unions, which are not routed though its P & L a/c. are liable to be converted as tax free or soft interest bearing loan in some contingencies and on which assessee exercised control till they were spent or utilized for the purposes for which they were given, could not be allowed deduction under s. 36(1)(xii) or in the alternative under s. 37(1) or 28(i).

National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

3. Assessee was an agent of E Ltd. For sale of tractors and motor cycles in Ahmedabad district and Mehsana district and had its head office at Ahmedabad and branch at Mehsana – It claimed deduction of certain expenditure for Mehsana office - It also claimed deduction of certain amounts paid as commission to NCT and TSC respectively under agreements – Agreement entered into between assessee and NCT provided, inter alia, that NCT was to maintain an upto date workshop and carry out pre-delivery inspection of tractors and motor cycles, installation of tractors and servicing – Agreement entered into between assessee and TSC provided , inter alia, that TSC had to maintain sales office at its own cost - Assessing Officer disallowed expenditure relating to Mehsana branch office holding that assessee had outsourced work of sale of tractors and motor cycles to one party and of servicing to other party and, thus, there was no necessity to maintain office itself – Assessing Officer also disallowed commission paid to NCT holding that son of proprietor of NCT made statement before him that NCT was not doing any work on behalf of assessee, but it was only selling spare parts on its own behalf – Assessing Officer also partly disallowed commission paid to TSC on sales of tractors by holding that commission was excessive – Commissioner (Appeals) deleted disallowances made by Assessing Officer – Even though work of sale and after sale service was outsourced, assessee had to maintain office and godown and, therefore expenditure for Mehsana Office was incurred for purpose of its business and was thus allowable as business expenditure - Amount paid to NCT was though named as commission, it was servicing charges paid to it for services rendered by it for purpose of assessee's business and, therefore same was rightly allowed by Commissioner (Appeals) – Since assessee had rendered services with regard to sale of tractors as per agreement, commission had to be paid as stipulated in agreement - Therefore, Assessing Officer was not justified in allowing commission paid to TSC in part.

Setalvad Bros., Dy. CIT v/s.
(2004) 140 Taxman 66(Ahd)

(m) GENUINENESS OF PURCHASE

Alleged bogus purchases – Relying upon information received from Sales Tax authorities that one SB in a bogus entity which was only supplying bogus bills, AO treated the purchases made by the assessee from SB as bogus and disallowed the same – Not justified - AO has not examined D from whose residence blank printed bills of SB were seized by the Sales tax authorities nor the assessee was given any opportunity to cross examine D – Assessee has filed tax audit report under s. 44AB wherein the auditors have clarified the quantitative details of raw material - Revenue has not brought anything on record to suggest that the payments made by account payee cheques to the suppliers have come back to the assessee – Disallowance deleted.

Shri Ram Multi Tech Ltd. v/s. Asst. CIT
(2005) 92 TTJ 568

(n) INTEREST ON BORROWED CAPITAL

1. Amount borrowed for expansion of business - Interest on borrowing utilized for setting up a new section in its existing business though capitalized in the books of account is allowable as deduction.

Ashima Syntex Ltd., Asstt. CIT v/s.
(2009) 120 TTJ 721(Ahd)(SB)

2. Loans for purchasing shares of group companies – Assessee engaged in the business of purchase and sale of shares and borrowing and lending money on interest having raised loans and utilized the funds for purchasing shares in group companies in the normal course of its business, these transactions cannot be treated as colourable device or dubious method and therefore interest on borrowings could not be disallowed.

Pinnacle Project & Infrastructure (P) Ltd., Addl. CIT v/s.
(2007) 106 TTJ 300= 104 ITD 122 = 290 ITR 45 (Ahd)

3. AO noticing assessee had taken interest bearing advances & that there was opening balance of Rs. 4 lakhs in the name of his son on which no interest was charged - AO thus disallowing interest claim to the extent of Rs. 72,000 i.e @ 18% on Rs. 4 lakhs – CIT(A) on facts deleting the addition - In revenue's appeal held that CIT(A) rightly deleted the addition as assessee had sufficient interest free funds as also no nexus between the interest bearing loans & interest free funds advances was established – (73 TTTJ 624, 108 Taxman 213 – relied upon).

Shri Bhimraj P. Guta, Asst. CIT v/s.
(2006)192 Taxation 127 (Ahd)

4. Whether where amount borrowed by assessee related to transactions during financial year 1991-92 wherein assessee undertook certain transactions on back to back basis, and loss claimed on those securities had been partly allowed by Tribunal amount invested by assessee in those securities could be said to be for non business purpose – Held, no – Whether consequently interest paid on borrowed funds was to be allowed – Held, yes.

State Bank of Saurashtra, Dy. CIT v/s.

&

Dy. CIT v/s. State Bank of Saurashtra

(2005) 93 ITD 662 = 95 TTJ 225

5. Interest, salary, etc. received by partner from firm – Certain amounts withdrawn by partners from capital accounts with assessee firm were invested with another firm, which advanced loan to assessee firm on interest – Whether in absence of any allegation that monies borrowed by assessee firm were not for purpose of business, there could be no reason to disallow interest paid thereon unless transaction was proved to be non-genuine – Held, yes – Whether simply because transaction resulted into reduction in tax liability it did not automatically become a colourable device – Therefore, disallowance made was neither justifiable nor tenable in eyes of law.

Voltamp Refrigeration Services v/s. ITO

(2005)1 SOT 221 = 94 TTJ 277 = 186 Taxation 104

6. Money borrowed for expansion of existing units – General provisions of s. 37(1) do not come into play in respect of interest payable on borrowings - Interest paid on borrowings is allowable as deduction where the borrowings are utilized for acquisition of capital asset or for revenue purposes – Dy CIT v/s. Core Healthcare Ltd. (2001) 169 CTR (Guj) 416: (2001) 251 ITR 61 (Guj) followed.

Shri Ram Multi Tech Ltd. v/s. Asst. CIT

(2005) 92 TTJ 568

7. Loan utilized for purchase of land - Deduction allowable notwithstanding the fact that interest had been capitalized in the books.

Aarti Industries Ltd. v/s. Dy. CIT & Dy. CIT v/s. Aarti Industries Ltd.

(2005) 95 TTJ 14

8. Money withdrawn from bank overdraft for payment of Income Tax – Assessee deposited its entire income in the same bank account from where the withdrawal for payment of income tax was made – Therefore, the assessee's claim that the withdrawal for payment of tax was out of the income generated during the year under consideration and not out of borrowed funds is sustainable - CIT(A) rightly deleted the disallowance.

Nirma Industries Ltd., Dy. CIT v/s.

(2005) 95 TTJ 867 = 95 ITD 199 =146 Taxman 90 (Ahd)(SB)

9. Interest free advances to sister concern - AO disallowed certain interest on borrowings on the ground that the assessee had made interest free deposits out of interest bearing loan – Not justified - Revenue having failed to establish that only borrowed funds have been utilized by the assessee for making interest free deposits with the sister concern, there was no justification to disallow the interest on the entire advances - CIT(A) was justified in disallowing interest which is proportionate to the loan amount diverted to make such advances.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 =97 ITD 125 (Ahd)(TM)

10. Year of allowability – Resolution of board of directors of the company that interest on deposits from members and directors will not be allowed till period of losses – Accrual of interest was deferred by the said resolution and claim in the year under consideration in which assessee company earned profits was allowable – Even otherwise, as the assessee company was running in losses, interest expenditure , if claimed in earlier years, would have been carried forward – Further, the rate of tax in case of companies was uniform in different years.
Dakle Reinforced Plastics (P) Ltd. v/s. Asstt. CIT
(2004) 83 TTJ 805 (Ahd)

11. Interest free advances – Disallowance under s. 36(1)(iii) could not be made on the ground of interest free advance to others.
Arjunlal Nebhumal & Co. v/s. Dy. CIT
(2003) 80 TTJ 67

(o) KNOW HOW

1. Allowability – Expenditure on acquisition of know-how – AO disallowed the claim of depreciation and allowed 1/6th of the aforesaid expenditure under the provisions of s. 35AB – Not correct – Know how covered by 35AB is that which would assist in manufacture or processing of goods - It does not include the know how acquired by the assessee for setting up the plant and machinery – Therefore, assessee was justified in capitalizing the same and claiming depreciation thereon - AO is directed to allow depreciation in place of deduction under s. 35AB.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985=97 ITD 125 (Ahd)(TM)

(P) LEGAL FEES – COMPOUNDING FEES

Allowability of - Assessee company took over business of a partnership firm – Department had launched prosecution proceedings against partners of erstwhile firm who were now directors of assessee – Assessee paid compounding fees to CBDT and claimed same as expenditure under section 37(1) – Since prosecution was launched against partners of erstwhile firm, it was their personal responsibility to face such prosecution and, therefore, compounding fees paid by assessee on their behalf was not allowable as deduction under section 37(1) – Expenditure incurred by assessee, being also hit by Explanation to section 37(1), was also not allowable..

Garden Silk Mills Ltd. v/s. Asstt. CIT

(2005) 2 SOT 856(Ahd)

(q) LOSS

1. Allowability of - Assessee bank claimed losses of Rs. 243.21 and Rs. 44.85 crores in respect of transactions of securities with two banks, PNB and SBP, on ground that assessee failed to deliver securities to purchasers for reasons beyond its control – In respect of transaction with PNB, Special Court vide order dated 11-3-1996, decided issue against assessee and decreed loss for Rs. 243.22 crores – While preferring appeal before Supreme Court, assessee admitted liability to PNB to tune of Rs. 182 crores – Vide an interim order Supreme Court directed assessee to make payment/deliver securities to PNB of aggregate value of Rs. 212 crores - In respect of transactions in SBP, assessee and SBP mutually settled matter regarding principal amount of Rs. 27.05 crores and assessee made payment thereof during the relevant year - However, interest portion of Rs. 17.76 crores was settled in subsequent year - In respect of PNB, since no dispute was raised by assessee before Supreme Court in respect of amount of Rs. 182 crores, it was to be held that they had accepted decision of Special Court on that amount, and liability to extent of Rs. 182 crores had arisen to assessee in previous year relevant to assessment year 1996-97 in which decision of Special Court was passed - – Since during relevant year liability of Rs. 30 crores, being difference between Rs. 212 crores and Rs. 182 crores, was still pending adjudication before Supreme Court, said amount would not be an allowable deduction in relevant assessment year –Rs. 31.22 crores, being difference between amount of compensation granted by Special Court at Rs. 243.22 crores and sum of Rs. 212 crores as settled by Supreme Court, would not be allowable at all as dispute was finally settled in 2001 at Rs. 212 crores and no liability as such remained payable by assessee - – Since out of total claim of loss of Rs. 44.85 crores in respect of SBP, liability for Rs. 27.09 crores had been amicably and finally settled and paid during year under consideration, it was to be allowed in relevant assessment year.

State Bank of Saurashtra, Dy. CIT v/s.

&

Dy. CIT v/s. State Bank of Saurashtra

(2005) 93 ITD 662 = 95 TTJ 225(Ahd)

2. Commissioner (Appeals) confirmed disallowance by Assessing Officer of write off of investment to extent of 90 per cent of assessee company in its subsidiary company 'S' company, treating same as capital expenditure - Investment made by assessee in acquisition of shares with ultimate purpose of merging 'S' company with itself constituted capital investment and any loss arising from writing off of same in its books could not be construed as either business loss or revenue expenditure.

APS Star Industries Ltd. V/s. Dy. CIT

(2003) 86 ITD 182= (2004) 82 TTJ 596 (Ahd)

(r) MOTOR CAR EXPENSES

Allowability – Disallowance for personal use of vehicles – Disallowances made by the AO on account of personal use of vehicles by the directors and their family members –Not sustainable - No disallowance of expenses on account of personal use can be made in the case of a company.

Keystone India (P) Ltd., Dy. CIT v/s.

(2006) 99 TTJ 386(Ahd)

(s) PRELIMINARY EXPENSES

For purpose of Explanation (b) to section 35D(3), issued share capital can only be considered to be a sum of share capital plus amount outstanding as share premium account – Sums standing to credit of 'Reserve and Surplus - Account' can not be considered as part of issued share capital within meaning of Explanation (b) to section 35D(3).

Sirhind Steels Ltd., Jt. CIT v/s.

(2005) 97 ITD 502 = 279 ITR 128 = (2006) 99 TTJ 1141 (Ahd)

(t) REBATE TO MEMBERS OF CO-OP. SOCIETY

Allowability – Rebate allowed to members by co-operative society – Assessee, a co-operative society, allowed rebate to its members which reduced the prices of goods sold to the members – Same allowable as revenue expenditure.

Surendranagar Dist. Co-operative Milk Producers Union Ltd., Dy. CIT v/s.

(2006) 101 TTJ 497(Rajkot)

(u) SALES PROMOTION EXPENSES

1. Assessee incurring expenses on advertisement & sales promotion Rs. 16,71,560 and claiming it as deduction although full amount not debited to profit & loss account – AO treating it as expenditure of enduing nature & disallowing assessee's claim – CIT(A) allowing assessee's claim – Revenue filing appeal & assessee the C.O supporting CIT(A)'s order – Assessee following mercantile system of accounting – Expenditure wholly & exclusively for business & liability incurred during the year – On facts & circumstances CIT(A) justified & his order upheld - (82 ITR 363 & 36 ITD 102 – Ahd etc. relied upon).

Gujarat Ambuja Apparels Ltd. , ACIT
(2006) 191 Taxation 6(Ahd)

2. Assessment year 1993-94 – Assessee engaged in business of manufacturing equipments for chemicals and other plants at various sites throughout country – Out of sum of Rs. 11,46,385 claimed by assessee as sales promotion expenses, Assessing Officer disallowed amount of Rs. 10,25,000 paid by assessee to 'BV' as marketing support charges on ground that assessee had not submitted details of services rendered by payee – Accordingly, he made addition but same was deleted by Commissioner (Appeals) – It had been found that 'BV' had issued various bills/debit notes for services rendered and that assessee had got job orders of Rs. 12.52 crores against payment of Rs. 10,25,000 – Whether on facts, it could be said that expenses had been incurred for commercial expediency, as without such expenses such a large volume of assessee's business could not be achieved – Held, yes – Whether therefore Commissioner (Appeals) had correctly deleted addition – Held, yes.

Project Technologists (P) Ltd., Dy CIT v/s.
(2007) 17 SOT 20 =(2006)192 Taxation 16= (2005)98 TTJ 471(Ahd)

3. Record showing that against payment of Rs. 10.25 lakhs, assessee got job orders of the tune of Rs. 12.52 crores – In view of various bills/debit notes issued by one of the service provider, observation of AO that assessee did not produce any evidence is factually incorrect – Expenditure was for commercial expediency as without such expenditure such a volume of business could not have been secured – CIT(A) was justified in deleting the addition made by the AO.

Project Technologists (P) Ltd., Dy. CIT v/s.
(2005) 98 TTJ 471 = (2007) 17 SOT 20 =(2006)192 Taxation 16 (Ahd)

(v) SECRET COMMISSION

Allowability of – Assessee firm which was engaged in business of trading in galvanized black pipes and pipe fittings, used to make sales to industrial concerns and dyeing house and for that purpose it paid secret commission to staff and plumbers of customers, who used to procure orders for assessee – Assessee claimed deduction of said expenditure - Assessing Officer disallowed claim of assessee and levied penalty on assessee under section 271(1)(c) – Since by paying commission assessee had procured more order of sale and payment of such commission was as per trade practice in which assessee was dealing and assessee had also furnished complete details of sales transactions on which commission was paid, said expenses were fully allowed under section 37(1) – However keeping in view fact that there were no changes of any part of such payment could be satisfactorily verified, disallowance of such commission payment was to be restricted by Assessing Officer at five per cent .

Mugatlal B. Sons , ITO, Ward 5(3), Surat v/s.
(2006)152 Taxman 29 = 100 TTJ 1042 = 193 Taxation 120 (Ahd)

(w) STUDY TOUR EXPENSES

Assessee firm carrying on legal profession in various laws including international laws – Expenses incurred for one of the partners in USA for procuring degree in Business Management Law in USA, disallowed by the A.O - CIT(A) allowing assessee's claim – In revenue's appeal held there is direct nexus between the type of education procured by the partner & nature of business of assessee firm and expense of revenue nature – CIT(A) correct & his order confirmed - 80 ITR 687, 114 ITR 256, 10 ITD 365 & decision in ITA No. 1074/Ahd/1992 dated 15.5.1997 also relied upon.

Hathi P.C , ACIT v/s.
(2005) 184 Taxation 64

(x) SUCCESSION OF BUSINESS- ALLOWABILITY

Assessee company incorporated under Part IX of Companies Act, 1956, by conversion of a partnership firm cannot claim deduction of the expenditure on discharge of firm's pre-existing liability towards sales commission.

Amin Machinery (P) Ltd. v/s. Dy. CIT
(2007)111 TTJ 892 = (2008)298 ITR 140 = 114 ITD 413 (Ahd)

(Y) TECHNICAL KNOW HOW - S. 35AB

1. Assessee already in the business of manufacturing air conditioners, acquiring from H Ltd. Japan, technical know how, drawings and designs for improvisation of the products against lump sum consideration - Same was allowable as revenue expenditure - In view of restrictive clauses in the agreement regarding impartibility, secrecy and confidentiality of know how, the assessee did not acquire ownership rights on the technical information - Provisions of s. 35AB were not applicable.

Amtrex Appliances Ltd. v/s. Dy. CIT
(2005)94 TTJ 396(Ahd)

2. Technical know-how, expenditure for – In terms of collaboration agreement, assessee company made lump sum payment to German company for acquiring technical know how and information for manufacture of textile machinery components and claimed deduction as revenue expenditure – Assessing Officer disallowed claim, whereas Commissioner (Appeals) restricted allowance to 1/6th of amount actually paid/remitted under section 35AB – Technical know how acquired by an assessee during course of business would necessarily be utilized over a number of years and expenditure incurred in acquiring same would, thus necessarily be allocated and apportioned over entire period of its user in conformity with matching concept which is an essential part of accrual accounting and section 35AB is primarily intended to incorporate matching concept into commercial accounting for purpose of arriving at profits of an enterprise in a realistic manner – Applicability of provisions of section 35AB to lump sum payment for acquiring technical know how is not to be considered on anvil of nature of expenditure being capital or revenue - There being a specific and unequivocal exclusion under section 37(1) of any expenditure covered under specific provisions of section 35AB, even if both provisions are applicable in respect of any expenditure, section 35AB would apply and such expenditure would be outside purview of section 37(1) – Assessee had acquired a benefit of enduring nature and, thus expenditure in connection thereof being capital in nature, was not deductible under section 37(1) – In view of above one sixth of amount paid during year by assessee to German company was deductible under section 35AB .

APS Star Industries Ltd. V/s. Dy. CIT
(2003) 86 ITD 182= (2004) 82 TTJ 596 (Ahd)

(z) TRAVELING EXPENSES

Allowability of – Assessing Officer disallowed certain amount claimed by assessee as expenses incurred on purchase of Air tickets – Commissioner (appeals) deleted disallowance with a finding that Air tickets were purchased for undertaking business trips – Since nothing was brought to notice by department to controvert finding of fact, recorded by Commissioner (appeals), there was no reason to interfere with finding of Commissioner (appeals).

Giriraj Mines, Asstt. CIT v/s.

(2005)1 SOT 279 = 189 Taxation 107

(zz) YEAR OF ALLOWABILITY

Prepaid lease rent relating to next financial year – Assessee is not entitled to deduction of prepaid lease rent pertaining to the next financial year as no liability can be said to have been incurred merely on the basis of advance payment irrespective of the terms of the lease agreement requiring the assessee to make payment of lease rent in the month of March preceding the financial year in which the asset is to be used – Lease rent being the period cost, is to be allowed only in the year to which such payment relates in view of the theory of matching concept.

FAG Bearings India Ltd., Dy. CIT v/s.

(2008) 118 TTJ 433 = 306 ITR 60 = 115 ITD 53 = 13 DTR 298(Ahd)

XI. BUSINESS INCOME

(a) GENERAL - S. 28(I)

Chargeable as - Where assessee company took a land on lease and constructed service center/building thereon providing various facilities such as services of lift, receptionist, secretarial services, etc. to occupants/tenants of service center, compensation received by assessee from such occupants was to be taxed under head 'Income from business' and not as 'Income from house property'.

Saptarshi Services Ltd. , Asstt. CIT v/s.

(2004) 135 Taxman 38 = 82 TTJ 590 = (2005) 184 Taxation 72 (Ahd)

(b) S. 28(1) RW S. 22

In addition to rental income assessee firm also received service charges from tenant in connection with services provided by assessee on account of watchman liftman,motor operator, scavengers, electrician and maintenance of electric power consumption, sanitary blocks, etc. – Assessing Officer treated service charges receipt as income from house property – Services provided by assessee were clearly a business venture and could not be treated as integral, necessary and indivisible part of leasing out of property – Remuneration paid for providing such services bore all essential characteristics of business receipts inasmuch as an organized, systematic and regular activity had been carried out by assessee for earning profit – While considering nature of income in relation to immovable property, facts and circumstances of case as well as intention of assessee would have to be ascertained – Therefore, service charges were liable to be assessed as business income -

Jash Development Corpn., Dy. CIT v/s.
(2002) 125 Taxman 76

(c) BUSINESS INCOME OR SHORT TERM CAPITAL GAIN - SECTION 28(I)

1. Chargeable as – Assessment years 1992-93 to 1995-96 – Where looking into volume, frequency, continuity and regularity of transactions of purchase and sale in shares by assessee, it could be inferred that those transactions must have been entered into by assessee with a profit motive and not for purpose of investment, income arisen to assessee from such transactions would be assessable under head 'Profit and gains of business or profession' – Merely because shares were acquired by assesse from primary market and assessee had to wait for two to three months for allotment process, transaction could not be held to be a non business transaction – Whether fact that shares purchased from secondary market were transferred in name of assessee, would not make transaction as non-business transaction – Held, no

Deepaben Amitbhai Shah (Smt), Dy. CIT v/s.
(2006) 99 ITD 219 = 100 TTJ 1065 (Ahd)

2. Assessees carried out numerous share transactions by borrowing huge funds – Transactions of purchase and sale of shares were few, significant portion had been acquired by way of right shares, original shares on which rights had been received, were acquired long back, out of right acquisitions, most had been retained by assessee, fewer scrips had been sold out of total acquisitions during year except in one case, in rest of cases, majority of scrips had been retained by them till end of year - Assessees were not dealers in shares and they had not carried out any trading activity in shares and, therefore, profits earned by them on sale of shares were capital gains, long term or short term, and not business profits.

Pushpaben H. Koticha (Smt) v/s. Dy. CIT
(2004) 136 Taxman 175 = (2005) 187 Taxation 208 (Rajkot)

(d) BUSINESS INCOME OR SHORT TERM PROPERTY INCOME

1. Merely because income is attached to immovable property it cannot be sole factor for assessment of such income as income from house property - For ascertaining income accruing from such asset, not only contention of parties is to be seen but also terms and conditions for which asset is given for use – Assessee was providing storage facilities measured in square feet on specific charges for specific period to various customers - In addition to space in warehouse, assessee provided services like electricity, telephone, staff for managing loading and unloading of goods and keeping a watch over goods stored in warehouse along with others services required from time to time by concerned customers – As per terms of letting, customers had no right of occupancy and godowns were owned and insured by assessee – Entire activity systematically undertaken by assessee was adventure in nature of trade and, therefore, liable to be assessed as business income and not as income from house property .

Tejmalbhai & Co. , ITO v/s.
(2006)99 ITD 399 =100 TTJ 898 =282 ITR 224(Rajkot)

2. Income from providing accommodation and various services in building constructed on leased land – Assessee not owner of the land – Directors of KTP, the lessor of the land of assessee different and not related – Assessee constructing a service center on the land and providing various facilities to sub-lessees like EPABX, lift, receptionists, secretarial services, data processing, conference room, etc.–Assessee is providing working place along with various facilities – Income derived by assessee is business income.

Saptarshi Services Ltd. , Asstt. CIT v/s.
(2004) 82 TTJ 590 = 135 Taxman 38 = (2005) 184 Taxation 72 (Ahd)

3. Vis-a-vis income from house property – Rental income derived by partner from firm – Even though the amount received by the assessee partner from the firm for user of assesses premises is nomenclatured as 'rent', no relationship of tenant and landlord could possibly subsist between the assessee partner as an owner and the partnership firm as a tenant inasmuch as partnership firm is a compendious name of all the partners – Thus, rental income derived by the partner from the firm would not be covered by the provisions of s. 22 – Merely because the income in question does not fall under s. 22 would not by itself confer exemption from taxation on the amount received by the partner from firm – Amount received by the partner from the firm by way of compensation for user of partner's premises essentially partakes of the nature of business receipts which come within the purview of s.28 – Therefore, rental income received by assessee partner from the firm is liable to be assessed as business income under s. 28(i) though not under s. 22.

Jogendrasing Mohansingh (HUF) & Ors., ITO v/s.
(2002) 76 TTJ 148

(e) BUSINESS INCOME OR INCOME FROM OTHER SOURCES

1. Assessee company had opened foreign currency account with SBI, in which contributions from NRI promoters were credited and said amount was utilized for import of plant and machinery – Assessee company opened L/C for import of plant and machinery and a lien was created for equivalent amount of L/C deposited in that account - Assessee earned interest on that deposit - Such interest would be chargeable to tax as income from other sources – Assessee would be entitled to deduction of interest paid on borrowings utilized for investment in such FDRs -
   Steelco Gujarat Ltd. , Jt. CIT v/s.
   (2006) 99 ITD 408(Ahd)

2. Interest on fixed deposits/loans prior to setting up and commencement of business – Is assessable under the head income from other sources and not 'profits and gains of business' – However, AO is directed to allow 10 per cent of total expenditure as having been incurred for purposes of earning such income under s 57(iii).
   Interlink Petroleum Ltd., Dy. CIT
   (2004)83 TTJ 274(Ahd)

(f) PRESUMPTIVE ASSESSMENT – s. 44AD

Scope and applicability of s. 44AD – Where the assessee choose to maintain the books of accounts, preferring to rely thereon for various other purposes, both apart from and under the I.T Act, it cannot ignore the book results and claim to be entitled to lower presumptive rate of income under s. 4AD than that revealed by such books.
Shivani Builders v/s. ITO
(2007)110 TTJ 719 = 108 ITD 520 = 295 ITR 281 (Ahd)

XII. CAPITAL GAINS

(a) AGRICULTURAL LAND

Enhanced compensation on acquisition of agricultural land – Date of transfer of agricultural land was 23rd Sept. 1986, i.e date of award - Land situated in Kalol – Kalol Municipal area was notified for the purpose of s. 2(14)(iii) w.e.f 6th Jan. 1994 – Therefore, on the date of transfer, the impugned agricultural land was not a capital asset as provided under s. 2(14)(iii) and no capital gain can be charged to tax – Contention of the Revenue that the impugned land was transferred on 31st Aug. 1994, when the Asstt. Judge determined the compensation is not sustainable – Sec. 45(5) is also not applicable as original transaction was not subject to capital gains.
Prajapati Shnkarbhai Ramabhai through LR & Ors. , ITO v/s.
(2006) 100 TTJ 143 = 6 SOT 487 (Ahd)

(b) CHARGEABILITY - TENANCY RIGHTS

There being no material on record to show that assessee had incurred any cost in acquiring tenancy rights, gain arising out of surrender of such tenancy rights cannot be charged as capital gains for the period prior to amendment of s. 55(2) w.e.f , 1st April, 1995.

Heena Agriculture (P) Ltd., ITO v/s.
(2007)109 TTJ 786 = (2008) 114 ITD 127 (Ahd)

(c) COMPUTATION OF CAPITAL GAINS

1. Deduction under s. 48 - Payment to daughter under a consent decree – Amount of Rs. 10 lakhs paid by assessee to his daughter towards her education, maintenance and marriage as per the terms of a consent decree of a Court out of the sale consideration of a property which was received on partition of HUF, was not deductible under s. 48 for the reason that the so called charge was created on the said property after the same agreement was registered and there was already a provision of Rs. 5 lakhs made at the time of partition for similar purpose on the property of HUF and such charge could not be fastened on a particular property.

Krishnadas G. Parikh v/s. Dy. CIT
(2007) 112 TTJ 634 = (2008) 114 ITD 363 (Ahd)

2. Assessee had sold its business to one 'C' as a going concern at a slump price of Rs. 3,64,00,000 – Assessing Officer computed short term capital gain at Rs. 2,03,50,292 and added said amount to income of assessee – Subsequently, Civil Court vide order dated 3-10-2000 reduced sale consideration to Rs. 1,41,29,707 and directed assessee firm and its partners to pay sum of Rs. 2,03,50,292 to 'C' – Assessee refunded said amount to 'C' – However, Assessing Officer passed assessment order afresh and again computed short term capital gain at Rs. 2,03,50,292 and added the said amount to income of assessee – In first round of appeal, Tribunal had not accepted revenue's contention that obtaining of decree was a collusive device by assessee resorted with ulterior motive of evading capital gain tax - Tribunal held that events of filing of civil suit and passing of order by civil court could not be brushed aside as irrelevant for adjudication of present issue and it was concluded that order of civil court would constitute relevant evidence for considering and deciding matter under Income Tax Law even though Income Tax Department was not a party to such proceedings - Since above order of Tribunal had been accepted by revenue, Assessing Officer while giving effect to order of Tribunal, could not take a view contrary to above observations of Tribunal – While giving effect to order of Tribunal, Assessing Officer was bound to consider decree of civil court as a relevant evidence for deciding levy of capital gain upon assessee – Since refund of sale consideration directed by Civil Court was equal to capital gain worked out by revenue there would remain no capital gain in hands of assessee – Therefore, addition

made to income of assessee on account of short-term capital gain was liable to be deleted.

Bio Pharma v/s. ITO
(2006) 5 SOT 478 (Ahd)

(d) COST OF ACQUISITION

Sale of land in erstwhile Portuguese territory – Alwara rights in land given to ancestors of assessee – Merger of Portuguese territory into India - Land Reform Regulation passed in 1971 – Concession granted by Protuguese Administration extinguished and new rights of occupation granted – Gains on sale of land assessable – Cost of acquisition ascertainable and could be substituted by fair market value as on 1-4-1981 – Income Tax Act, 1961, s. 45.

Vijaysinh R. Rathod v/s. ITO
(2007) 291 ITR 90 = 106 ITD 153 = 107 TTJ 593 =
201 Taxation 13 (SB)(Ahd)

(e) DEPRECIABLE ASSETS

Assessment year – 2002-03 – An explosion took place on premises of assessee, as a result of which various items of plant and machinery,electrical items, stock in process, etc. were destroyed – Assessee was insured and received certain sum from insurance company – Assessing Officer, proceeding under section 45(1A), determined capital gain after allowing written down value as per books of account of assessee and made addition – Whether since amount received from insurance company was lower or lesser than three items mentioned in section 50(1), provisions of section 50, read with section 45(1A) would not apply and no capital gain would be chargeable – Held, yes.

Nidan Chemicals (P) Ltd., Asstt. CIT v/s.
(2007)Taxman 109(Ahd)

(f) EXEMPTION UNDER S. 54E

1. Investment in residential house – Benefit under section 54F is not allowable for a residential house purchased/constructed outside India .

   Leena J. Shah v/s. ACIT, Circle 1(1), Baroda
   (2006) 6 SOT 721(Ahd)

2. Transfer of property vis-à-vis receipt of consideration – Period of six months is to be reckoned from the date of transfer in contrast to the date of receipt of consideration – There is no ambiguity in the statutory provision in this regard - In the instant case, investment was made by the assessee in National Rural Development Bonds after the stipulated period of 6 months from the date of transfer – Case of the assessee being not a case of compulsory acquisition of property, the benefit under the proviso to s. 54E(1) would not be available to the assessee – In view of clear language of s. 54E(1)

the alternate submission that the view beneficial to the assessee is to be accepted, is also not acceptable.

Jyotindra H. Shodhan v/s. ITO
(2003) 81 TTJ 1 = 87 ITD 312 = 264 ITR 1 =(2005) 187 Taxation 221 (Ahd)(SB)

(g) LOSS

1. Loss from extinguishments of rights in share warrants - Although share warrants applied for by assessee constituted capital asset under s. 2(14) and extinguishments of right therein constituted 'transfer within the meaning of s. 2(47), no value having been assigned to considering received on transfer of such warrants the computation provisions under s. 48 failed, hence no loss can be allowed to assessee from extinguishments of such right as short term capital losss.

Ajay C. Mehta v/s. Dy. CIT
(2008)115 TTJ 281 = 305 ITR 155 = 114 ITD 628 = 4 DTR 577 (Ahd)

2. Long term capital loss – Transfer of capital asset – Sale of shares of company which was being wound up – Shares pledged to IDBI - Sale not valid – Capital loss not deductible - Companies Act, 1956, s. 536(2) – Income Tax Act, 1961.

Bijal Investment Co. P. Ltd., CIT (Deputy)
(2008)303 ITR 350 = (2007)109 TTJ 65 = 108 ITD 432(Ahd)

3. Capital loss – Loss on sale of units of UTI – Sub.s (7) of s. 94 had been brought on statute book w.e.f 1st April, 2002, only and therefore short term capital loss was rightly allowed by CIT(A) for the asst. yr. 1991-92 is question – Union of India & Anr. v/s. Azadi Bachao Andloan & Anr. (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) relied on.

Cadila Laboratories Ltd. , DY. CIT v/s.
(2004) 83 TTJ 758 (Ahd)

4. Assessee claimed an amount of Rs. 1,51,554 as loss on account of fire in riots – Records showed that insurance company had further allowed subsequent claim at Rs. 2,11,28 to assessee – Since total claim received by assessee was more than loss incurred, question of allowing any deduction for loss did not arise - Therefore, lower authorities were justified in disallowing assessee's claim for deduction of loss.

Setalvad Bros., Dy. CIT v/s.
(2004) 140 Taxman 66(Ahd)

5. Business loss - Irrecoverable advances for purchases – AO directed to consider the issue of deduction of such amounts as business loss under s. 28 if the advances have been written off.

Gujarat Fluoro Chemicals Ltd. v/s. Jt. CIT
(2002) 76 TTJ 313

6. Sale of scientific research assets on which deduction is already allowed under s.35 – Assets namely, equipment, furniture and building were properties and, therefore capital assets within the meaning of s. 2(14) – By the mere fact that the entire cost of assets had been allowed as a deduction under s. 35 neither the assets ceased to be capital assets nor cost thereof ceased to be cost of acquisition – Observations of the Departmental authorities that by allowance of 100 per cent deduction under s. 35, the cost becomes zero and if the entire cost is again allowed as cost of acquisition while computing capital gains it would amount to double deduction has no force – Statutory increase in cost on account of cost inflation index as contemplated by second proviso to s. 48 was not subject matter of any allowance earlier and is to be allowed as loss under the head capital gains - Assessee could not however be allowed deduction of the cost of acquisition of assets used for scientific research which had been allowed already as deduction under s. 35 – Said loss could not be allowed as business loss in view of s. 71(3).

Pharmson Pharmaceuticals Ltd. v/s. Dy. CIT
(2003) 81 TTJ 818 = 87 ITD 668 (Ahd)

(h) <u>RELINQUISHMENT</u>

Loss incurred on surrendering industrial land to Government – Expenditure on acquisition of land was a capital expenditure - There was a relinquishment of right by the assessee – Therefore, the loss has to be treated as a loss under the head 'capital gains' subject to verification that assessee acquired the land and became owner thereof before the surrender.

Essar Steel Ltd., Dy. CIT v/s.
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

(i) <u>SLUMP SALE</u>

1. Chargeability – Sale of business undertaking vis-à-vis slump sale – When a business as a whole is transferred it is a transfer of property within the meaning of s. 45 r/w s. 2(47) – Even if a slump price is paid for the transfer of the business as a whole, the liability under s. 45 could arise – Capital gain can be determined on the basis of the consideration received for the transfer of the undertaking as reduced by the book value or WDV as shown in the accounts maintained by the assessee – Assessee company sold three of its units – Respective lumpsum consideration was fixed for transfer of each unit – Entire business is to be taken as a whole and the difference between the WDV of the assets and the sale consideration is to be charged to tax as "short-term capital gain" under s. 50 – Capital gain is to be worked out on the basis of the consideration received or accruing to the assessee on account of transfer as recorded in the sale deeds – The consideration cannot be taken as per the revaluation made by the transferee companies.

Essar Steel Ltd., Dy. CIT v/s.
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

2. Section 50B of the Income Tax Act, 1961 – Capital Gains
Computation of in case of slump sale - Whether section 50B, introduced by Finance Act, 1999 with effect from 1-4-2000, is substantive provision which specifically brings to charge profits arising from slump sale and has to be held prospective in operation.
Industrial Machinery Associates v/s. CIT
(2002) 81 ITD 482(Ahd)

(J) TRANSFER

1. Revaluation of depreciable assets and conversion of partnership firm into company – Simply revaluation of assets does not lead to incidence of capital gain inasmuch as the revaluation is made in the hands of the assessee by writing up the value of assets in the books – In view of the provision of ss. 575, 576 and 577 of the Companies Act, 1956, there is no transfer involved when a company gets itself registered under Part IX of the Companies Act – Thus, no question of applicability of s. 45, 50 or any other provision of the IT Act arises on conversion of a firm into a company under Part IX – Further, the assets were not taken over at the revalued figure - Therefore, it cannot be said that the firm had received price equal to the revalued figure on conversion – Also, it would not be possible to conceptualise the cost of acquisition of a going concern as well as the date of acquisition thereof - Thus, assessee firm was not liable to tax on capital gain either under s. 45(1) or s. 45(4).
Well Pack Packaging v/s. Dy. CIT
(2003) 78 TTJ 448 = 130 Taxman 215

2. Computation cost of acquisition--.sale/renunciation of rights shares - In a case where cum right price and ex-right price of the share before and after the announcement of the right offer is more than the actual cost of acquisition of share, the depreciation in the market value of share as a result of right offer cannot be treated as real loss in the original cost of acquisition and such difference cannot be regarded as cost of acquisition of right – Cost of acquisition of the "right offer" which is embedded in the cost/value of old shares has to be only a portion or fraction of the cost of acquisition or indexed cost of acquisition of the old shares and cannot exceed it - Average actual cost of shares held by the assessees ranged between Rs. 20 to 22 per share while the cum right price and ex-right price was Rs. 215 and Rs. 180 respectively as per spot quotations – Depreciation in the value of shares being Rs.35, the value declined by 16.28 percent as a result of announcement of right offer - Assuming that the assessee have owned the original shares for a period exceeding one year it is long term capital asset and, therefore the proportionate costs of right entitlements transferred by the assessee is 16.28 per cent of indexed cost of acquisition of the original/old shares – Losses claimed by assessee on account of sale/renunciation of right entitlements by arriving at the cost of acquisition at a figure higher than the cost of original shares was a part of colourable

device adopted by the assessee which cannot be accepted - AO directed to ascertain the indexed cost of acquisition of the right entitlements accordingly.

Affection Investments Ltd., Asstt. CIT v/s.
Ajay Investment Ltd., Asst. CIT v/s.
Aligator Investment Ltd., Asst. CIT v/s.
Anagbhai Ajaybhai, Asstt. CIT v/s.
(2003) 80 TTJ 278 = 137 Taxman 102(Ahd)

(k) VALUATION - UNQUOTED SHARES

Cost of acquisition –For valuation of unquoted shares as on 1-4-1981, application of rule 1D of Wealth Tax Rules is mandatory –

Sirhind Steels Ltd., Dy. CIT v/s.
(2005)97 ITD 12 = 98 TTJ 586(Rajkot)

XIII. CAH CREDIT

Genuineness of gift - Assessee having produced an affidavit from the donor, copy of NRI account in the name of donor, certificate affirming gross salary of the donor and copy of the official cheque in the name of the assessee the gift has to be treated as genuine in the absence of any contrary evidence to refute the same.

Vijay Parkash (HUF) Dy. CIT v/s.
(2009) 120 TTJ 429(Ahd)

XIV. CHARITABLE TRUST

(a) ASSESSMENT

1. Computation of income – Deduction under s. 24(1)(ii) and depreciation – For the purpose of the provisions of s. 11(1)(a), income of the assessee trust has to be computed in the normal commercial manner without classification under various heads set out in s. 14 – There is no scope of granting deduction under s. 24(1)(i) – However, depreciation on immovable property is allowable - Claim of assessee could not be denied on the ground that the said claim was not made before AO.

Shrimad Vallabh Vishwa Dharma Sanstha V/s. Addl. CIT
(2006)102 TTJ 653 = (2007) 16 SOI 34 (Ahd)

2. Assessee Trust registered under the Bombay Public Charitable Trust Act, 1950, Societies -Registration Act & under section 12A of the Income Tax Act & also granted recognition under section 80G – Asstt. for assessment year 1988-9 completed under section 143(3) & exemption granted under section 11 – For assessment years 1991-92 & 1992-93 A.O passing orders under section 143(3) & denying claim under section 11 & also reopening assessments for assessment years 1988-89 to 1990-91 under section 147 & completing reassessments denying exemption – CIT(A) upholding - Held, no satisfaction recorded by the A.O for escapement of income for assessment years 1988-89 to 90-91 – Even on merits in the absence of fresh facts or material on record reopening not sustainable as there was only change of opinion - Reassessments held illegal & cancelled – For other years held objects of the Trust being encouragement of sports & games are charitable and on facts & circumstances assessee entitled to exemption under section 11.

Surat City Gymkhana v/s. ACIT - (2004) 182 Taxation 63(Ahd) **Also see 254 ITR 733 (Guj) of the same assessee.**

3. Procedure for registration – Assessment years 1997-98 to 2000-01 – Assessee trust filed application for registration of trust under section 12AA – As it was beyond time, assessee also made an application for condonation of delay – Commissioner granted registration for period from 1-4-2000 but refuse to condone delay for period 31-3-1999 to 31-3-2000 and denied registration – There was also delay in filing appeals to Tribunal which was also requested to be condoned – Plea of assessee was that there was sufficient cause for delay on both counts as trustees were uneducated, rustic and rural people and were not aware of technicalities of relevant provisions of Act and also did not understand consequences for non registration of trust – It was also pleaded that Commissioner passed impugned order in a cryptic manner and without giving assessee an opportunity of being heard – Whether there were sufficient reasons for assessee for late submission of application for registration and, therefore, delay should be condoned – Commissioner should have given an opportunity of being heard to assessee and should have assigned reasons for rejecting applications for condoning delay – Therefore, Commissioner should grant registration to trust.

Dashnam Goswami Bawa Samaj Trust v/s. ITO
(2003) 127 Taxman 54(Rajkot)

(b) CHARITABLE PURPOSE

Trust for the benefit of a community – Trust created for the benefit of a particular small community cannot be denied benefit under s. 11 on the ground that it is not for general public utility –

Rajkot Visha Shrimali Jain Samaj v/s. ITO
(2007)109 TTJ 286 = 292 ITR 222 (Rajkot)

(c) REGISTRATION UNDER S. 12A

1. Scope and applicability of s. 12AA – Sec. 12AA nowhere lays down that where a charitable trust is already registered under s. 12A, it has again to get registered under s. 12AA – Assessee trust having been registered long back under s. 12A CIT(A) was not justified in refusing exemption under s. 11 only on the ground that it was not registered under s. 12AA.
H.D Acharya Vidyottejak Trust v/s. Asstt. CIT
(2007) 106 TTJ 324 = 104 ITD 268 (Ahd)

2. Application of income – Medical expenses - Object of assessee trust includes establishment of hospital – Establishment of hospital is one of the modes to provide medical help to the public – Hence, providing medical help is also covered in the objects of the assessee trust – Therefore, expenditure incurred on providing medical help is deductible in arriving at income for the purpose of s. 11(1)(a).
Shrimad Vallabh Vishwa Dharma Sanstha V/s. Addl. CIT
(2006)102 TTJ 653=(2007) 16 SOI 34 (Ahd)

3. Registration under s. 12A – Object of general public utility - Assessee, a corporate body incorporated under Gujarat Industrial Development Act, 1962 for the purpose of securing and assisting in the rapid and orderly establishment and organization of industries in industrial areas and industrial estates in the State of Gujarat – Said object is an object of general public utility and the assessee is eligible for registration under s. 12A – Gujarat Maritime Board v/s. CIT(2005) 94 TTJ (Ahd) 1103 followed.
Gujarat Industrial Development Corpn. Ltd. V/s. Asstt. CIT
(2006)102 TTJ 928(Ahd)

4. Registration under s. 12A – Delay in filing Form No. 10A – upto 31st March, 2002, assessee's income being exempt under s. 10(20A), and Form No. 10A having been filed on 14th May, 2003, assessee is eligible for registration w.e.f 1st April, 2002 and small delay in filing Form No. 10A deserves to be condoned – Market Committee v/s. CIT (2005) 94 TTJ (Del) 692 followed.
Gujarat Industrial Development Corpn. Ltd. V/s. Asstt. CIT
(2006)102 TTJ 928(Ahd)

5. Assessee association which was formed for promotion of game of cricket laid out an expenditure on distribution of mementos to its member on occasion of its diamond jubilee and claimed that said amount was applied for charitable purposes – Assessing Officer included that amount in income of assessee holding that said amount could not be considered to have been applied for any charitable purpose, as it did not lead to fulfillment of any object of general public utility - In honouring its members, association was only on a befitting occasion, acknowledging contribution of its members towards its cause i.e promotion of cricket and thus, there was a live link between object of assessee association and impugned layout –Ttherefore, assessee's claim was to be allowed .

Baroda Cricket Association v/s. ITO
(2006) 8 SOT 735(Ahd)

6. Scope and allowability – Assessee Gujarat Maritime Board (GMB) being an institution established under Gujarat Maritime Board Act, 1981 for purposes of maintaining and developing ports in the State of Gujarat, which is an object of general public utility, is eligible for registration under s. 12A w.e.f 1st April, 2002 the application having been made on 13th Nov., 2002 – Fact that it is termed as a local authority within the definition of 'person' in s. 2(31) and not trust or institution is no bar for registration – Having been established under statute there was no necessity to furnish the name/address of founder, etc. – Fact that the Act of 1981 does not mention that income of GMB is exempt from income tax is immaterial for purposes of s. 12A – For the registration of the institution, the CIT has to satisfy himself about the object of the institution and genuineness of the activities of the institution and not about the nature of the income - Object of assessee being of general public utility, it is eligible for registration under s. 12A.

Gujarat Maritime Board v/s. CIT
(2005) 94 TTJ 1103 = 147 Taxman 31

XV. COMPANY

(a) BOOK PROFIT UNDER S. 115JA

1. Deduction under s. 42 – Deduction under s. 42 cannot be allowed for the purpose of computing book profit under s. 115JA.

Gujarat State Petroleum Corporation Ltd. v/s. Joint CIT
(2009) 120 TTJ 256 = 308 ITR 248 = (2008) 15 DTR 486(Ahd)

2. Adjustment of provision for obsolescence loss – Any provision made by assessee for diminution in value of assets by way of obsolescence loss, though a provision under the Companies Act, 1956, is not covered under cl. (c) of Explanation to s. 115JA, hence cannot be added back for computing book profits.

   Adjustment of reduction in value of inventory due to change in method of valuation – Not being covered by Explanation to s. 115JA cannot be added back for determining book profits.

   Deepak Nitrite Ltd. V/s. Dy. CIT
   (2008) 114 TTJ 980 = 304 ITR 123 = 117 ITD 143 = 3 DTR 511(Ahd)

3. Also see Interest u/s. 234C".

(b) <u>BOOKS PROFIT UNDER S. 115JB</u>

1. Adjustment of brought forward loss vis-à-vis applicability of s. 79 – In arriving at the book profit under s. 115JB, the lower of the amount of brought forward loss or unabsorbed depreciation as appearing in the books of account of the assessee has to be reduced, irrespective of the fact whether the same is allowable under s. 79 or not.

Fascel Ltd. Ltd. v/s. ITO
(2008)117 TTJ 891 = 305 ITR 368 = 12 DTR 154(Ahd)

2. Provision for repairs of assets damaged by earthquake – Said loss having been determined by a Government agency, i.e District Industries Centre, it was an ascertained liability – Thus, assessee was required to provide for said loss on a reasonable basis – Provision was very well ascertained, and by no stretch of imagination, it can be said to be contingent or unascertained liability - Therefore, addition made by the AO treating the same as unascertained liability under cl. (c) of Explanation to s. 115JB(2) is not sustainable.

Samay Electronics (P) Ltd. v/s. Dy. CIT v/s.
(2006)100 TTJ 128 = 99 ITD 236 (Rajkot)

(c) <u>COMPANY IN WHICH PUBLIC ARE SUBSTANTIALLY INTERESTED</u>

Second subsidiary, subsidiary and parent company vis-à-vis share holding – Shares of both the assessee companies carrying not less than 50 per cent of voting powers held by S and A throughout the relevant previous year – These two companies fell in the category of "any company to which this clause applies" as not less than 50 per cent of their shares are hold by SF and AK respectively which are public limited companies and their shares are listed on the Bombay Stock Exchange on the last day of the previous year as required by item A of sub-cl. (b) of s.2(18) – Therefore, assessee companies are companies in which public are substantially interested - There is no further requirement in s. 2(18)(b) to the effect that either the parent company should hold any shares or requisite shares in the second subsidiary (assessee) or that the first subsidiary should hold 100 per cent shares of second subsidiary – Since S and A held requisite number of shares of

assessee – companies the requirements of s. 2(18)(b) were met – Fact that S and A are not companies to which this clause applies of its own and that they acquire that status by virtue of their being subsidiaries of SF and AK respectively cannot be a ground for holding that the second part of sub-cl. (c) becomes operative and, therefore 100 per cent of shares must be held by S and A respectively to grant the derivative status to the assesses in which it holds 50 per cent shares.

Acropolish Investment Ltd. , Asst. CIT v/s. &
Ajax Investment Ltd., Asst. CIT v/s
(2003) 78 TTJ 847 =85 ITD 154 = 175 Taxation 81 (Ahd)(SB)

XVI. COMPULSORY AUDIT – SECTION 44AB

Whether, where sharebroker does sell goods of its constituents as his own and only charges commission for bringing two parties together to transactions of sale and purchase of shares, such transactions cannot amount to "sale, turnover or receipt" of sharebroker himself within meaning of section 44AB.

Hasmukh M. Shah, Asstt. CIT v/s. (Ahd)
(2003)85 ITD 99 = 80 TTJ 323(Ahd)

XVII. DEDUCTIONS

(a) s. 36(1)(viii)

Special reserve created by financial corporation – s. 36(1)(viii) - Providing long term finance for industrial or agricultural development – Assessee providing long term finance to dairy co-operatives cannot be said to be providing such finance for industrial and agricultural development, hence not entitled to deduction under s. 36(1)(viii), moreso, when it had no paid-up share capital.

National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

(b) s. 80HHA

Small scale industrial undertaking – Aggregate value of machinery and plant less than Rs. 60 lacs – Assessee is a small scale industrial undertaking, keeping in view the amendment made in Expln. (b) to s.80HHA w.e.f 1st April, 1978 – Issue remitted to AO to verify whether the assessee fulfils various other conditions laid down in s. 80HHA and readjudicate the issue.

Sumedh Synthetics (P) Ltd., Asstt. CIT v/s.
(2003) 81 TTJ 804 = (2005) 184 Taxation 56 (Ahd)

(c) s. 80HHC

1. Computation of deduction u/s. 80HHC – Deduction under s. 80HHC in a case of MAT assessessment is to be worked out on the basis of the adjusted book profit and not on the basis of the profit computed under the regular provisions of law applicable to the computation of profit and gains of business or profession – 90 per cent of net interest receipts is to be reduced from the book profit for the purpose of quantification of deduction under s. 80HHC.
Ashima Syntex Ltd., Asstt. CIT v/s.
(2009) 120 TTJ 721(Ahd)(SB)

2. Special deduction – Computation of special deduction – Excise duty and sales tax not includible in total turnover for purpose of section 80HHC – Income Tax Act, 1961, s. 80HHC.
Claris Lifesciences Ltd. V/s. Asstt. CIT
(2008) 298 ITR 403 = 112 ITD 307 = (2007 111 TTJ 902 (Ahd)

3. Profits of the business - DEPB licence benefits/receipts – In view of insertion of cls. (iiid) and (iiie) in s. 28 as well as insertion of a new proviso to s. 80HHC(3) with retrospective effect from 1st April, 1998, for including DEPB receipts as part of business income, the issue is to be processed afresh in accordance therewith for computation of deduction under s. 80HHC(3).
Zaveri & Co. Exports & Ors., Dy. CIT
Tarulata Agrawal v/s. Asstt. CIT
(2008) 119 TTJ 1 = 307 ITR 1 = 14 DTR 334(Ahd)

4. Computation of total turnover - Excise duty and sales tax – Excise duty and sales tax cannot be included in total turnover for purposes of deduction under s. 80HHC.
Deversons Industries Ltd. , Jt. CIT
(2007) 106 TTJ 314 = 104 ITD 171 = 290 ITR 287 (Ahd)

5. While computing deduction under section 80HHC only net interest income is to be excluded from profits and gains of business and not gross amount of interest received by assessee .
S.C Chemicals , Jt. CIT v/s.
(2006) 99 ITD 41 = 100 TTJ 1072) =(2007) 196 Taxation 65 (Ahd)

6. Exporters – While computing deduction under section 80HHC(3), profit is to be reduced by deductions under sections 80-I and 80G which are allowed to assessee.
Rajoo Engineers Ltd., Asstt. CIT v/s.
(2006) 100 ITD 555 = 284 ITR 119 = 102 TTJ 733 (Rajkot)

7. Profits of the business – Excise duty refund - Assessee not liable to pay excise duty on the goods which were exported - Duty deposited by assessee pending export refunded when export materialized and debit and credit made in the books accordingly – Thus, neither the payment nor the refund of excise duty affected the business profits of assessee and 90 per cent of such refund could not be excluded in terms of Expln. (baa) to s. 80HHC(4B) from the profits of business.

Aarti Industries Ltd. v/s. Dy. CIT & Dy. CIT v/s. Aarti Industries Ltd.
(2005) 95 TTJ 14

8. Profits of the business – Processing charges - Processing charges received by assessee by utilizing plant and machinery and other manufacturing facilities installed in the industrial undertaking are not hit by Expln. (baa) to s. 80HHC and 90 per cent thereof cannot be deducted – The expression 'any other receipts of a similar nature' in Expln. (baa) have to be read ejusdem generis with the expression 'receipts by way of brokerage commission, rent, interest, charges' – AO has to consider the nature of business, the nature of activity and such other factors to find out whether receipts are operational income or the dormant income of the assessee - Merely because words used are "processing charges", the same cannot be excluded from the profits of business.

Aarti Industries Ltd. v/s. Dy. CIT & Dy. CIT v/s. Aarti Industries Ltd.
(2005) 95 TTJ 14

9. Computation of deduction – Assessee a hundred per cent export trading company – Profits of export – Computation governed by specific provision in section 80HHC(3)(b) – Actual indirect costs alone can be considered – Receipts representing import benefits - Ad hoc deduction of ten per cent of receipts resulting in negative figure not contemplated - Interest and other miscellaneous income - Net interest to be taken into account – Income Tax Act, 1961, s. 80HHC.

Rang International , CIT (Asst.) v/s.
(2005) 277 ITR 148 = 97 TTJ 221 =(2004) 91 ITD 499 (Ahd)

10. Exporters - Assessment year 2001-02 – Amount received by assessee on account of exchange rate fluctuations does not partake character of income enumerated in Explanation (baat) 90 per cent of which is required to be excluded from 'profits of business' while computing deduction under section 80HHC – Exchange rate fluctuation income relating to exports effected in earlier years can not be differentiated from exchange rate difference in relation to exports effected in current year – Where assessee was engaged in export and for availing export credit facilities from bank it was required to give deposits to bank and on such deposits assessee had earned interest income, whereas on credit facilities enjoyed in respect of export, assessee had paid huge interest to bank itself 90 per cent of only net interest received by assessee was liable to be reduced from profits of business as provided in Explanation (baa) given below section 80HHC while computing deduction under that section – Export proceeds received belatedly by assessee, for which ex post facto approval of RBI had been received by assessee, could not be excluded while computing deduction under section 80HHC(2)(a).

Priyanka Gems v/s. Asstt. CIT

(2005) 5 SOT 817 (Ahd)

11. Exporters - Amount of central excise and sales tax is to be excluded in calculation of total turnover for purpose of its computation under section 80HHC – Central Excise set off being in nature of export incentive and its receipt being directly relatable to export activity, it is to be reduced (to extent of 90 per cent thereof) under Explanation (baa) to section 80HHC, treating it as covered within ambit of section 28(iiic) – Amount of sales tax set off not falling under section 28(iiic) would not be excluded from total turnover in terms of Explanation (baa) to section 80HHC – Income tax refund and profit on sales of assets do not form part of profit and gains from business or profession from which amount of profits of business is to be derived by effecting some deductions and, therefore, question of their further deduction under Explanation (baa) to section 80HHC does not arise.

Atlas Dye Chem Industries , Asstt. CIT

(2005)148 Taxman 63(Ahd)

12. Exporters – Assessment year 1994-95 - Assessing Officer while working out profit from assessee's business, included bad debts recovery in total turnover holding that such recovery was nothing but trading credit - Commissioner (Appeals) deleted addition of bad debts recovery – Whether Assessing Officer was to be directed to decide matter afresh after giving reasonable opportunity of presenting facts and figures – Held, yes.
Exporters - Assessment year 1994-95 - Assessee company received on late payment from parties to whom sales had been made - Assessing Officer denied assessee's claim that such interest was to be treated as part of eligible profit for computing deduction under section 80HHC – Whether interest received was part of business income and, therefore, it was to be included in eligible profits for computation of deduction under section 80HHC – Held, yes
Lubi Electricals Ltd., Dy. CIT v/s.
(2003) 133 Taxman 113(Ahd)

13. Computation – Loss from exports - Negative figure is to be ignored for the purpose of working out deduction under s. 80HHC.
Sumedh Synthetics (P) Ltd., Asstt. CIT v/s.
(2003) 81 TTJ 804 = (2005) 184 Taxation 56 (Ahd)

14. Allowability – Composite contract – Two separate contracts one for supply of material and equipment and the other for erection of equipment in Thailand – Even in case of composite agreement assessee is entitled to deduction under s. 80HHC on apportionment of turnover in respect of goods exported – As figures supplied were subject to verification matter remanded.
Elecon Engg. Co. Ltd., Asstt. CIT v/s.
(2003) 81 TTJ 809(Ahd)

15. Exporters - Assessment year 1996-97 and 1997-98 – Activity of converting marine products of assessee like shrimps, cuttle fish, ribbon fish, squid and other fish varieties, into PVD, PD, PD vain, headless shrimps, cuttle fish whole, etc. amounts to processing – It is immaterial that such processing is carried out in factory taken on lease from sister concern as that amounts to goods processed by assessee and, hence, assessee will be entitled to deduction claimed – Where interest received and paid have direct nexus, then only net interest can be considered in profit and loss account and for purpose of deduction under section 80HHC.
Raymon Gelatine v/s. Asstt. CIT
(2003) 133 Taxman 198

16. Profits derived from exports – Loss from export business – Profits derived from exports for the purpose of s. 80HHC(1) are to be arrived at by determining first the profit component as computed under the main provision of s. 80HHC(3) and then increasing it by the second profit component as worked under the proviso thereto – First profit component worked out under the main provision does not represent profits or loss of the export business – Figure of profits from export business is to be arrived at on the basis of computation as laid down under s. 80HHC(3) – Merely because the figure worked out under Expln (baa) below s. 80HHC(4B) is negative would not lead to the conclusion that there is loss in the export business – Basic conditions as implicit in the incentive provision were fulfilled by the assessee inasmuch as goods manufactured were exported and foreign exchange was realized and the composite picture of business including export business as well as domestic business reflected in the books depicts a substantial amount of profit – Once the basic conditions were satisfied computation provisions contained under s. 80HHC(3) would have to be applied in a liberal manner – Profits derived by assessee from exports as computed in accordance with the provisions contained under s. 80HHC(3) qualified for deduction under s. 80HHC even though the profits of the business as per Expln. (baa) was a negative figure.

Pratibha Syntex Ltd., CIT v/s.
(2002) 75 TTJ 124

17. Computation of total turnover – Sales Tax and excise duty – Excise duty and Sales Tax recovered by assessee from the customers essentially constitute trading receipts of the assessee and form part of total turnover for the purpose of computing deduction under s. 80HHC – Essential character of the amount realized from the customers as a part of sale proceeds and subsequent payment of sales tax and excise duty to the Government Departments have been unequivocally accepted and acknowledged as business receipts and business expenditure – Therefore, it does not stand to reason to exclude Sales Tax and excise duty as part of sale proceeds for the purpose of computing relief under s. 80HHC – This is particularly so when the legislature has specifically indicated the items to be excluded viz, freight and insurance.

Gujarat Fluoro Chemicals Ltd. v/s. Jt. CIT
(2002)76 TTJ 313

18. Profits and gains of business – Insurance claim and dividend – Insurance receipts form part of profits of business and Expln. (baa) below sub-s. (4B) does not make any reference for excluding the insurance receipts while working out profits of the business – Dividend however is obviously not assessable as business income and is covered under the head "income from other sources" – AO therefore, justified in excluding the dividend income for the purpose of computing profits of the business.

Gujarat Alkalies & Chemicals Ltd. v/s. Dy. CIT
(2002) 77 TTJ 245 =82 ITD 135

19. Computation of total turnover – Excise duty and sales tax – Word turnover as used in s. 80HHC has necessarily to be interpreted as inclusive of sales tax and excise duty as judicially interpreted by the Supreme Court in a string of decisions rendered before the enactment of the provisions of s. 80HHC - If the legislature intended to exclude sales tax and excise duty from the purview of turnover which is contrary to judicial interpretation, it would have specifically said so – Word "turnover" has been used in various sections alongwith sales and gross receipts and have to be construed as inclusive of taxes like sales tax and excise duty – Further, once sales tax and excise duty are to be considered for arriving at the profits of the business, it would be quite illogical to say that such taxes would not be included in the total turnover of the business.

Gujarat Alkalies & Chemicals Ltd. v/s. Jt. CIT
(2002) 77 TTJ 304

20. Profits derived from export - Exchange difference pertaining to exports of current and earlier years – Receipts in excess of notional value of goods in rupees on account if exchange rate fluctuations treated by assessee as part of export turnover for purposes of claiming deduction under s. 80HHC – Justified – Export bills are drawn in foreign currency and entries are made in the books in terms of rupees on the basis of notional rate of exchange of foreign currency prevailing on the date of making of the sale bill – When the foreign bills are retired by the foreign buyers, what the assessee receives is exactly the amount of foreign currency mentioned in the bill and the assessee's bankers credit the actual amount of such foreign currency by converting the same into Indian rupees at the rate prevailing on the date of conversion – In this process, assessee receives sometimes more end sometimes lesser amount in Indian rupees than the notional value of goods shown in the books at the time of export – Thus, there is a direct nexus between amount realized on account of export sales and exchange rate differences whether treated by the assessee in the books as receipts from export sales or from exchange rate fluctuation – Explanations (b) and (ba) below s. 80HHC(4A) specifically excluding certain items like freight and insurance from the ambit of "export turnover" and insurance from the ambit of 'export turnover" and "total turnover" do not exclude exchange rate difference – Receipt was not on account of any foreign exchange forward

contract – The expression "any other receipts of similar nature" in Expln. (baa) has to be construed ejusdem generis with brokerage, commission, etc. and not the receipts directly referable to export turnover – There being no transfer of goods by assessee to any branch office outside India, Expln. 2 to s. 80HHC(2) has no application.
B.S.P Exports v/s. Asstt. CIT
Gami Exports v/s. ITO
ITO v/s. Gami Exports
Mitual Gems v.s, Asstt. CIT
Pankaj Diamonds v/s. Asstt. CIT
Pavasla Exports v/s. Asstt. CIT
Priyanka Gems v/s. Asstt. CIT
R. Jaykumar & Co. v/s. Asstt. CIT
(2002) 94 TTJ 557

21. Profits of business – Exclusion of gross or net interest – Fixed deposits having admittedly been made with bank as collateral security for availing credit facilities from bank for purposes of doing export business, only the net interest earned on fixed deposits and paid on credit account can be subjected to 90 per cent deduction under Expln. (baa) below s. 80HHC(4B).
B.S.P Exports v/s. Asstt. CIT
Gami Exports v/s. ITO
ITO v/s. Gami Exports
Mitual Gems v.s, Asstt. CIT
Pankaj Diamonds v/s. Asstt. CIT
Pavasla Exports v/s. Asstt. CIT
Priyanka Gems v/s. Asstt. CIT
R. Jaykumar & Co. v/s. Asstt. CIT
(2002) 94 TTJ 557

22 Computation - Reduction of belated export receipts under s. 80HHC – Computation – Reduction of belated exports receipts under s. 80HHC(2) – Assessee having - Facto approval of the RBI as regards belated receipts of convertible foreign exchange in respect of exports, AO is directed to allow deduction in accordance with the provisions of s. 80HHC(2)(a) r/w s. 155(13).
B.S.P Exports v/s. Asstt. CIT
Gami Exports v/s. ITO
ITO v/s. Gami Exports
Mitual Gems v.s, Asstt. CIT
Pankaj Diamonds v/s. Asstt. CIT
Pavasla Exports v/s. Asstt. CIT
Priyanka Gems v/s. Asstt. CIT
R. Jaykumar & Co. v/s. Asstt. CIT
(2002) 94 TTJ 557

(d) s. 80-I

1. Assessee claiming deduction under section 80-1 on commission income & marketing fees – CIT(A) allowing claim – Held as in assessment year 1993-94 in assessee's case issue restored to the AO for fresh adjudication. Income Tax Act, 1961 – Section 80-I. Rs. 1,49,022 being garden expenses disallowed by AO as capital expenses allowed by CIT(A) as of revenue nature – Held CIT(A) correct.
   M.C Daver Aromatics Ltd. v /s.DCIT
   (2007)199 Taxation 19 = 125 Taxman 134 (Ahd)

2. Assessment year 1993-94 – Assessing Officer disallowed assessee's claim of deduction under section 80-I on grounds that assessee had not properly apportioned expenses under head Office and manufacturing division and that there would not be any profit, if expenses were properly apportioned – Whether matter was to be sent back to file of Assessing Officer with direction to take apportionment of expenses on basis of audited final statements and to allow claim of assessee accordingly – Held, yes.
   Project Technologists (P) Ltd., Dy CIT v/s.
   (2007) 17 SOT 20 = (2006)192 Taxation 16 = (2005) 98 TTJ 471(Ahd)

3. Apportionment of expenses between head office and manufacturing division – Apportionment of expenses accepted by the auditor prima facie should be the correct apportionment unless and until some contrary material or evidence is available on record or found by the AO – Matter remanded for reconsideration.
   Project Technologists (P) Ltd., Dy. CIT v/s.
   (2005) 98 TTJ 471= (2007) 17 SOT 20 = (2006)192 Taxation (Ahd)

4. Profits and gains derived from industrial undertaking – Sale of scrap - Scrap generated during the course of manufacturing was eligible for deduction under s. 80-I .
   Aarti Industries Ltd. v/s. Dy. CIT & Dy. CIT v/s. Aarti Industries Ltd.
   2005) 95 TTJ 14

5. Profits and gains derived from industrial undertaking - Interest on deposits with banks – Profits and gains can be said to be derived from the industrial undertaking only when there is a direct or immediate nexus between the profits and gains and the industrial undertaking - Direct or the immediate source of interest was the deposits made by the assessee and not the industrial undertaking - Therefore, interest on fixed deposits with bank, interest on deposits with IDBI and interest on deposits with N Ltd. cannot be said to be income derived from the industrial undertaking and the same do not qualify for computing deduction under s. 80-I.

Profits and gains derived from industrial undertaking - Profit on sale of raw material - Has no direct or immediate nexus with the industrial undertaking – Therefore, the profit on sale of raw material is not the profit derived from the industrial undertaking for the purpose of s. 80-I.

Profits and gains derived from industrial undertaking – Interest received from debtors for late payment – Did not arise out of manufacturing activity of the industrial undertaking – It was paid because the sale proceeds remained unpaid beyond the stipulated period – Thus, said interest cannot be said to have been derived directly from the industrial undertaking and is not eligible for deduction under s. 80-I.

Profits and gains derived from industrial undertaking - Insurance claim - Vehicles of the assessee involved in accidents – Expenditure incurred by the assessee on repairs of vehicles is admittedly more than the insurance claim received by it – Therefore, there was no income to the assessee in the nature of insurance claim and no amount could be excluded from the profits and gains of business for computing deduction under s. 80I.

Profits and gains derived from industrial undertaking - Transport rent income – Is not income derived from the industrial undertaking - However, only the net income from transport rent after reducing the depreciation claimed on trucks is to be excluded from the profits and gains of business for computing deduction under s. 80-I.

Profits and gains derived from industrial undertaking - Sale of Bardan and waste material – Bardan and wast material are generated during the course of production in the assessee's industrial undertaking – Hence, it has a direct and immediate nexus with the industries undertaking and the sale proceeds of Bardan and wast material are entitled to deduction under s. 80-I.
Nirma Industries Ltd., Dy. CIT v/s.
(2005) 95 TTJ 867 =95 ITD 199 =146 Taxman 90 (Ahd)(SB)

6. Manufacture or production – Production of demineralised water – It is only where a new and commercially distinct article with an identity of its own comes into existence that "manufacture" can be said to have taken place – Though water is rendered free of impurities, minerals and micro-organisms and thus made more hygienic and suitable for human consumption by the process carried out by the assessee, it remains only drinking water i.e what it was at the raw material stage – Its name, character and use is only of drinking water and is regarded as such by the buyers as well as those who deal in it – Thus, no new product comes into existence so as to qualify the antecedent processes as amounting to manufacture – Excisability of the treated water produced by assessee's franchisee, S Ltd. was only on account of addition of mineral contents to the water to meet a particular end product specification – In the case of assessee there is removal of minerals through the process of demineralization, rather their addition – Assessee was not therefore entitled to deduction under s. 80-I.

Acqua Minerals (P) Ltd. V/s. Dy. CIT

(2005) 97 TTJ 658 = 96 ITD 417 = 279 ITR 106 (Ahd)

7. Allowability – Claims not made before AO – It is for the assessee to claim the relief and comply with the requirements of the section under which deduction is claimed – If the assessee fails to make a claim for deduction in the original assessment, same cannot be claimed in subsequent proceedings while giving effect to the appellate or revision order – Even if there was no income against which the deduction could be allowed, the claim ought to have been made by the assessee – In the absence of necessary information on record matter is remitted back to the AO to ascertain as to whether the necessary details for allowing the claim of the assesssee were made available at the time of original assessment and to allow the claim only if the requisite material is present.

Essar Steel Ltd., Dy. CIT

(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

8. Profits and gains from hotels or industrial undertakings, etc. in backward areas - Assessee received interest from fixed deposits (FDs) pledged with bank as security for cash credit, etc. – Interest income could not be said to be derived from industrial undertaking inasmuch as source of receipt was FDs with bank and it had no direct and immediate nexus with industrial undertaking – Held, yes – Therefore such interest income would not qualify for deduction under section 80HH .

Bio Pharma v/s. Dy. CIT

(2003)85 ITD 575 = (2002) 75 TTJ 486

(e) s. 80-IA

1. Exception – Loan advanced to shareholder in ordinary course of business where lending of money is substantial activity of company – Cannot be treated as deemed income – Income Tax Act, 1961, s. 2(22)(e).
Krishnonics Ltd., ITO v/s.
(2009) 308 ITR 8 = 120 TTJ 650 = 15 DTR 366(Ahd)

2. Profits and gains derived from industrial undertaking – Interest and agency income – Interest and agency income earned by the assessee was not related to the activities of the industrial undertaking and hence not eligible for deduction under s. 80-IA – Matter is remitted back to the AO to allow netting benefit to the assessee and to exclude only the net income earned under these heads.
Keystone India (P) Ltd., Dy. CIT v/s.
(2006) 99 TTJ 386= (2007) 16 SOT 64 (Ahd)

3. Profits and gains from infrastructure development undertaking in backward area. Whether while computing deductions under chapter VI-A , 80IB, etc. depreciation has to be allowed whether the it is claimed by assesseee or not – Held, no.
Vahid Paper Converters v/s. ITO
(2006) 98 ITD 165 = 100 TTJ 532 = (2007) 289 ITR 10 (Ahd)(SB)

4. Profits and gains from industrial undertakings – Bajra seeds manufactured / produced by assessee, which after treatment with poisonous chemicals got rendered unfit for human consumption and ceased to be cereal, was a different article or thing than raw Bajra fit for human consumption and, therefore assessee was entitled to deduction under section 80-I .
New Nandi Seeds Corpn. , Addl. CIT v/s.
(2006) 99 ITD 702 = 101 TTJ 725 (Ahd)

5. Profits and gains from infrastructure undertaking - Assessment year 1995-96 – Whether in case of assessee company, engaged in printing of continuous and non-continuous stationary to be supplied at destination as per agreement, miscellaneous income from job work and from sale of paper scrap, generated from printing, was eligible for deduction under section 80-IA – Held, yes – Whether since assessee had undertaken a contract for printing and supply of forms, stationary, etc. at certain destination to concerned parties, Assessing Officer should examine if courier charges formed part of sale itself for purpose of claiming deduction under section 80-IA – Held, yes (matter remanded).
Kunal Printers Ltd., Asstt. CIT v/s.
(2005) 2 SOT 414

6. Deduction under s. 80-IA – Manufacture or Production - Activity of annealing of steel rods – Activity of annealing of steel rods is an activity of manufacturing and therefore, deduction under s. 80-IA is allowable.
Anil Steel Traders v/s. Dy. CIT
(2007)111 TTJ 747= (2005)148 Taxman 61 (Ahd)

7. Deduction under s. 80-IA – Computation - Adjustment of brought forward losses and depreciation - In view of the specific provisions of s. 80-IA(5), the profit from the eligible business for the purpose of determination of the quantum of deduction under s. 80-IA has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.
Goldmine Shares and Finance P. Ltd., CIT v/s.
Joyco India (P) Ltd. v/s. ITO
(2008) 116 TTJ 705 = 302 ITR 208 = 113 ITD 209 = 9 DTR 282(Ahd)(SB)

8. Profits and gains from infrastructure industrial undertakings etc. – Assessment years 1995-96 to 1997-98 – Assessee, engaged in activity of annealing and straightening of steel rods, claimed deduction under section 80-IA – In view of decision of Madras High Court in CIT v/s. Tamil Nadu Heat Treatment & Fetting Services (P) Ltd. (1999) 238 ITR 529/04 Taxman 114, it could be said that assessee was engaged in activity of manufacturing and was entitled to deduction under section 80-IA.
Anil Steel Traders v/s. Dy. CIT
(2005)148 Taxman 61 = (2007) 111 TTJ 747 (Ahd)

(f) <u>s.80HH and 80-I</u>

Profits and gains from hotels or industrial undertakings, etc. in backward areas - Assessment years 1992-93 to 1994-95 – Assessee was not entitled to deduction under section 80HH in respect of interest recovered from debtors for late payment of sale price, interest received from bank on deposits pledged with it for obtaining letter of credit/bank guarantee, interest received from IDBI on deposits pledged with it as required under section 32AB, interest from sarafi and bank deposits out of initial/surplus funds, insurance claim receipts for reimbursement of losses, interest from bank on short-term loans and interest on fixed deposits with banks, interest from Electricity Board from electricity deposit, dividend income, income from hire charges and interest on income tax refund – As far as sale of spare parts and of raw material and other misc. receipts is concerned, if it was a sale as an after sale service condition or sale is of own manufactured spare parts or receipt has arisen in course of manufacture or production, it would be income derived from industrial undertaking, on other hand, if it is an independent activity not conditioned to sale or manufacture or production, it would not be an income derived from industrial undertaking even though it might be income attributable to industrial undertaking .
Mira Industries , Dy. CIT v/s.
(2003) 87 ITD 475(Ahd)

2. Profits and gains derived from industrial undertaking – Interest on inter-corporate deposits – Inter-corporate deposits made by assessee out of surplus funds – Interest is "income from other sources" - Interest income had no nexus, direct or indirect, with the industrial undertaking and, therefore, deduction under ss. 80HH and 80-I is not allowable in respect of interest income – Deduction of interest sought by the assessee against the interest income was not covered under s. 57(iii) and, therefore, the alternative contention of the assessee that adjustment of interest debited to the P & L a/c against the interest received from the intercorporate deposits may be allowed and only the net amount be excluded for the purpose of ss. 80HH and 80-I could not be accepted.

Gujarat Fluoro Chemicals Ltd. v/s. Jt. CIT
(2002)76 TTJ 313

3. Manufacture or production – Ship breaking activity – Constitutes manufacturing activity – Assessee entitled to deduction under ss. 80HH and 80-I.

Vijay Ship Breaking Corpn. V/s. Dy. CIT
(2002) 76 TTJ 169 (Rajkot)

4. Interest income on income tax refund and inter corporate deposits – Fact that amount of particular income is assessable as business income would not be sufficient to hold that such income is derived from actual conduct of the business activities of the industrial undertaking - A direct nexus is required to be established between the relevant items of income and the activities of the industrial undertaking – Interest income on income tax refund and interest income on inter-corporate deposits could not be regarded as income derived by the assessee from its industrial undertaking - Fact that this had been assessed as income from business or the fact that in the past deduction under s. 80-I/80-IA had been allowed thereon, would not entitle the assessee to deductions under s. 80-I/80-IA on such amount of interest income.

Profits and gains derived from industrial undertaking - Interest income – Margin money deposits made with bank for obtaining various guarantees were inextricably connected with the activities of the industrial undertaking – Similarly, the guarantee given for issue of letters of credit and the interest income on bills discounting had a direct nexus with the manufacturing activities of the industrial undertaking of the assessee – Deposits in investment deposits with IDBI had been made out of income of the industrial undertaking for the exclusive purpose of its utilization for purchase of new plant and machinery - Therefore, such interest income had clear and direct nexus with the activities of the industrial undertaking – Interest on deferred payments received from customers is a part of sale price - CIT(A) justified in allowing deduction under ss. 80-I and 80-IA in respect of interest on above

items - However, interest on electric power connection deposits and telephone connection deposits did not qualify for deduction.

Commission income – Assessee could not point out any material or evidence existing on record on the basis of which any direct nexus between the commission income and manufacturing activities of the industrial undertaking could be established – CIT(A) was justified in excluding the commission income for the purpose of computing deductions under ss. 80-I and 80-IA.

Inductotherm (India) Ltd., Dy. CIT v/s.
(2002) 75 TTJ 728 = 123 Taxman 325

(g) <u>s. 80-IB</u>

1. Manufacture or production - Transformation of cold rolled grain oriented coils/sheets into transformer core – Making of transformer core from CRGO coils/sheets is a manufacturing activity as there is a complete transformation of the raw material into a new product having a different name, character and use, and therefore, assessee engaged in such activity was entitled to deduction under s. 80-IB.

Alfa Lamination , Asstt. CIT
National Lamination Industries, Asstt. CIT
(2007)111 J 754 = 295 ITR 1 = 109 ITD 181 (Ahd)(TM)

2. Assessment years 2001-02 to 2004-05 – Assessee had developed and built a housing project on a land belonging to one 'G' and others through power of attorney holder 'M' – There was a tripartite development agreement revealing that landowners had agreed to get land developed through assessee and also had agreed that assessee would make members i.e prospective buyers and collect land consideration at rate mentioned in agreement – Said project was approved by local authority in name of said owners – Assessee claimed deduction under section 80 – 1B(10) – However, Assessing Officer disallowed claim on ground that (i) assessee was not owner of land (ii) even approval was also not in name of assessee and it had acted merely as an agent / contractor for construction residential houses – Whether requirement for claiming deduction under section 80-1B(10) is that assessee as an undertaking must develop and build housing project irrespective of fact that whether it is acting as a contractor for developing and building housing project or acting as an owner of land – Held, yes – Whether in view of above position since there is no requirement of ownership for claiming deduction under section 80-1B(10) assessee's claim of deduction on profits derived from construction and development of residential housing project was be allowed – Held, yes -

Radhe Developers v/s. ITO
(2008)23 SOT 420(Ahd)

(h) DEDUCTION UNDER S. 80P(2)(A)(I) – CO-OPERATIVE SOCIETY

1. Assessment years 2000-01 and 2001-02 – Activities of dealing in Government securities fall within ambit of section 6(1)(a) of Banking Regulations Act, 1949 and constitute banking business and income emanating therefrom would be attributable to business of banking and therefore eligible for deduction under section 80P(2)(a)(i) in hands of Co-operative bank.
   Rajkot Nagarik Sahakari Bank Ltd. v/s. ITO
   (2009) 27 SOT 63(Rajkot)(URO)

2. Whether if interest income is actually earned by a co-operative society from its members on provision of credit facilities provided to members for purchase of raw material, then deduction under section 80P(2)(a)(i) in respect of interest received from members has to be given to society -
   Surat Art Silk Cloth Producers Co-op. Soc. Ltd., ITO v/s.
   (2007) 11 SOT 329(Ahd)

3. Allowability – Profits derived from sale of testing equipment, acids, alcohol etc. – Assessee, a federal co operative society , engaged in marketing of milk products, cattle seeds, raw and processed agricultural produce, collection, production and packing of such products and financial and social development of milk producers – Entitled to deduction under s. 80P(2)(ii) and (iv) in respect of income/profits derived from sale of testing equipments, acids, alcohol, stationary etc.
   Surendranagar Dist. Co-operative Milk Producers Union Ltd.,
   Dy. CIT v/s.
   (2006) 101 TTJ 497(Rajkot)

4. Business of banking – Income from trading in Government securities – Forms part of banking business in view of provisions of s. 6(1)(a) of the Banking Regulation Act – Investments were made by assessee, a co-operative bank, in Government securities approved by the RBI from time to time and trading in these securities was carried out in the ordinary course of business of the assessee bank – Activities of dealing in such securities fell within the ambit of s. 6(1)(a) of the Banking Regulation Act and the income emanating therefrom is attributable to business of banking and is eligible for deduction under s. 80P(2)(a)(i) in the hands of the assessee.

   Business of banking - Income from investments of non statutory reserve in various mutual funds – Attributable to the business of banking, eligible for deduction under s. 80P(2)(a)(i).
   Rajkot Nagarik Sahakari Bank Ltd., ITO v/s.
   (2005) 98 TTJ 330 (Rajkot)

5. Business of banking – Interest from Government securities, fixed deposits, etc. and locker rent – Interest on investments made by co-operative banks in Government securities attributable to utilization of its funds from statutory reserves under s. 67(2) of Gujarat Co-operative Societies Act, 1961, interest income from investment made by way of mandatory minimum banking reserves as required by the relevant provisions of the Banking Regulation Act and income from hiring of safe deposit valuts are eligible for grant of deduction under s. 80P(2)(a)(i) - Investment in excess of statutory reserves have been made out of mixed funds which constitute investments made out of surplus funds available out of 'working capital' – Activity of receiving deposits from customers and utilizing the same for lending or for investment in approved modes are all integral part of the activities of banking business as defined in s. 5(b) of the Banking Regulation Act – Investment in Government securities, other trustee securities and fixed deposits (Kayami Thapan) are permissible modes for investments and fully satisfy the test of "easy realizable in case of need" – Thus, income from investments made in excess of requirements of CLR and SLR and statutory reserves in Government securities, fixed deposits IVPs/KVPs and other approved modes of investments is eligible for deduction under s. 80P(2)(a)(i).

   Business of banking – Excess collection of interest tax – Part of trading receipt – Same is integral part of income attributable to banking activities of the assessee co-operative banks and would qualify for deduction under s. 80P(a)(i).

   Surat District Co-operative Bank Ltd. & Ors. V/s. ITO & Ors.
   (2003) 78 TTJ 1 = 85 ITD 1 = 262 ITR 1 (Ahd)(SB)

XIX. DEPRECIATION

(a) ACTUAL COST

Assessee , a port trust, was exempted from income tax under section 10(20) till 31-3-2002 – By virtue of amendment in section 10(20) by Finance Act, 2002, assessee filed its first return for assessment year 2003-04 – In computation of total income assessee claimed depreciation, which was computed on original cost of assets i.e assessee had taken WDV of asset as on 1-4-2002 as original cost of assets – Assessing Officer allowed depreciation on book value of assets, which was arrived at after deducting from original cost of assets depreciation provided in account books till 31-3-2002 – However, in instant case, WDV as on 1-4-2002 would be original cost of assets – Therefore assessee was entitled to depreciation on original cost of assets.

Kandla Port Trust v/s. Asstt. CIT
(2006)8 SOT 429 = 104 TTJ 396 = (2007) 104 ITD 1=(2008)296 ITR 88(Rajkot)

(b) ALLOWABILITY

1. According to RBI's guidelines, assessee bank was required to keep invested specified percentage of its demand and time liabilities in certain approved securities – Assessee claimed depreciation on such securities treating same as stock-in-trade – Assessing authority disallowed claim holding inter alia, that securities were not depreciable assets – Commissioner (Appeal) allowed assessee's claim – Investment made by bank in securities was closely and intimately connected with assessee bank's business – Since assessee was following same system of valuation regularly from assessment year 1977-78 and claiming depreciation in returns and same was being accepted by department, Commissioner (Appeals) was justified in allowing assessee's claim for depreciation.
   State Bank of Saurashtra, Dy. CIT v/s.
   &
   Dy. CIT v/s. State Bank of Saurashtra
   (2005) 93 ITD 662 = 95 TTJ 225

2. Payment for goodwill, which actually amounted to giving compensation to a retiring partner, without any acquisition of any intangible asset as contemplated in section 32(1)(ii), would be eligible for depreciation .
   Bharatbhai J. Vyas v/s. ITO
   (2005)97 ITD 248 = 279 ITR 41 = (2006) 101 TTJ 1012 (Ahd)

(c) PLANT

Allowability – Expenditure on acquisition of know-how – AO disallowed the claim of depreciation and allowed 1/6th of the aforesaid expenditure under the provisions of s. 35AB – Not correct – Know how covered by 35AB is that which would assist in manufacture or processing of goods - It does not include the know how acquired by the assessee for setting up the plant and machinery – Therefore, assessee was justified in capitalizing the same and claiming depreciation thereon - AO is directed to allow depreciation in place of deduction under s. 35AB.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985=97 ITD 125 (Ahd)(TM)

(d) PURCHASE AND LEASE BACK

Allowance / Rate of - Assessment year 1994-95 – Assessee company engaged in business of leasing of assets purchased certain machinery from 'S' Ltd. and leased back same machinery to "S' Ltd. – Assessing Officer held that purchase and lease back transaction entered into between assessee and 'S' Ltd. was not a genuine transaction rather it was simply a case of providing finance to 'S' Ltd. by assessee and therefore it was not entitled to depreciation on such machinery – Whether since physical existence of assets was not denied lessor had made payment for purchase of relevant asset directly to lessee, lessee had been using assets even after transaction for his business and transaction was evidenced by duly executed lease deed, transaction in question satisfied all requirements of a genuine transaction of purchase and lease back therefore assessee was entitled to depreciation on said machinery – Held, yes.

Gujarat Lease Financing Ltd., Asstt. CIT v/s.
(2008) 174 Taxman 28(Ahd)

(e) SET OFF AND CARRY FORWARD

Succession of firm by company – Assessee company having succeeded to the business of a partnership firm, unabsorbed depreciation is allowable in the hands of the successor company Matter is remitted to the AO to decide as to whether the WDV in the assessee's hand is to be determined after excluding depreciation which is not eligible for carry forward in terms of s. 32(2).

Amin Machinery (P) Ltd. v/s. Dy. CIT
(2007)111 TTJ 892=(2008) 298 ITR 140 =114 ITD 413(Ahd)

(f) USER – ACTIVE OR PASSIVE

Filing of requisite proof - Certificate of Gujarat Energy Development Agency (GEDA), sales tax exemption certificate, eligibility certificate, commissioning certificate and quick test report issued by GEDA and letter of NEPC- MICON evidencing that Wind Turbine Generating Set was commissioned on 27th March, 1995, and test run was also undertaken, assessee was entitled to depreciation.

Omkar Textile Mills (P) Ltd., Asstt. CIT
(2008)115 TTJ 716 = 28 SOT 12 = 5 DTR 187 (Ahd)

(g) WRITTEN DOWN VALUE

Depreciation actually allowed within meaning of s. 43(6) – Assessee not being a taxable entity in earlier years, it was entitled to depreciation on the original cost of the assets without reducing from original cost the notional depreciation accounted for in the books of assessee.

National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

XX. DISALLOWANCE

(a) S. 36(1)(VA)–EMPLOYEE'S CONTRIBUTIONS TO FUNDS–DELAYED PAYMENT

Assessing Officer had disallowed certain amounts paid by assessee towards PF and ESIC under section 36(1)(va) on account of delayed payment – Since it was found that assessee had made payments towards PF within grace period of five days allowed under circulars, issued by concerned authorities and had made payments towards contribution to ESI before 21st of succeeding month, which was due date, disallowance made by Assessing Officer was not justified – Held, yes.

Rotex Mfg. & Engg., Asstt. CIT v/s.
(2004)137 Taxman 37 = 183 Taxation 28 (Ahd)

(b) DELAYED PAYMENT OF PROV. FUND S. 36(1)(IV)

1. Deduction claimed for delayed payment of provident fund dues disallowed by Revenue allowed having been paid within the accounting period – Decision reported in 92 ITRD 1 (Delhi) relied upon.

   Kohinoor Tobacco Co, v/s. ITO
   (2006)191 Taxation 5(Ahd)

2. Deduction claimed for delayed payment of provident fund dues disallowed by Revenue allowed having been paid within the accounting period – Decision reported in 92 ITRD 1 (Delhi) relied upon.

   Kohinoor Tobacco Co, v/s. ITO
   (2006)191 Taxation 5(Ahd)

(c) INTEREST FREE LOANS

A.O noting 3 interest free advances worth Rs. 1.34 lakhs and disallowing Rs. 24090 out of interest expenditure – CIT(A) upholding – Held partners own capital substantially more then advances to the three persons – Also in earlier years action initiated under section 263 on this ground was dropped by CIT as partners capital was more than advances – No disallowance justified – addition deleted.

Mustaffa Abbas & Brothers v/s. ITO
(2002) 171 Taxation 74 = 121 Taxman 330

(d) S. 40(b)

1. Salary to partners – Interest income on fixed deposit – Sec. 40(b) adopts the net profit as shown in the P & L a/c. of the firm as the basis for allowing deduction on account of remuneration to partners – Income from sources other than business which are assessable under other heads are also embedded in such 'net profit' – Qualifying words "computed in the manner laid down in Chapter IV-D" in Expln. 3 below s. 40(b)(v) have been advisedly used only in order to ensure that inadmissible or excessive claims relating to income to be computed under the head 'business' which are embedded in the book profit are excluded from the base for limiting remuneration to partners – Prima facie, the legislature has not authorized exclusion of non-business receipts recorded in the P & L a/c. – Whole income of the firm under different heads is liable to be assessed in the hands of the firm and remuneration to partners debited to P & L a/c. cannot be broken down into different components, to be allocated to the income computed under different heads – All income embedded in the net profit as appearing in the P & L a/c. of the assessee firm is to be taken into consideration for allowing deduction of remuneration paid to partners under s. 40(b) without excluding the interest income which formed part of the book profit.

Sheth Brothers Asst. CIT v/s.
(2006) 99 TTJ 189(Rajkot)

2. Disallowance under s. 40(b) – Salary to partners – Allowability against undisclosed income – Assessee declaring that excess stock discovered during survey was out of current year's undisclosed income, taking the same to its P & L a/c. and claiming partners' remuneration against the same under s. 40(b) – AO treating the undisclosed income under s. 69 and disallowing the claim under s. 40(b) – Not justified - Claim of assessee that excess stock represented its business income of the current year was neither disbelieved nor any reason given for treating the same under s. 69 – No case of Department that assessee had any other source of income – Claim under s. 40(b) allowable.

Jamanadas Muljibhai, ITO v/s.
(2006)99 TTJ 197(Rajkot)

3. Interest, salary, etc. paid by firm to partner – Assessing Officer found that assessee had paid remuneration to two of its partners who represented firm in capacity of their HUFs - He was of opinion that according to explanation 4 to section 40(b), only an individual could be a working partner and karta of HUF could not be a working partner and that since Kartas represented their respective HUFs and were not partners in their individual capacity, remuneration could not be paid to such partners – Held, Assessing Officer was not justified.

Giriraj Mines, Asstt. CIT v/s.
(2005)1 SOT 279 = 189 Taxation 107

4. Held salary paid to partner in his capacity representing HUF not a payment to HUF but to Karta as an individual (ITA No. 2072/Ahd/1999 order dt. 21.07.2003 relied upon) – However, issue restored to the file of AO to verify if work was done by the partner & if so salary to be allowed.
Associated Rasayan Agencies v/s. ITO
(2005)187 Taxation 40 (Ahd)

(e) S. **40A(2)(b)**

1. Assessee having running accounts with traders & making cash payments of Rs. 20,000 or less on different dates – AO making disallowance under section 40A(3) - CIT(A) deleting additions – Held provision is applicable only when payment is made exceeding Rs. 20,000 – Since none of payments exceeded Rs. 20000 no disallowance was called for.
Shri Hasib Rasid Shaikh , ITO v/s.
(2006)192 Taxation 57(Ahd)

2 Excessive or unreasonable payments – Assessment year 2001-02 - If any disallowance on account of expenditure incurred with reference to section 40A(2) is to be made, same can be done by bringing on record that payment was made in absence of commercial consideration or same was excessive or unreasonable having regard to fair market value of goods or services or facilities for which payment was made or legitimate needs of business of assessee – Assessing Officer disallowed foreign traveling expenses claimed by assessee observing that partners of assessee firm had not traveled abroad but father of partners traveled to Belgium in connection with purchase of rough diamonds – Commissioner (Appeals) upheld disallowance - Since no cogent material had been brought on record by Assessing officer to reach conclusion that expenditure was not incurred for purposes of business and since expenditure was incurred wholly and exclusively for purposes of business and traveling was undertaken in connection with purchases of rough diamond from Belgium for which an experienced person was sent there which was fully and exclusively in interest of assessee's business, action of lower authorities in disallowing traveling expenses was wrong.
Priyanka Gems v/s. Asstt. CIT
(2005) 5 ITAT 817 (Ahd)

3. Excessive or unreasonable payments – Assessment year 1992-93 – Since there was continuous growth and progress of assessee company after joining of managing director remuneration (viz 10 times increase in salary) equal to 10 per cent of net profit of assessee company to Managing Director was reasonable and was, therefore, allowable for business consideration.
Mira Industries , Dy. CIT v/s.
(2003) 87 ITD 475(Ahd)

4. Assessee a partnership firm – A.O disallowing remuneration paid to a partner under section 40A(2)(b) – CIT(A) upholding – Held provisions of section 40A had no application to a case governed by Section 40(b) – This intention more clearly manifested after amendment w.e.f 1-4-1993 – Also clear agreement as per partnership deed between parties to pay remuneration to the partner at the maximum rate permissible under the Act – Remuneration paid as per agreement & as permissible under the Income Tax Act – No reason to disallow the same – A.O directed to allow the same – Appeal allowed -
Chhajed Steel Corporation v/s. ACIT
(2002) 171 Taxation 22

(f) <u>s. 40A(3)</u>

Assessment under s. 44AF – Assessee engaged in retail business disclosed net profit less than that prescribed under s. 44AF, got his accounts audited and was assessed accordingly – Provisions of ss. 28 to 43C, including s. 40A(3), are not applicable where the retail traders are taxed in a presumptive manner under the provisions of s. 44AF – Assessee having agreed to assessment under s. 44AF(1), AO is directed to apply net profit rate of 5 per cent on total turnover and delete the disallowance under s. 40A(3).
Gopalsingh R. Rajpurohit v/s. Asstt. CIT
(2005) 94 TTJ 865 = 149 Taxaman 32(Ahd)

(g) <u>s. 40A(7)</u>

Contribution to unapproved gratuity fund – Gratuity trust which was granted approval by CUT w.e.f 1st Nov. 1971 having remained inoperative from 1988 to 2002, which was sought to be revived by the assessee under deed of variation by moving an application to LIC on 31st March, 2003, with new terms and conditions, having not been again approved by the CIT, no contribution to such unapproved fund could be allowed deduction under s. 43B on actual payment basis.
National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

(h) <u>s. 40A(9)</u>

1. Contribution to employees' recreation trust – Contribution to employees' recreation trust is disallowance under s. 40A(9).
National Dairy Development Board v/s. Addl. CIT
(2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

2. Contribution to employees welfare trust and employees benevolent fund – Not covered by cl. (iv) or cl.(v) of sub-s (1) of s. 36 – Disallowance sustainable.
Gujarat Alkalies & Chemicals Ltd. v/s. Dy. CIT
(2002) 77 TTJ 245

(i) TDS

Section 195, read with sections 2(28A) and 40(a)(i), of the Income Tax Act, 1961 and Double Taxation Avoidance Agreements with Singapore and United Kingdom – Deduction of tax at source – Payment to non resident – Assessee firm had purchased two ships for ship breaking business, one from a UK based non-resident company and other from a Singapore based non – resident company – Purchase of ships was only transaction for which agreements were entered into between assessee and respective sellers - Agreements categorically provided that total purchase price shall be paid by means of 100 per cent confirmed irrevocable 100 days' usance letter of credit - Payment of interest, though separately mentioned in agreement, was part of purchase price – In course of assessment proceedings, it was observed that as per Memorandum of Agreement entered into between assessee and sellers of ships, assessee was making interest payments to non-resident parties on account of credit facility availed by it for purchase of ships – Assessing Officer held that assessee was liable to deduct tax at source on 'usance interest' paid by it under terms of letter of credit (LC) through which assessee had paid purchase price of ships as per terms of MOA – Assessee not having discharged that liability, Assessing Officer invoked provisions of section 40(a)(i) to disallow interest - As definition of term 'interest' as given in DTAA is a narrower definition than given in section 2(28A), provisions of DTAA will prevail upon provisions of Act, and as per definition of term 'interest' given in DTAA, interest amount specified in MOA partook of character of purchase price and it did not fall within definition of term 'interest' given in DTAA – Therefore assessee was not liable to deduct tax at source from said payment of interest and hence disallowance of interest made under section 40(a)(i) was not warranted . This decision was reversed by the Gujarat High Court in Vijay Ship Breaking Corpn., CIT v/s. 181CTR 134, 261 ITR 113,

129 Taxman 120, 175 Taxation 233 . However , the High court decision is now superceded by Taxation Laws Amendment Act, 2003 with effect from 1-4-1962.

Vijay Ship Breaking Corpn. V/s. Dy. CIT
(2003) 86 ITD 497 = 76 TTJ 169(Rajkot)

(j) WEALTH TAX PAYMENT

Wealth Tax on closely held companies – Is a levy charged under the provisions of the WT Act, 1957 – Therefore, CIT(A) had rightly confirmed the disallowance in respect of wealth tax payment.

Inductotherm (India) Ltd., Dy. CIT v/s.
(2002) 75 TTJ 728, 123 Taxman 325

XXI. DIVIDEND

(a) DEEMED DIVIDENDS

1. Assessment year 1996-97 – Assessee received loan from three companies – Assessing Officer observed that one A, who was also shareholder of paying companies, was holding more than 20 per cent of total shareholding of assessee, in his capacity as an individual as well as karta of HUF, and held that provisions of section 2(22)(e) would be applicable – Accordingly, Assessing Officer treated loan as deemed dividend - Assessee's case was that 'A' was holding only 10.24 per cent of total shareholding of assessee, and shareholding of individual and HUF could not be clubbed for purpose of section 2(22)(e) – Whether assessee's case was to be accepted - Held, yes.
   Kunal Organics (P) Ltd., Jt. CIT v/s.
   (2007)164 Taxman 169(Ahd)

2. Accumulated profits – For the purpose of s. 2(22)(e), the accumulated profits are to be worked out upto the date of each payment/advancement of the loan – There is a distinction between the "accumulated profits" of business and the current year's profits of business – Explanation 2 to s. 2(22)(e) does not have the effect of inclusion of current year's business profits – Since the business profits of the company accrue only at the end of the year, the current year's business profits are not to be included - Loan or advance treated as deemed income upto the date of fresh loan is to be reduced from accumulated profits – Sec.2(22)(e) is applicable even in cases where the company has declared dividend – There is no evidence on record to establish that the amount of loan advanced to the assessee by the lending company was in the course of carrying on of its business of the money-lending – Matter remanded to the AO for the purpose of working out accumulated profits.
M.B Stock Holding (P) Ltd. v/s. Asstt. CIT
(2002) 75 TTJ 898 = 84 ITD 542

XXII. EXEMPTION

(a) s. 10(16)

Scholarship - Assessment year 2001-02 – Assessee received certain sum being Humboldt Research Award from Alexander Von Humboldt Foundation, Germany – His name was approved by Council of Scientific and Industrial Research as a beneficiary of said award – Assessee claimed same as exempt under section 10(16) – Whether in view of decision of Madras High Court in CIT v. V.K Balachandran (1985) 23 Taxman 29, assessee was entitled to exemption under section 10(16) – Held, yes.
Girish Saran Agarwal , Asst. CIT v/s.
(2007) 160 Taxman 79(Ahd)

XXIII. GIFT

(a) FAMILY SETTLEMENT OR GIFT

1. Property being plot Bungalow belonged to 'C' who died interstate leaving behind wife, son & three daughters – After death name of 'C' deleted from record of rights & his wife's name entered – As per family arrangement 3 daughters relinquished their shares in favour of mother & brother for consideration of Rs. 3.98 lakhs each – Value of property 47 lakhs – AO holding family arrangement not bonafide & assessing deemed gift of Rs. 5.42 lakhs under section 4 in the hands of each daughter - CIT(A) upholding – Held, dispute was there between parties as daughters' name not entered in record of rights – Assessee discharging onus by producing family settlement & establishing the same having been acted upon – Family settlement bonafide on facts – No deemed gift – Appeals allowed.

Sumita U. Desai (Smt) v/.s. ACGT

(2006)190 Taxation 116 = 153 Taxman 33 (Ahd)

2. Allowability – Export of goods vis-à-vis sale of goods to another EOU – There was no requirement under s. 10B as it existed at the relevant time to receive sale proceeds in convertible foreign exchange in the absence of any specific definition in the Act - The word 'export' has to be interpreted in accordance with the meaning ascribed to it under relevant exim policy which deems the sale by one EOU to another as export – Further, assessee is claiming exemption only in respect of profits accruing to it from the undertaking after the date of grant of approval as EOI and the profits from trading activities are not considered for exemption – Therefore, the fact that the assessee is also engaged in trading cannot disentitle it in respect of its otherwise valid claim – Contention of AO that the undertaking was not a new one and was formed by splitting or reconstruction of business already in existence is not correct - Ownership, management and control of the assets of the business continued to vest in the hands of same both prior to and subsequent to its being accorded approval – Hence, assessee's claim for exemption under s. 10B could not be disallowed on any of the aforesaid grounds.

Anita Synthetics (P) Ltd., ITO v/s.

Geeta Fibres (P) Ltd., ITO v/s.

(2006)100 TTJ 277(Ahd)

(b) GIFT TAX ACT

Deemed gift under s. 4(2) – Conversion of individual property into HUF Property -Family settlement - Property standing in the names of sons and daughters of assessee though assessee showing it as individual property in his wealth tax and income tax returns – Sons openly challenging the sole ownership of assessee and one son had already moved the Court – Further, in view of Benami Transactions (Prohibition) Act, 1988 any suit claim or action at the instance of the assessee in respect of property standing in the names of his sons and daughters was barred – In these circumstances, when the assessee wanted to dispose of the property he had no alternative but to agree for family settlement so that he can have at least 1/3rd share in the property instead of losing the same in toto – The transaction was a bona fide family settlement and no deemed gift under s. 4(2) was attracted.

Shah, K.M (Dr.) v/s. Asstt. CGT

(2004) 83 TTJ 721 = 90 ITD 21 (Ahd A)(TM)

XXIV. INCOME

(a) ACCRUAL - TIME OF

1. Interest on bonds – Assessee returning certain interest income in revised return on accrual basis is not precluded from claiming the same as exempt during the course of assessment on the ground that there was no contract for payment of interest on accrual basis.

   Interest on Deep Discount Bonds – Circular No. 2 of 2002 was not applicable to assessee who had subscribed to DDBs for holding the same as investment, either for bonds purchased prior to this circular or after this circular – Assessee following cash system, addition of income from bonds was not justified.

   Kisan Discretionary Family Trust v/s. Asstt. CIT

   (2008)113 TTJ 918 = 2 DTR 363(Ahd)

2. Assessee following mercantile system of accounting - Assessee's income being chargeable to tax from asst. yr. 2003-04 only for which it had followed mercantile system of accounting, interest income relating to earlier years but actually received during the said assessment year could not be bought to tax.

   Interest on doubtful loans of public financial institution – Assessee having applied for the status of public financial institution on 10th July, 2002, such status granted by Notification dt. 23rd Feb. 2004 would relate back to the date of application and its interest income on doubtful loans shall be chargeable as per s. 43D from the date of application.

   National Dairy Development Board v/s. Addl. CIT

   (2008) 114 TTJ 145 = 3 DTR 122 =(200)310 ITR 384 (Ahd)

3. Assessment year 1993-94 – Assessee was awarded a contract by 'IAL' for construction of acrylic plant – While construction and erection work was in progress, terrorists attacked on work site resulting in death of various persons employed by contractors and assessee company – Due to terrorist's action, all site sub-contractors deserted project site – Assessee, however at request of owners restarted and completed work - There was total amount of Rs. 53,14,044 outstanding in name of 'IAL' in books of assessee, but said amount was not accepted by 'IAL' on ground that assessee did not complete job as per terms of contract and in view of inordinate delay in execution of project which was still incomplete - On contrary, 'IAL' made counter claim against assessee for delay in executing of work – Assessee was not likely to receive an amount in excess of Rs. 15 lakhs and, therefore, it debited difference of Rs. 53,14,044 and Rs. 15,00,000 i.e Rs. 38,14,044 from its total income – Assessing Officer held that aforesaid amount was in nature of bad debts and that said bad debts could be allowed only if assessee wrote off said amount but since assessee had not written off said amount and was still claiming said amount as receivable from 'IAL' said amount had to be treated as assessee's income and accordingly Assessing Officer added said sum to income of assessee – On appeal, Commissioner (Appeals) deleted addition and held that mere passing of a unilateral entry in books of account could not give rise to any income when said claim was challenged and rejected by party concerned and that said income did not accrue to assessee during year under consideration – Whether order of Commissioner (Appeals) was reasonable and, thus same was to be confirmed but subject to modification that if any amount was received or realized by assessee in subsequent year that would be subject to tax as per provisions of Act – Held, yes.

Project Technologists (P) Ltd., Dy CIT v/s.
(2007) 17 SOT 20(Ahd)

4. Where amount of additional compensation awarded by High Court for acquisition of land along with interest thereon was duly paid by Government and received by assessees without any condition of furnishing any security bond for refunding amount in event of appeal being filed and allowed against order of High Court, interest was liable to be taxed under Act –

Merely because Government had filed appeal against order of High Court, interest income on additional compensation could not be said to be contingent income and could not go out of tax net, particularly when in appeal only quantification of award was disputed and not right of assessee to receive award itself.

Interest on enhanced compensation payable under sections 28 and 34 of Land Acquisition Act, 1894 cannot be taken to have accrued on date of order of Court granting enhanced compensation but has to be taken as having accrued year after year from date of delivery of possession of land till date of such order – Therefore, even though such interest is paid in lump sum, same

would be spread over in years to which such interest income pertains and cannot be included in entirely in year of actual payment.

Govindbhai Mamaiya , ITO v/s.
(2006) 100 ITD 265= 102 TTJ 712(Rajkot)

5. Payment refused by contractee vis-à-vis counter claim - Assessee awarded a contract by IAL for setting up acrylic plant to be completed in March, 1992 – Assessee had carried out work of Rs. 125 lakhs in November, 1991 – On 10th March, 1992 there was a terrorist attack at the work site in which 16 persons belonging to various contractors, IAL and 2 senior engineers of the assessee company were killed and the construction manager of the assessee company was wounded, and the sub contractors deserted the project site – Due payments of assessee thereafter rejected by IAL who on the contrary made a counter claim of Rs. 4.72 crores as compensation for delay – Income of Rs. 53,14,044 was credited in the books of assessee against which it was pointed out before CIT(A), the maximum that could be payable to assessee was Rs. 15 lakhs – Assessee thus debited its accounts with a sum of Rs. 53,14,044 – 15,00,000 = 38,14,044 – In the facts and circumstances of the case, CIT(A) correctly held that the income of Rs. 38,14,044 did not accrue to the assessee during the year under consideration – In any amount is received or realized by the assessee in subsequent year that will be subject to tax as per the provisions of the IT Act.

Project Technologists (P) Ltd., Dy. CIT v/s.
(2005) 98 TTJ 471= (2007) 17 SOT 20 = (2006)192 Taxation 16 (Ahd)

6. Assessee company engaged in business of civil construction claimed deduction of money withheld by Government from bills pending verification of satisfactory completion of work on ground that said retention money did not arise or accrue until satisfactory completion of work – Assessing Officer rejected assessee's claim on ground that amount retained was for additional security and was released to assessee on submission of bank guarantee – Commissioner (Appeals) deleted addition on ground that income represented by retention money accrued only after completion of contract and after defect liability period was over – Since as per terms and conditions of tender, money deducted from bills was not retention money but additional security deposit for satisfactory performance of contract and money so deducted, in fact, had been released to assessee on furnishing bank guarantee, it was to be held that entire bill amount accrued to assessee in relevant assessment years in which bills were raised – However, if assessee established that it had actually incurred any expenditure in future years for inefficient performance and that had not been allowed as deduction in those years, an estimated liability could be allowed in relevant assessment years.

Amarshiv Construction(P) Ltd., Dy. CIT
(2004) 88 ITD 381 = 84 TTJ 347 (Ahd)

7. Assessee giving advance to a party – As debtor's financial position worsened, as agreed assessee not charging interest during the year to ensure safe return of capital – A.O making addition of Rs. 45,000 for alleged interest – Held no proof that agreement was not acted upon which was based on commercial consideration - On facts no income accrued or received - Addition deleted - (46 ITR 144 & 236 ITR 315).
   Rambhai Kilabhai & Co. v/s. ACIT
   (2003) 177 Taxation 71 (Ahd)

8. Accrual of – Assessee had accounted for net income by way of Advance Licence Benefit Receivable (ALBR) in its books in year under consideration, i.e in the year in which it had actually exported goods on basis of which input licence was granted to it for importing duty free raw materials – However, while submitting income tax return, it claimed that such income could not be treated as income accrued to assessee in year when exports were made but it should be treated as having accrued only in year when duty free raw material was actually imported - Obligation of exporter was to fulfil export obligation for acquiring right to import duty free raw material and once that obligation was fulfilled, right to have import licence for importing duty free raw material became a vested and absolute right - Therefore income by way of 'ALBR' flowing from such right accrued in year when export obligation had been discharged by assessee Therefore, income by way of ALBR accrued to assessee in year in which it exported goods.

   Section 145 of the Income Tax Act, 1961 – Method of accounting - Section 145 do not override sections 4 and 5 – Therefore, section 145 has no effect on range or ambit of taxable income –
   United Phosphorus Ltd. v/s. Joint CIT
   (2002) 81 ITD 553

(b) <u>ADDITIONS</u>

1. Alleged Suppression of sales – In the absence of relevant evidence supporting the claim of the assessee that the impugned amount recorded in its books of account represented the sales made by its sister concern and not by the assessee and in view of failure of the assessee to reconcile the discrepancy in the contra accounts, CIT(A)'s order deleting the impugned addition is set aside and the matter is restored to him for a fresh decision in accordance with law.
   Va**ria Pratik Engineering, ITO v/s.**
   (2009)120 J 1 = 17 DTR 1(Ahd)

2. Assessment year 1996-97 – Assessee company was in business of bottling of LPG Gas and sale of stoves and regulators – Assessee used to give cooking gas filled in cylinders against taking deposit for same and thereby was selling gas – Assessing Officer taking view that assessee was engaged in purchase and sale of cylinders treated deposit received as sale receipt of assessee and made addition – Assessing Officer, accordingly, also disallowed depreciation on cylinders claimed by assessee showing same as assets in balance sheet – Whether since Assessing Officer did not point out any material or evidence basis on which it could be said that assessee was engaged in trading of cylinders, addition made by Assessing Officer was to be deleted.
   Osian LPG Bottling Ltd., Jt. CIT v/s.
   (2007)164xman 171(Ahd)

3. Assessment years 1995-96 and 1996-97 – Assessee company was carrying on business of texturising - Assessing Officer considered net oil gain shown by assessee as low and held that normal net oil gain should have been 1 to 2 per cent after giving set off to wastage, etc. and he, therefore, computed oil gain at rate of 1 per cent and made consequential additions – Whether since Assessing Officer's conclusion that generally net oil gain was 1 per cent to 2 per cent was not supported by any formula or expert advice, Commissioner (Appeals) was quite justified in deleting addition – Held, yes.
   Rinkesh Prints (P) Ltd., ITO v/s.
   (2006)151 Taxman 44 = (2007) 199 Taxation 120 (Ahd)

4. For low withdrawals by partners AO making addition of Rs. 49,000 in the hands of the firm – CIT(A) deleting the addition – Held, there is no material to hold that such addition on account of household withdrawals in the hands of firm is sustainable in law & fact – CIT(A)'s order upheld.
   Vishal Dughdhalaya , ITO v/s.
   (2006) 191 Taxation 7(Ahd)

5. Addition under s. 69 – Discrepancy in stock – Stock in their personal capacity – Two directors of the assessee company who are guarantors for credits extended by the bank to the company are also proprietors of two associate concerns each having stock in trade adequate to explain the discrepancy noted by the AO – Stock in trade of the said associate concerns are the absolute properties of the respective directors and the company has interest in the said properties to enable it to offer them for hypothecation – Proforma agreement of the bank does not require the assessee to mention separately the stock which is the absolute property of the company and the stock in which it has some kind of interest - It cannot therefore, be said that higher value of stock was shown as hypothecated to the bank without any basis - Books of account of the assessee company are subject to audit both under the company law and the income tax law – No specific defect has

been found in the books of account – GP rate disclosed by the assessee company is satisfactory – Therefore, addition was rightly deleted.
Simron Printeres (P) Ltd. , Asstt. CIT v/s.
(2006) 100 TTJ 1106(Rajkot)

6. Assessee purchasing land from M/s. Paneri Hotel Pvt. Ltd. – During search on the premises of Shri S.N Paneri in his statement under section 132(4) he stated that the Hotel sold land to assessee for Rs. 17 lakhs through the documented price was Rs. 9 lakhs - AO during assessment processing noticing documented price Rs. 5.91 lakhs - AO accordingly adding Rs. 11.09 lakhs - ITAT restoring issue to the file of AO for readjudication – AO after allowing cross examination of Shri Paneri again repeating the addition - CIT(A) observing assessee denying payment of on money & in view of Shri Paneri's changing statements etc. & on facts deleting additions – Revenue filing appeal – No material on record to show that Hotel the owner, received any on money – Addition made on the basis of statement of a third party – Except assessee, on money not considered in the hands of third party etc. – On facts & circumstances & changing statements of Shri Paneri, CIT(A) rightly deleted the addition & his order upheld – Appeal dismissed Income Tax Act, 1961 - Sections 69 & 143(3).
Nirman Developers , ITO v/s.
(2006)193 Taxation 179(Ahd)

7. Addition to income – Assessee company, which was engaged in business of purchase and sale of non ferrous metal scrap, claimed shortage in copper, lead and MG silicon at 1.38 per cent, 1.26 per cent and 5.13 per cent respectively - Assessing Officer on basis of last year's order passed by Commissioner (Appeals) held shortage of 0.5 per cent as reasonable for year under consideration not only for copper but also for other items and made certain addition to income of assessee – On appeal, Commissioner (Appeals) found that in assessment year 1989-90, there was no trading in lead and MG silicon and since lead and MG Silicon were totally different materials shortage in those items could not be compared with that of copper – He therefore, deleted addition – In view of facts that in earlier year assessee was dealing only in copper while in year in question items were in addition to copper, it would not act as res judicata against it – Shortage in lead, MG Silicon and tin anode would vary depending upon physical and chemical composition of each item and, therefore Commissioner (Appeals) was justified in deleting addition made by Assessing Officer.

   Additions to income – During course of search, excess stock and deficit stock was found in respect of various items of scrap – Assessing Officer treated excess stock found as purchases made by assessee out of unaccounted income and deficit stock was treated as sold outside books of account – Assessing Officer made certain additions to income of assessee on both grounds – In view of facts that assessee was keeping stock of all

non ferrous metal together and, thus, there was every chance of inter mixing resulting into deficit in certain and excess in other items, Commissioner (Appeals) was justified in deleting addition made by Assessing Officer.

Additions to income – A survey was conducted on premises of assessee – Assessing Officer found that there was excess stock of copper and shortage of tin, nickel and silicon in godown of assessee – Assessing Officer deducted stock belonging to 'MMD' which was lying in godown of assessee and considered rest of excess stock as purchases out of books of account and deficit stock as sold outside books of account – Accordingly, Assessing Officer made certain additions to income of assessee – On appeal, Commissioner (Appeals) observed that there was discrepancy in stock of 'MMD' which was to be explained by them and not by assessee and that excess stock could not be considered as belonging to assessee – Commissioner (Appeals) held that theory of Assessing Officer that assessee had purchased fresh stock, sold same and showed balance in balance sheet was based on surmises and that no prudent businessman would ever resort to such a procedure when it was totally disadvantageous to him – Accordingly, he deleted additions on both counts made by Assessing Officer – In view of facts that Assessing Officer had made estimation without support of cogent evidences and firm foundation and that revenue had not been able to bring on record any evidence after search that there was sale outside books of account, Commissioner (Appeals) was right in deleting additions made by Assessing Officer.

Allowability of – Assessing Officer observing that foreign trip undertaken by director of assessee company to meet prospective suppliers was not supported by any evidence and as he had gone with his family, it was a personal trip, disallowed entire expenses incurred by assessee on said trip – On appeal, Commissioner (Appeals) disallowed expenditure incurred on tickets of his family but allowed expenses incurred on director - In view of facts that assessee's director had contacted various parties abroad with whom assessee had business dealings in subsequent years, visit of director was business trip and, therefore, Commissioner (Appeals) had rightly allowed deduction in respect of cost of ticket of assessee's director.

Mercury Metals (P) Ltd., Asstt. CIT v/s.
(2005) 1 SOT 435

8. Additions to income – Assessment years 1993-94 and 1994-95 – Pursuant to survey operation carried out at assessee's premises, he disclosed certain additional income - However, subsequently assessee filed letter of retraction to said disclosure - No evidence/material was found to prove existence of such disclosed income or earning of such income in hands of assessee – Assessing Officer was justified in not making addition on basis of disclosure made by assessee under section 133A .

Ashok Manilal Thakkar v/s. Asstt. CIT
(2005) 97 ITD 361 (Ahd)

9. 'On money' received on sale of land – SM, partner of a firm, clearly stated at the time of search and seizure operation that he had paid 'on money' of Rs. 40/60 lakhs to A, director of the assessee company, for purchase of land – SM has admitted payment of 'on money' even in his statement recorded on cross examination in front of A – Admittedly, there is invariable involvement of 'on money' in cases of real estate dealings – Therefore, in view of the facts and circumstances of the case vis-à-vis the prevalent practice, it cannot be denied that assessee has received 'on money' on sale of land and had also paid 'on money' on purchase of plot – Therefore, AO is directed to restrict the addition of 'on money' to Rs. 10 lakhs only.
Aatithya Motels & Complex (P) Ltd. v/s. Jt. CIT
(2005) 98 TTJ 825 (Rajkot)

10. Section 143 of the Income Tax Act, 1961 – Assessment - Additions to income - Assessee declared sales at Rs. 17,52,852 and on it disclosed gross profit at rate of 16.4 per cent - Assessee claimed that its account books were destroyed in fire in riots and, therefore, could not produce same before Assessing Officer – Assessing Officer in absence of account books estimated sales of assessee at Rs. 20 lakhs and adopting gross profit rate of 20 per cent made an addition of Rs. 72,000 – Commissioner (Appeals) deleted addition – Except in immediately preceding year, gross profit rate shown by assessee in all three earlier years was less than gross profit rate disclosed in year under consideration – Since relevant record was destroyed in fire, assessee could not have produced same, there was no infirmity in order of Commissioner (Appeals) in deleting addition.

11. Additions to income – Assessee, a stockist of soda ash claimed that it obtained 296 bags of soda ash from "s" on loan – Assessing Officer on enquiry 'S' found that there was no practice giving soda ash on loan – Assessing Officer, therefore, disallowed assessee's claim and made an addition of Rs. 60,561 – Commissioner (Appeals) deleted addition on ground that loan of soda ash bags was appropriately reflected in assessee's stock register - Merely because loan of soda ash in question was reflected in assessee's stock register, it was no ground for accepting loan to be genuine - Transaction in question had to be confirmed by parties from whom loan was said to have been obtained - Therefore, Commissioner (Appeals) was wrong in deleting addition.
Setalvad Bros., Dy. CIT v/s.
(2004) 140 Taxman 66(Ahd)

12. Assessable as – Assessee as a consignment agent, sold goods supplied by principal at fixed price on commission basis – It was entitled to collect sales tax, octroi, etc. from customers – Out of total sale proceeds, after amount was credited to principal's account and other expenses, a surplus amount was found – Assessee surrendered it as a trading receipt and Assessing Officer made addition – Commissioner (Appeals), however, deleted addition – Whether where amount recovered by assessee was in excess of amount authorised to be recovered from dealers and was not payable to principal, impugned amount received in course of business was of character of income, and Commissioner (Appeals) was not justified in deleting said addition more so when amount was offered for taxation in course of assessment proceedings .
Orient Trading Co. , ITO v/s.
(2003) 84 ITD 97 = 79 TTJ 487(Ahd)(SMC)

13. Both assessees constructing & selling immovable properties – Tirupati Builders showing cost of construction at Rs. 1170 per sq. m. while Mahavir Builders at 1058 – A.O referring to DVO who estimating cost @ 1531 & 1530 per sq. m. – A.O making additions & also 10% profit on unexplained cost - Hon'ble ITAT setting aside orders of the authorities directing the A.O to redo assessments after opportunity to assessee's valuer to cross examine the DVO etc. – AO making fresh asstts on similar lines but after rejecting assessee's request to cross examine the DVO by the Registered Valuer – CIT(A) giving part relief – Assessees & Revenue filing appeals – Held, defects pointed out while rejecting books are without material or any evidence – Material produced by assessee also not discussed while retaining part additions by CIT(A) – A.O also not giving opportunity to cross examine the DVO & willfully violating ITAT's orders & this could expose him to contempt proceeding – DVO estimating cost by plinth area method while as per expert opinion there could be difference of 34.2% in this method vis a vis detailed quantity survey & rate analysis method – Also addition for unexplained expenditure could be made under section 69C & when debited to P & L a/c. it was neutralized & result was with no addition – On facts & circumstances all additions deleted & assesses awarded cost of Rs. 2500 for each appeal.
Tirupati Builders v/s. ITO & (Vice Versa)
(2002)168 Taxation 33 = 126 Taxman 54 (Rajkot)

14. See "income from undisclosed sources"

(c) CASH CREDIT

1. Fixed deposits received from employees and ex employees – Applications containing details of depositors, signature, telephone numbers etc. – Transactions through bank – Assessing Officer calling for confirmations from depositors - Assessee producing whatever evidence available with it – Additional on ground that identity, credit worthiness and genuineness not proved – Assessee discharging primary onus under section 68 – Assessing Officer to rebut on the basis of available record – Cash credit cannot be added as unexplained income – Income tax Act, 1961, 1961, s. 68.
Claris Lifesciences Ltd. V/s. Asstt. CIT
(2008) 298 ITR 403 = 112 ITD 307 = (2007) 111 TTJ 902 (Ahd)

2. Genuineness – Assessee having submitted confirmations of cash credits from allthe creditors with PANs before the AO and satisfactorily explained the reason for borrowing funds and making repayments in cash, addition under s. 68 was not justified.
Arihant X-ray & Sonography Clinic (P) Ltd., ITO v/s.
(2007) 111 TTJ 528(Ahd)

3. Burden of proof and genuineness - AO having accepted that depositors were ex-employees of assess company, the applications made for deposit contained their PAN, respective Aos and telephone numbers, the deposits were received and repaid through bank account and interest was paid, primary onus cast on assessee under s. 68 stood reasonably discharged and addition of cash credit was uncalled for only on account of failure of assessee to file confirmation in respect of such ex- employees, who as per explanation of assessee had left services, settled elsewhere or migrated abroad, and their present whereabouts were not known.
Claris Lifescience Ltd. v/s. Asst. CIT
(2007)111 TTJ 902= (2008) 298 ITR 403 = 112 ITD 307 (Ahd)

4. AO making addition of Rs. 4,52,000 in regard to four cash credits – In remand report to CIT(A) AO accepting cash credits appears to be genuine but for enquiries assessment be set aside - CIT(A) setting aside the assessment - AO repeating the addition in reassessment - CIT(A) holding that no worthwhile enquiries made in reassessment proceedings to show that loans were not genuine – Identity of creditors, source of funds & genuineness of the transactions are established & CIT(A) deleting addition – Held on facts & circumstances CIT(A) correctly deleted the addition & his order confirmed.
Vishal Dughdhalaya , ITO v/s.
(2006) 191 Taxation 7(Ahd)

5. When shares are issued in name of non-existing persons, ITO would have jurisdiction under section 68 to treat such credit to be income of assessee – Where share capital is not received by an assessee pursuant to public issue and it is a private placement out of promoters quota which has to be brought in by promoters from their friends and relatives, in such a situation, there is close connection between investors and promoters, and it cannot be said to be difficult to make enquiries at stage of application –
Modern Cement Industries Ltd., Asst. CIT v/s.
(2004) 90 ITD 170 = (2005) 95 TTJ 341 (Ahd)(TM)

6. On assessee's failure to furnish affidavits and confirmations of parties from whom loans were claimed to have been taken, Assessing Officer made addition – However, assessee furnished affidavits and confirmations during second appeal which revealed that assessee had even deducted TDS in respect of interest paid to parties - In view of fact that in almost similar circumstances Tribunal had set aside issue to file of Assessing Officer for fresh adjudication in case of one of assessee's sister concern, instant matter was to be restored to file of Assessing Officer for fresh adjudication in accordance with law.
Arjunlal Nebhumal & Co. v/s. Dy. CIT
(2004)140 Taxman 123 = 80 TTJ 67(Ahd)

7. Assessing Officer found cash deposits in assessee's bank account and made additions of aggregate of such cash deposits in each of the assessment years – For making additions on account of unexplained cash deposits, only peak credits should be taken, as by aggregating deposits, they tend to get taxed twice.
Maheshkumar Jayantilal Vora, ITO v/s.
(2004)141 Taxman 71(Rajkot)

8. Issue of share capital – Assessee furnished all details such as folio numbers, names and addresses of the subscribers and number of shares subscribed by them, copy of share application form, dates and numbers of cheques and names of the brokers - AO picked up only 13 subscribers to whom notices were sent and returned with remarks 'not known' and making addition – Not justified – AO ought to have made enquires from banks and brokers – Same having not been done, CIT(A) was justified in deleting the addition.
Interlink Petroleum Ltd., Dy. CIT
(2004)83 TTJ 274(Ahd)

9. Genuineness - Assessee could not furnish the affidavits and confirmations of the parties from whom the loans were allegedly taken - Same furnished before the Tribunal - Matter restored to the AO for fresh adjudication in accordance with law.
Arjunlal Nebhumal & Co. v/s. Dy. CIT
(2003) 80 TTJ 67 = 140 Taxman 123

10. Burden of proof – Assessee furnished complete addresses of all the creditors along with GIR numbers/PAN as well as confirmations along with copies of assessment orders passed in the cases of individual creditors, wherever available, and copies of returns filed by the creditors in the remaining cases – All loans were received and repaid by assessee by account payee cheques along with interest – Thus, assessee has discharged the initial onus which lay on it in terms of s. 68 – Assessee is not further expected to prove the genuineness of cash deposited in the bank accounts of the creditors - Merely because summons issued to some of the creditors could not be served or they failed to appear before the AO the loans taken from those creditors could not be treated as non genuine – Further, AO has not disallowed the interest paid in relation to these credits and tax has been deducted at source out of the interest paid/credited to the creditors - Addition not justified.

Rohini Builders v/s. Dy. CIT
(2002) 76 TTJ 521

11. Burden of proof – Assessee is duty bound to establish the identity of the creditors, their creditworthiness and genuineness of the deposits – Assessee failed to discharge onus – AO justified in making the addition under s. 68.

M.B Stock Holding (P) Ltd. v/s. Asstt. CIT
(2002) 75 TTJ 898 = 84 ITD 542=(2003) 84 ITD 542

12. Unconfirmed cash sales – AO was fully justified in asking the assessee to prove the amounts introduced in the books in the shape of cash receipts from customers and in treating them as unexplained income of the assessee when it failed to prove the cash receipts – There is no material difference whether a sum is introduced as "cash credit" or as "trade credit" - In both the cases the unexplained credit is to be assessed as "deemed income" of the assessee – However, all the credits were added without bothering to know as to how much cash was available with the assessee on the date on which it was introduced in the books of account as receipt from the customer – In the absence of details as to what was the opening balance with the assessee on the dates of credit and how much cash it had from known and accepted sources, the addition for unexplained cash could not be worked out – Therefore, it was necessary to work out the peak of the credits as also details of available funds with the assessee and then determine how much unaccounted for cash was introduced in the books of accounts – Accordingly the impugned orders are set aside and matter is restored to the AO for passing a fresh order after affording reasonable opportunity of being heard to the assessee.

S.R Enterprise v/s. ITO
(2002) 77 TTJ 69

(d) DISCONTINUED BUSINESS – S. 176

When any sum is received after discontinuance of business is deemed to be income of recipient it is to be charged to tax in year of receipt, and it is to be included in income of receipt as if such sum would have been included in total income of person who carried on business had such sum been received before such discontinuance – When trusts were dissolved and refund of custom duty was received by persons other than original trust though in erstwhile names of trust and deposited in a bank account opened in names of those trusts for and on behalf of beneficiaries as authorized by dissolution deeds of trust by constituted attorneys, constituted attorneys received money for and on behalf of beneficiaries under a new obligation created by dissolution of trust deeds of erstwhile trusts – Since, assessment were also completed through constituted attorneys of new obligation and not on trustees of erstwhile trust, provisions of section 176(3A), read with section 41(1) were correctly applied by Assessing Officer and Commissioner (Appeals) was not justified in deleting addition.

K. Kachradas Patel Spec. Family Trust, Asstt. CIT v/s.
(2004) 88 ITD 228(Ahd)

(e) ESTIMATE - LOW HOUSEHOLD EXPENDITURE

1. AO estimated total house hold expenses of all the assesses at Rs. 6,58,600 as against Rs. 1,88,000 debited in the books of account – Not justified - Estimate not supported by any evidence/material on record except a milk bill – Similarly, the estimate of CIT(A) at Rs. 8,000 per month per family of six brothers was also without any basis - Expenditure shown by the assesses who all are living together being rather low and inadequate, addition of Rs. 20,000 sustained in respect of all the five assessees having regard to the facts and circumstances of the case.

Shankerlal Nebhumal (HUF) & Ors.. v/s. Dy. CIT
(2003) 80 TTJ 69=(2004) 135 Taxman 33

(f) GENERAL

1. Clubbing of income under s. 60 – Transfer of income without transfer of asset – Income earned by family members of assessee by employing interest free loans advanced to them by assessee out of his funds subjected to income tax cannot be made subject matter of addition under s. 60 – It is not a case of transfer of income without transfer of assets and s. 60 is not attracted.

Nalinbhai M. Shah, ITO v/s.
(2005)93 TTJ 107= 149 Taxaman 28

2. Answer to question as to whether unrecorded sale itself is income or only a net profit on such unrecorded sale is income would depend upon facts of each case – Where an assessee makes purchases outside books and also sells goods outside books, profit, i.e difference between sale price and expenditure incurred by assessee, is income from unrecorded sale – Where an assessee records all expenditure in books of account but part of sale consideration is not recorded in books of account, then unrecorded sale itself would be income of assessee.

Bhogilal Mulchand, Dy. CIT v/s.
(2005) 3 SOT 211 = 96 ITD 344 = 98 TTJ 108 (A**hd)**

3. Assessee a Dharma Guru – On 7-2-1985 assessee's two minor sons received gifts of Rs. 2.65 lakhs & Rs. 2.50 lakhs on their thread ceremony from assessee's followers - A.O . However, treating such gifts as assessee's income from profession – CIT(A) deleting the same - Held amounts received by assessee sons purely personal in nature & cannot be treated as income - Assessee's sons receiving these amounts as gifts on thread ceremony - No justification for treating this as income of assessee – CIT(A)'s order upheld & revenue's appeal dismissed.

Suresh V. Goswami , ITO v/s.
(2005) 188 Taxation 187(Ahd)

4. Clubbing of income under s. 60 – Transfer of income without transfer of asset – Income earned by family members of assessee by employing interest free loans advanced to them by assessee out of his funds subjected to income tax cannot be made subject matter of addition under s. 60 – It is not a case of transfer of income without transfer of assets and s. 60 is not attracted.

Nalinbhai M. Shah, ITO v/s.
(2005)93 TTJ 107= 149 Taxaman 28

5. Answer to question as to whether unrecorded sale itself is income or only a net profit on such unrecorded sale is income would depend upon facts of each case – Where an assessee makes purchases outside books and also sells goods outside books, profit, i.e difference between sale price and expenditure incurred by assessee, is income from unrecorded sale – Where an assessee records all expenditure in books of account but part of sale consideration is not recorded in books of account, then unrecorded sale itself would be income of assessee.

Bhogilal Mulchand, Dy. CIT v/s.
(2005) 3 SOT 211 = 96 ITD 344 = 98 TTJ 108 (A**hd)**

6. Assessee a Dharma Guru – On 7-2-1985 assessee's two minor sons received gifts of Rs. 2.65 lakhs & Rs. 2.50 lakhs on their thread ceremony from assessee's followers - A.O . However, treating such gifts as assessee's income from profession – CIT(A) deleting the same - Held amounts received by assessee sons purely personal in nature & cannot be treated as income - Assessee's sons receiving these amounts as gifts on thread ceremony - No justification for treating this as income of assessee – CIT(A)'s order upheld & revenue's appeal dismissed.
Suresh V. Goswami , ITO v/s.
(2005) 188 Taxation 187(Ahd)

7. Issue of share capital – Assessee furnished all details such as folio numbers, names and addresses of the subscribers and number of shares subscribed by them, copy of share application form, dates and numbers of cheques and names of the brokers - AO picked up only 13 subscribers to whom notices were sent and returned with remarks 'not known' and making addition – Not justified – AO ought to have made enquires from banks and brokers – Same having not been done, CIT(A) was justified in deleting the addition.
Interlink Petroleum Ltd., Dy. CIT
(2004)83 TTJ 274(Ahd)

8. Interest on FDRs of amounts pending final decision - Assessee doing construction work for Govt. – Certain dispute with Govt. regarding payment – Arbitrator giving award for 37 lakhs with interest which became rule of Court – Govt. filing appeal – Hon'ble High Court directing deposit of 70% of decretal amount by 19-10-1992 & assessee could with draw it on furnishing of Bank guarantee – Assessee withdrawing it & depositing it in FDRs & not showing accrued interest in the return on the plea that the amount received etc. was still disputed & subject matter if appeal – A.O accepting assessee's plea – CIT under section 263 directing to tax the interest accrued - Assessee filing appeal – Held no material to show that assessee bound to compensate or return part of interest to the opposite party if the issue was decided against the assessee – Assessee had absolute and unfettered right to receive interest from Bank & it was not affected in any manner on account of litigation before Hon'ble High Court – Interest chargeable to tax – Order of CIT under section 263 upheld and appeal dismissed.
Banyan and Berry Construction Pvt. Ltd. V/s. ACIT
(2002) 170 Taxation 118

(g) OTHER SOURCES

1. Technical know-how fees during precommencement period – Fees for technical know how received by the assessee company for providing consultancy to other parties after procuring such know how from overseas parties for development of its own port and before using the same for its own purpose is taxable as income from other sources – Expenditure including depreciation and cost of know how exclusively uses and transferred to said parties is allowable as deduction.

   Adani Port Ltd. , ITO v/s.
   (2007)111 TTJ 593 =108 ITD 1 (Ahd)(TM)

2. Deduction under s. 57(iii) - Dividend income – Expenditure incurred by assessee in the business of purchase and sale of shares cannot be reduced from dividend income assessable under the head "Income from other sources".

   Torrent Finance (P) Ltd. v/s. Jt. CIT
   (2007) 108 TTJ 615(Ahd)

3. Chargeable as – Assessment years 1989-90 to 2000-01 – Whether it is only when a unit has been put into such a shape that it can start functioning as a business or a manufacturing organization that it can be said that the unit has been set up – Whether an assessee can be said to have set up its business from date when one of essential categories of its business activities is started and it is not necessary that all categories of its business activities must start either simultaneously or that last stage must start before it can be said that business was set up – Government undertook Sardar Sarovar Project for supply of water and electricity and construed a part of dam – Subsequently, assessee corporation was established and whole project along with assets, rights and liabilities were taken over by assessee – Assets to be generated in future would belong to assessee and it would be able to generate revenue by selling water and electricity pending project completion/construction, money available with assessee, out of capital contribution by State Government and also of borrowings, which could not be utilized for construction immediately, became surplus and was invested in short deposits with banks and assessee earned interest thereon – Assessee claimed that construction of dam itself was starting of its business and, therefore, interest income was to be reduced from cost of construction – In fact, assessee was engaged in constructing infrastructure and by mere construction of dam it could not be said to have set up of business – Only when infrastructure would be ready to be exploited, assessee could be said to have started and/ or set up its business or commenced its business – Therefore, interest income earned on short term deposits were to be taxed as income from other sources and could not be reduced from cost of construction.

Deductions – Assessment years 1989-90 to 2000-01 – Expenses incurred during preparatory stage prior to setting up of business would not qualify for deduction, however, expenses incurred during intervening period between setting up of business and commencement of business would be permissible deductions, however long intervening period may be - For claiming deduction of expenditure under section 57 there should be some nexus between expenditure incurred and income earned, it is not sufficient to establish that expenditure was incurred indirectly to facilitate carrying on activity which is source of income – In facts described under heading income from other sources - Chargeable as expenditure of interest paid on borrowings raised by assessee for purpose of construction of dam would not be allowed as deduction while computing income from interest under head income from other sources' .

Sardar Sarovar Narmada Nigam Ltd., Jt. CIT v/s.
(2005) 93 ITD 321 = 93 TTJ 965

4. Chargeability – Interest earned on deposit of share application money received on public issue for expansion of existing business could be set off against public issue expenses incurred for public issue and such interest income is not chargeable as income from other sources – There is no dispute to the fact that deposit was made in a bank as an statutory requirement for keeping such share application money in separate bank account in scheduled bank until permission for listing of share on stock exchange is granted – Hence, directly and intrinsically linked with public issue.

Aarti Industries Ltd. v/s. Dy. CIT & Dy. CIT v/s. Aarti Industries Ltd.
(2005) 95 TTJ 14

5. Dividend – Interest on sum borrowed for investment in shares – Change of law making dividend income exempt - Interest not deductible where dividend not taxable - Interest liability accrues from year to year – That deductible in earlier years when dividend taxable not relevant.

Not a tax out of dividend distributed to shareholder – Not a tax paid on behalf of shareholder – Company and shareholder distinct entities - Dividend received by shareholder fully exempt in his hands – No expenses allowable to shareholder against it .

Expenditure relating to income not included in total income – Provision for disallowance brought with retrospective effect but with proviso that assessments completed prior to April 1, 2002 not to be reopened or rectified – Intimation under section 143(1) prior to that date – Assessment taken up for scrutiny thereafter - Not a case of reopening of assessment or rectification but of assessment – Not affected by proviso.

Harish Krishnakant Bhatt v/s. ITO
(2005)278 ITR 1(Ahd)

6. Chargeable as – Profits and gains from hotels or industrial undertaking etc. in backward areas - Interest income was to be treated as income from other sources, and as such, benefit of netting of interest could not be given to assessee.
   Bio Pharma v/s. Dy. CIT
   (2003) 85 ITD 575 = 75 TTJ 486

(h) CAPITAL OR REVENUE RECEIPT

1. Subsidy from State Government subsidy received by assessee from the State Government under the capital investment subsidy scheme for New Industries 1986 was in the nature of capital receipt not chargeable to tax.
Symphony Comfort Systems Ltd., ITO v/s.
(2006) 101 TTJ 224(Ahd)

2. Interest (liquidated damages) for delay in supplying capital goods and carrying out construction work – There was expansion of existing business and not new business - Advances were made to various parties for carrying out construction work and for supply of machinery – Amount received by assessee was for delay caused in execution of contract of construction and supply of plant and machinery and was capital receipt.
Shri Ram Multi Tech Ltd. v/s. Asst. CIT
(2005) 92 TTJ 568

3. Assessee had entered into forward contract against existing liability towards advance taken from R against supplies to be made by the assessee to it – Though the advance was utilized for payment of capital goods directly to the suppliers, the liability towards R had not arisen for acquisition of capital goods – Assessee's liability to supply goods against those advances was a part of circulating capital – Hence, the gain arising on cancellation of forward contract relating thereto has to be on revenue account.
Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 125 = 97 ITD 125 (Ahd)(TM)

4. Non compete amount – Amount received by assessee and after his death by his legal heirs, in consideration of non compete agreement is capital receipt – Hence not chargeable to tax for the relevant asst. yrs. 1992-93 to 1995-96.
Saroj V. Gandhi (Smt.), ITO v/s
(2004) 83 TTJ 716(Ahd)

(i) UNEXPLAINED INVESTMENTS - SECTION 69A

1. Pursuant to survey under section 133A, which disclosed excess stock as against book stock at assessee's business premises, assessee after reducing value of stocks, admittedly belonging to its two sister concerns, admitted balance difference as income from unexplained investment and declared same in its return – Assessing Officer, however, in course of assessment proceedings, having found wide variation between book stock and stock statements submitted to bank for availing of credit facilities inferred excess investment as assessee's unexplained investment, and made addition after working out deemed income with reference to peak value of stock, allowing credit for book stock as also stock surrendered on survey operation –A heavy burden lay on assessee to prove that books of account alone gave a correct picture and its own statement given to Bank was motivated, and courtesy survey operations, such burden in proving that its books did not reflect true picture and statements submitted to Bank were, in fact, inflated, was amply discharged and, therefore, it would be incorrect as well as inconsistent with facts on record to ignore same –In view of fact that stock of assessee or any business entity for that matter, could not be held at constant levels throughout year, assessee's plea that its entire excess stock stood discovered and surrendered at time of survey could not be accepted – In view of above addition made by Assessing Officer to extent of Rs. 26,21,865 subject to reduction made to extent of stock of its two sister concerns as at 30-6-2000 was to be upheld, and since addition was being sustained on basis of peak value of stock addition on basis of stock found on survey was to be simultaneously deleted.
   Harish Hosiery Mart , ITO v/s
   (2006) 6 SOT 175(Ahd)

2. Assessing Officer had made certain addition on account of on money involved in sale and purchase of a plot of land – On appeal, Assessing Officer was directed by Commissioner (Appeals) to examine a witness, U, who was a middleman in transaction and had constructed gala houses on said plot, and then to make fresh assessment – Assessing Officer failed to examine him as he did not comply with summons under section 131 and assessee also failed to produce him, but made addition, which was deleted by Commissioner (Appeals) _ Commissioner (Appeals) was justified in deleting addition on basis of failure of Assessing Officer to examine important witness of assessee.
   Maneklal Bhagwandas Reshamwala , Asstt. CIT v/s.
   (2004)137xman 35(Ahd)

(j) UNDISCLOSED SOURCES – ADDITION UNDER S. 69

1. Addition on the basis of statement under s. 132(4) – There being no spectre of evidence regarding undisclosed income, addition made only on the basis of statement of managing partner of assessee under s. 132(4) given in a state of confusion and later retracted, could not be sustained either in part or as a whole.

   Pramukh Builders, Dy. CIT
   (2008)115 TTJ 330 = 112 ITD 179 = 5 DTR 166(Ahd)(TM)

2. Cost of construction – In view of the fact that there is a vast difference between the cost estimated in DVO's report and the cost shown in the books, and the latter is also less than the cost estimated in the report of the registered valuer furnished by assessee itself by Rs. 1.51 lakhs, addition is sustained to the extent of 5 per cent of the cost of construction as recorded in the books of account in the respective assessment years so as to cover unaccounted expenses.

   Amit Estate Organizer v/s. ITO
   (2008) 113 TTJ 1018 = 113 ITD 255 = 2 DTR 481(Ahd)

3. Addition – Discrepancy in stock – Assessee, a sugar producer, explained that there is no difference between the total quantity of sugar bags as reflected in the inventory in its final accounts and that submitted to the bank and that the difference in the valuation arose merely on account of difference in bifurcation of the total quantity into levy and non levy sugar in the two statements – Assessee has been following the method of bifurcating its closing stock into levy and non levy (free) sugar in the ratio postulated by the extant Government policy, ignoring the factum of accommodation, if any by way of loaning of free sugar to the Government by way of its conversion into levy sugar and vice versa – This method is perfectly valid as the book results are not distorted by the fluctuations occurring by such 'loaning' which get reversed in due course – As regards statement to be submitted to bank, it is proper that the figures given to the bank are those after conversion as the sales would only be on that basis – However, in the instant case, the two sets of statement implies that assessee has actually loaned 28,772 bags of levy sugar to non-levy sugar – Same is not understandable and does not seem probable – Hence, matter is remitted to AO to determine whether the reduction in quantity of levy sugar as shown by the assessee at the end of the year was on account of a temporary or a permanent reason – If the same is temporary no adverse inference whatsoever can be drawn.

   Sahakari Khand Udhyog Mandal Ltd., ITO v/s.
   (2006) 99 TTJ 771(Ahd)

4. Unexplained investment in purchases – AO made addition merely because suppliers could not be located and were not produced for examination – Not justified - Purchases were properly recorded in books of account and supported by authenticated purchase bills/vouchets – Assessee has filed details of suppliers and their sales tax numbers – Payments were made through banking channels – Sales against these purchases are not doubted – Hence, addition cannot be sustained.
   Rajesh P. Soni v/s. Asstt. CIT
   (2006) 100 TTJ 892(Ahd)

5. Addition under s. 69C – Unaccounted purchases – Assessee was not able to prove the existence of certain suppliers from whom purchases were said to be made - However, AO had no material to prove that payments of purchases came back to the assessee - If addition made by AO is sustained GP would come to 100.6 per cent which is not possible – Since suppliers were not produced it is possible that assessee had made purchases from unregistered dealers to get benefit of margin of purchases – Hence, addition is restricted to Rs. 50,000.
   Sunsteel, ITO v/s.
   (2005) 92 TTJ 1126

6. Addition – Opportunity of being heard - Assessee is stated to be a name lender who booked a flat – AO made the addition in the hands of assessee relying on the statement of one J – AO did not supply the copies of said statement to the assessee – Also he did not provide opportunity of cross examination of said J whose statements were used against the assessee – There were no findings as to how the flat booked in the name of the assessee was disposed of by the alleged syndicate – AO did not provide reasonable opportunity of hearing and has not considered all the material filed by the assessee – Facts and material produced by the assessee before the CIT(A) has also neither been examined nor relevant finding is given by the CIT(A) – Case is restored to the AO for fresh hearing and to decide the issue afresh.
   Ajay P. Pandya , ITO v/s.
   Bharat D. Patel, ITO v/s.
   Himansu M. Bhatt, ITO v/s.
   Janak Kumar C. Vyas, ITO v/s.
   Kantilal D. Patel, ITO v/s.
   Sundhaben H. Bhatt, ITO v/s.
   (2005) 92 TTJ 123

7. Income from share dealings vis-a-vis loss - Assessee declaring unaccounted income of Rs. 25 lakhs including income from share dealing but filing a return showing loss of Rs. 3,48,300 from that business – Transaction through middlemen and no contract note or document found during search – Middlemen not brokers of any stock exchange nor appointed by Government – Persons connected with transactions either not available or not maintaining relevant books – No details of distinctive numbers or share scrip numbers either for or sale of shares - Payment for purchase of shares made in full though assessee had sold the shares much before the payment - In the facts and circumstances, the transaction in shares was not genuine but a show to create a loss – Alternatively, the loss was speculation loss as the transaction was settled without actual delivery of shares – Loss not allowable in computing undisclosed income.

   Rameshchandra R. Patel v/s.Asst. CIT
   (2005)94 TTJ 361= (2004) 89 ITD 203

8. Retraction of statement under s. 132(4) – An admission statement under s. 132(4) can be used as evidence against the assessee – Any retraction thereof has to be based on evidence accompanied by justifiable reasons – Assessee making an admission in statement under s. 132(4) that approximately Rs. 2 lakhs were spent by him out of undisclosed income of Rs. 25 lakhs in renovation of house – Assessee retracting from the disclosure of Rs. 2 lakhs during assessment on the basis of 'panchnama' and two valuation reports - Not justified - Valuation report is no proof of investment in renovation of house or household goods or furniture - Panchnama only shows the household goods and furniture and not the investment in house – In view of repeated admissions of assessee in his statement under s. 132(4) amount of Rs. 2 lakhs was rightly added in undisclosed income towards renovation of house notwithstanding the assessee's retraction which was not based on any evidence and reasons.

   Rameshchandra R. Patel v/s.Asst. CIT
   (2005)94 TTJ 361 = (2004) 89 ITD 203

9. Addition - Retraction of statement under s. 132(4) – Evidentiary value – Assessee disclosed Rs. 16 lakhs in his statement recorded under s. 132(4) but later retracted from the same - AO made the addition merely on the basis of statement recorded under s. 132(4) at the time of search – Not sustainable – No evidence, material, assets, immovable or movable, were found at the time of search which supports the disclosure – ITO is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all – There must be something more than bare suspicion to support the assessment or addition – There being no material on record on the basis of which it can be said that the disclosure made by the assessee was in accordance with law and spirit of s. 132(4) CIT(A) rightly deleted the addition.

   Jorawar Singh M. Rathod, Asstt, CIT v/s.
   (2005) 94 TTJ 867 = 148 Taxman 35

10. Addition under s. 69 – Discrepancy in stock – Assessee is maintaining books of account according to recognized accounting principle in the ordinary course of its business – Thus, entries made therein carry with them presumption of truth unless proved otherwise – Further, there are only small variations between the stocks of certain items shown in the bank statement and the books – Statement was submitted to the bank for availing of cash credit facility and was prepared on estimated basis whereas the closing stock shown in the books of account was worked out on the basis of details available with the assessee i.e vouchers and entries in the accounts – AO could give weightage to the bank statement over the books of account if he had found any other defects in the assessee's books of account and not otherwise – CIT(A) rightly deleted the addition.

Mapin Publishing (P) Ltd., ITO v/s.
(2005) 96 TTJ 990

11. Reference to DVO for determination of cost of construction – In view of s. 142A which has been inserted with retrospective effect from 15th Nov. , 1972, AO can require the Valuation Officer to make an estimate of value of any investment and report the same to him where such estimate is required to be made for the purpose of making an assessment or reassessment - Assessee failed to maintain and furnish quantitative details of major building materials used by it in construction of a building - Hence, there was no infirmity in the action of the AO in making reference to the DVO – It is only after knowing the quantum of unexplained investment or unaccounted money that the AO has to make addition under any of the provisions contained in s. 69, 69A, 69B or 69C – Therefore, reference made to DVO was not invalid on the ground that the eventual addition after receipt of DVO's report was made under s. 69C and not under s. 69, 69A or s. 69B.

Nalanda Housing Development Ltd., Asstt. CIT v/s.
(2005) 98 TTJ 518 (Rajkot)

12. Addition – Retraction of statement under s. 132(4) – Additions made only on the basis of disclosure statement normally should not be confirmed in the absence of corroboration – During the proceedings under s. 132(5), the assessees retracted from their statements – No material/evidence collected by the Revenue during the search in support of the disclosure statements – No addition can, therefore, be made on the basis of such confession.

Addition under s. 69 - Unexplained investment in household items - AO did not hold that these articles were acquired by the assessee during the accounting but were received by the assessee from his father – Same could not be considered as acquired from undisclosed sources of income – Hence, no addition could be made.

Amishkumar Mansukhlal Shah v/s. Asstt. CIT
&
Ranjnaben Mansukhlal Shah v/s. Asstt. CIT
(2004) 83 TTJ 369 = 136 Taxman 168 (Rajkot)

XXV. INCOME FROM HOUSE PROPERTY

(a) ANNUAL VALUE

1. Rent actually settled in subsequent year – Annual value of the property is chargeable to tax from year to year – Amount pertaining to the year under consideration has to be brought to tax in the relevant year irrespective of the fact that the assessee received it and offered the same in the subsequent year – Same is to be excluded from the income of the subsequent year.

Essar Steel Ltd., Dy. CIT
(2005) 97 TTJ 985 = 97 ITD 125 (Ahd)(TM)

2. Assessee partner had let out his godown to a firm in which he was a partner for which he received rent – Whether exception in section 22 regarding occupation of property for business or profession carried on by assessee, was applicable to assessee's case and as such income received from above godown was exempt - Held, no – Decision of Gujarat High Court in case of CIT v. Rasiklal Balabhai (1979) 119 ITR 303 is inapplicable to a case where property is let out by partner to firm for a consideration which is actually received –

Dilip K. Shah, ITO v/s.
(2002) 83 ITD 91

XXVI. INDIVIDUAL OR TRUST INCOME

Chargeability – Interest received by beneficiary from trust - Liable to be assessed in his hands notwithstanding - Filling of any declaration by the trust under the Kar Vivad Samadhan Scheme – Assessee being a beneficiary of a specific trust is the right person to be assessed in respect of interest income received from the trust – This is not a case of double taxation - AO proceeded to assess the interest as a protective assessment originally because he was doubting the genuineness of the trust - Now that the trust has been held to be a genuine trust, there is absolutely no question of any protective assessment of interest income in the hands of the assessee.

Minor Janak P. Patel, Asstt. CIT v/s.
(2003) 80 TTJ 756 = 86 ITD 15

XXVII. INTEREST

(a) REFUND - INTEREST UNDER S. 244A

1. Assessment year 1999-2000 – Whether in context of section 244A)1)(b), expression 'tax' would include interest also and definition of tax in section 2(43) meaning income tax would not be applicable in context of section 244A(1) – Held, yes – Whether consequently, interest paid in pursuance of order under section 234B has to be regarded as forming part of tax or an adjunct to income tax and assessee would be entitled to interest on refund of interest paid under section 234B also.

Alembic Glass Industries Ltd., Asstt. CIT v/s.
(2008) 111 ITD 320 = 21 SOT 19(Ahd)

2. Tax not paid to the Central Government – Tax deducted at source but not paid to the Central Government within the financial year cannot be treated as payment of tax on behalf of the assessee and as such, cannot be taken into consideration for purposes of grant of interest under s.244A -
Shri Digvijay Cement Co. Ltd., Asstt. CIT v/s.
(2007)106 TTJ 491 = 104 ITD 185 = 290 ITR 168 (Rajkot)

3. Assessee had inadvertently paid Advance Tax by filing Challan No. 2 which was meant for payment of TDS – Assessee's claim for interest on refund was rejected on ground that repayment of refund to assessee had been delayed due to fault of assessee who used a wrong challan and so he was not entitled to interest under section 244A – Whether neither in the Act nor in Rules framed under the Income Tax Rules, 1962, any statutory form has been prescribed for payment of different types of taxes like advance tax, TDS or payment of regular demand or even of self assessment tax under section 140A and all forms supplied by Department for payment of various types of taxes are non-statutory forms and are meant only for convenience of tax payers and as such department authorities were not justified in denying claim of assessee for interest under section 244A – Held, yes.
Flint Pharma (P) Ltd. v/s. Asstt. CIT
(2002) 82 ITD 342 = 76 TTJ 518 = 172 Taxation 82

(b) <u>INTEREST UNDER S. 234D – COMPUTATION</u>
Refund found due to the assessee on regular assessment – Refund payable to assessee on regular assessment being in excess of the first two refunds but less than the third refund, interest under s. 234D could not be charged on the first two refunds but could be charged only on the excess of third refund from the date of third refund to the date of regular assessment.
Alembic Ltd., Asstt. CIT v/s.
(2007) 108 TTJ 134(Ahd)

(c) <u>TDS - INTEREST UNDER S. 201(1A)</u>
Date upto which payable - Interest under s. 201(1A) is chargeable from the date of deduction of TDS to the date of completion of assessment of the payees or upto the actual date of payment of TDS, whichever is earlier and where no assessment has been made upto the date of processing of return under s. 143(1)(a).
Labh Construction & Industries Ltd., ITO v/s.
(2006) 103 TTJ 269(Ahd)

(d) INTEREST UNDER SS. 139(8) AND 215

Opportunity of being heard - Mandatory requirement – Rules 40 and 117A give discretion to the AO to waive or reduce interest under certain circumstances – By implication, these rules require that an opportunity must be given to the assessee to show cause as to why interest should not be levied or to satisfy the AO that there is a case for waiver or reduction of interest – Admittedly no such opportunity was given by the AO to the assesses – Orders levying interest under ss. 139(8) and 215 not justified - Matter restored to AO for fresh adjudication in accordance with law after giving opportunity of being heard to the assesses.

Shankerlal Nebhumal (HUF) & Ors.. v/s. Dy. CIT
(2003) 80 TTJ 69 = (2004) 135 Taxman 33

(e) SECTION 234B READ WITH SECTION 140A OF THE INCOME TAX ACT, 1961 – INTEREST CHARGEABLE

Explanation to sub-section (1) of section 140A, provides that where assessee pays only part of amount due at time of filing return such payment shall first be adjusted towards interest payable, and balance if any, shall be adjusted tow towards tax payable – Adjustment towards interest payable under section 234B(2) is to be considered only at time of filing return of income and not at time of making ad hoc payment of self assessment tax – If at time of filing return it is (self assessment tax) found short after adjust if at time of filing return it is (self assessment tax) found short after adjustment of interest out of tax paid under section 140A further interest is required to be calculated in accordance with section 234B(2)(ii) on balance amount which is assessment tax minus advance tax and ad hoc payment.

Patson Transformers Ltd. v/s. Dy. CIT
(2006) 6 SOT 673 = 103 TTJ 735 (Ahd)

(f) **INTEREST U/S. 234B – ON REASSESSMENT**

Assessing Officer processed return and send an intimation under section 143(1)(a) – No interest was charged in this intimation – But while making assessment under section 147 Assessing Officer charged interest under section 234B – Sending of an intimation does not amount to an assessment - Assessment made under section 147, would be first assessment and by virtue of Explanation (2) to section 234B this assessment would be a regular assessment - Therefore interest under section 234B was clearly chargeable while making impugned assessment under section 147.

Gujarat Bitumen Ltd., Asstt. CIT v/s.
(2002) 82 ITD 614 = 76 TTJ 940

(g) S. 234C

Assessment of company under s. 115JA – Provisions of s. 234C are attracted even in a case where a company is assessed on the income computed under s. 115JA.

Ashima Syntex Ltd., Asstt. CIT v/s.
(2009) 120 TTJ 721(Ahd)(SB)

(h) INTEREST TAX ACT, 1974

1. Financial company – For purposes of Interest Tax Act, leasing activity is not a financial activity and lease rentals earned by a company cannot be brought to tax under Act.
   Rajath Leasing & Finance Ltd. v/s. Jt. CIT
   (2004) 89 ITD 289= 83 TTJ 792=(2005) 186 Taxation 169 (Rajkot)

2. Section 4, read with section 2(7), of the Interest Tax Act, 1974 – Interest – tax – Charge of – Assessment years 1998-99 to 2000-01 – Intercorporate deposit can neither be a loan nor an advance and, therefore, interest on such deposits would not be taxable under Act.
   Utkarsh Fincap (P) Ltd. v/s. ITO
   (2006) 99 ITD 259 = 101 TTJ 210 =(2007) 288 ITR 38 (Ahd)

XXVIII. INTERPRETATION OF STATUTES

The mechanical approach to construction is altogether out of step with the modern positive approach – The modern approach is to have a purposeful construction that is to effectuate the object & purpose of the Act (1992 AIR (SC) 1846 & also 247 ITR 192 relevant.
Bharatbhai Vithalbhai Patel (Shri) (HUF) V/s. WTO
(2003) 175 Taxation 116 =(2002) 77 TTJ 142 (Ahd)

XXIX. INVESTMENT ALLOWANCE

(a) MANUFACTURE OR PRODUCTION

Mining activity – Assessee engaged in the business of mining and quarrying of stone, rubble and converting it into Kapchi, grit and metal etc. – Entitled to investment allowance on the cost of dempers used in its business.
Vasudev S. Dalwadi (HUF) v/s. Asstt. CIT
(2002) 77 TTJ 1005

XXX. INVESTMENT DEPOSIT ACCOUNT

1. Withdrawal - Utilisation of withdrawals for repayment of term loans – In the year of withdrawal, the only requirement is about the utilization of the amount as provided in the Investment Deposit Account Scheme, 1986 – Assessee is not required to utilize the amount again in conformity with sub-s. (1) of s. 32AB – When the amount is utilized for repayment of term loan, there is no requirement that the term loan must be only for purchase of new ship, aircraft, machinery or plant – Assessee has fulfilled the conditions as provided in cl. 9(1)(iii) of the Scheme by utilizing the amount withdrawn from the deposit account for repayment of term loan irrespective of the fact that these loans were taken for purchase or trucks and tankers – AO not justified in making the addition of the amount withdrawn under s. 32AB(6).
Nirma Industries Ltd., Dy. CIT v/s.
(2005) 95 TTJ 867 = 95 ITD 199 =146 Taxman 90 (Ahd)(SB)

2. Profits of business – Service charges from tenants – Assessee failed to show whether any permanent staff was employed by it for rendering services to its tenants – There was nothing on record to show what were the receipts against each services provided by it – Directors' report did not mention that such provision of services was their business activities and similar were the position of auditor's report – Assessee did not establish that its service activites were carried out in an organized manner with the sole motive to earn profit and that it was not incidental to the letting out of the properties – Therefore, so called "service charges" was not "income from business" – Therefore, the service charges not being income from business was not eligible for benefits of s. 32AB.

Bharat Bobbins Ltd. v/s. Asstt. CIT

(2002) 76 TTJ 155

XXXI . LOSS

(a) CARRY FORWARD AND SET OFF

1. Bar of s. 78(2) – In view of specific provision of s. 78(2), claim for carry forward of unabsorbed business loss of the predecessor partnership firm cannot be allowed to a successor company- Unaccounted stock.

Amin Machinery (P) Ltd. v/s. Dy. CIT

(2007) 111 TTJ 892 =(2008) 298 ITR 140 =114 ITD 413(Ahd)

2. Defective return – Delay in rectifying defects in returns – Application for extension of time – Refusal to grant extension and intimation thereof not established - Revised returns filed within time requested – Original returns and revised returns valid. – Income tax Act, 1961, ss. 68, 80, 139, 143(1).

PIC (Gujarat) Ltd., ITO v/s.

(2008) 306 ITR 72 = 119 TTJ 410 (Ahd)

(b) LOSS – SET OFF

Capital loss on sale of shares of company in liquidation – Sale of shares of company in liquidation being invalid, capital loss arising therefrom could not be allowed, moreso, when the said shares were pledged with a bank.

Bijal Investment Co. (P) Ltd. , Dy. CIT v/s.

(2007) 109 TTJ 65 = 108 ITD 432 = (2008) 303 ITR 350 (Ahd)

(c) **RETURN - DELAY**

Assessee filing form No. 6 for extension of time to file return by 31-8-1988 – A.O not responding - Assessee filing loss return on 29-8-1988 – As the return was late (i.e beyond 31-7-1988). The A.O refused to carry forward the loss – CIT(A) allowing assessee's claim & Revenue filing appeal – Held amended provision of section 80 read with section 139(3) applicable w.e.f 1-4-1989 i.e assessment year 1989-90 – Although there is a silent dichotomy between the wordings of section 80 & section 139(3) the provision were to be read together & in favour of the assessee – Further no reply sent for rejection of

application in form No. 6 when it ought to have been sent – On all facts & circumstances CIT(A)'s order upheld and Revenue's appeal dismissed.
Ilaben Virendra Kumar , DCIT v/s.
(2002) 171 Taxation 24

(d) SPECULATIVE LOSS

1. Set off against dividend income - Loss from purchase and sale of shares deemed to be speculation loss under Explanation to s. 73 cannot be set off against dividend income arising from such shares.
Torrent Finance (P) Ltd. v/s. Jt. CIT
(2007) 108 TTJ 615 = (2008) 110 ITD 315 = 303 ITR 380 (Ahd)

2. Whether in view of facts stated under heading income escaping assessment – Non disclosure of primary facts, it could be said that since assessee had not explained either before Commissioner (Appeals) or before Tribunal position of date of purchase of scrip being after date of its sale, this was a clear indication of fact that transaction had been settled without delivery and was in nature of speculation – Held yes.
Gujarat Credit Corpn. Ltd v/s. Asstt. CIT
(2008) 113 ITD 133 = 302 ITR 250 = 116 TTJ 619 = 9 DTR 121 (Ahd)

3. Applicability of Explanation to s 73 – Assessee non banking financial company having its principal business of granting loans and advances, Explanation to s. 73 did not apply – Income criteria will not apply for determining whether the assessee's principal business is granting of loans and advances.
Punjab Lease Financing Ltd. v/s. ITO
(2008) 119 TTJ 395(Ahd)

4. Whether where settlement of contract was not for payment of difference of value of securities contracted to be purchased and sold and assessee's intention had throughout been to take delivery and hand securities over to purchasing parties but there was no delivery of units in terms of contract as assessee could not enforce delivery from parties from whom it had purchased, it could not be said that transaction was speculation transaction – Held, yes.
State Bank of Saurashtra, Dy. CIT v/s.
&
Dy. CIT v/s. State Bank of Saurashtra
(2005) 93 ITD 662 = 95 TTJ 225

5. Applicability of Explanation to s. 73 – Contention that explanation to s. 73 does not apply to transaction of acquiring shares by allotment is not tenable – Shares become existing property the moment they are allotted – It is a case of purchase or sale of existing goods or property on allotment – Even if the shares allotted were not in existence it does not make any difference because there can be a purchase and sale of future property or goods as provided under the Sale of Goods Act – Therefore, when a price is paid for allotment of shares it is a purchase of shares in general law as well as for the purposes of Explanation to s. 73 – Language of Explanation is clear and there is no ambiguity in it – Rule of literal interpretation demands that if the meaning of a statutory provision is plain, the Court must apply the same regardless of the result – Therefore, there is no scope of construing the Explanation as applicable to a certain type of transactions only – Thrust of the Explanation to s. 73 is on the nature of business rather than the nature of "transaction" – Further the provisions of Explanation to s. 73 apply to all the transactions of purchase and sale of shares of the companies whose business consists of purchase and sale of shares and the same cannot be restricted to only those transactions which are found to be device resorted to by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control – Therefore, loss suffered by the assessee company on sale of shares acquired by allotment being a loss arising in the business of purchase and sale of shares, Explanation to s. 73 applied and the loss had to be treated as a speculative loss.
   AMP Spg. & Wvg. Mills (P) Ltd. v/s. ITO
   (2006) 101 TTJ 1113 = 100 ITD 142 (Ahd)

6. Applicability of explanation to s. 73 – Explanation to s. 73 is attracted only when part of the business of the assessee company consists of purchase and sale of shares of other companies – Purchase and sale of shares, within the ambit of the Explanation must be carried out as an activity of business – Any kind of venture does not fall within the definition of 'business' – Venture or adventure has to be in the nature of trade, commerce or manufacture – Assessee company doing business of share broker and not dealing in shares as its own – It incurred loss on purchase and sale of shares as it had to undertake some transactions as its own after some of the clients disowned part of the transactions – No purchase or sale shares was made either in the preceding year or in the succeeding year – Conduct of the assessee shows that its intention was not to deal in purchase and sale of shares on its own – Thus, the transactions entered into by assessee under compulsion cannot constitute of the assessee, more so part thereof – Therefore, loss incurred by the assessee does not fall within the ambit of Explanation to s. 73 and is a loss occurring in the course of its business activity of brokerage – It is allowable as business loss and is to be set off against brokerage income.
   Parkar Securities v/s. Dy. CIT
   (2006) 102 TTJ 235 = 8 SOT 257 (Ahd)

7. Assessee derived share income from partnership firms, income from property, dividend income and interest, etc. – He owned certain shares of TICO along with investments in various other shares - Assessee purchased 2000 shares of TISCO on 2-4-1992 for Rs. 14,00,000 through a broker but did not take actual delivery of said shares, nor made payment to broker at time of purchase of those shares - Assessee sold the shares and suffered loss - He paid Rs. 4 lakh on 24-4-1999 to broker to cover up risk of broker against loss due to fluctuations in price of TISCO shares – Transaction in purchase and sale of 2000 shares of TISCO was made by assessee during seven periods of fortnightly settlements and said transaction was settled by assessee at end of each badla period and amount of loss was determined and payment against such loss was made to broker – Assessee claimed loss suffered in purchase and sale of 2000 shares of TISCO as short term capital loss and, accordingly urged that said loss should be set off against income under any other heads - Lower authorities disallowed assessee's claim and treated loss as speculative loss – Whether transactions relating to purchase and sale of shares in question were clearly speculative transactions and loss in question were clearly speculative transactions and loss in question constituted speculative loss – Therefore, assessee was not entitled to benefit of set-off of such speculative loss against any other income.(Appeal admitted by High Court against Tribunals decision).
   Kanubhai A. Patel v/s. Asstt. CIT
   (2004) 89 ITD 255(Ahd)

8. Assessee was engaged in manufacture of textile - It purchased units of Unit Trust of India on 23-5-1990 at higher price and sold them on 17-7-1990 at lower price, incurring loss - In computation of income it claimed it as short term capital loss and adjusted same against other taxable income – Assessing Officer disallowed loss treating it as speculation loss within meaning of Explanation to section 73 – Assessee did not produce any evidence to show that actual delivery of units was taken by assesssee or had been transferred in assessee's name – Further, it was also found that transaction was not by way of investment, as was clear from holding period of 33 days only and purchase was at rate which was cum dividend – Transaction was also found to be dubious one – Transaction was in nature of speculative transaction and loss incurred was speculation loss – Therefore revenue authorities were justified in disallowing claim of assessee that loss was short term capital loss.
   Soma Textiles & Industries Ltd. V/s. Dy. CIT
   (2003) 87 ITD 326 = 81 TTJ 1002(Ahd)

(e) **TRADING LOSS**

1. Loss on sale of shares – Assessee a Government Corporation, formed with the object to promote the interest of industrial units in the State and once the units became self sufficient to sell them off – One GSL was promoted with the same object as a subsidiary and later on sold off when the loss started mounting - Loss on sale of shares of GSL was thus rightly allowed by CIT(A) as trading loss.

Gujarat Small Industries Corporation , Dy. CIT
(2004) 84 TTJ 22(Ahd)

XXXII. NON RESIDENT

(a) AGENT OF

1. In case of an agent under section 163, a written order in this behalf is necessary to be passed by Assessing Officer after giving opportunity of being heard.

Pankaj Savailal Patel v/s. Dy. CIT
(2006)100 ITD 237 = 104 TTJ 249 (Ahd)

2. Person in possession of wealth belonging to persons residing outside India – Would be deemed to be an agent of non-resident under the WT Act – Sec. 22 provides wide power for treating a person as an agent of a non resident - Power of the AO provided in s. 22 cannot be restricted by importing the meaning of agent from the Contract Act – Terms of the agreement between the assessee jeweler and the non resident explicitly show that the assessee was possessing the gold belonging to the latter not only for making gold ornaments according to his line of business but was retaining it in a representative capacity – Owner had an option to claim cash in lieu of gold in case he did not desire the making of gold ornaments - Manner in which gold was retained by the assessee for more than three years also does not show that it was a simple business deal – Fact that the ornaments were delivered to the owner after receiving the making charges at a later stage is not decisive – AO rightly treated the assessee as an agent of the non resident.

Ashokkumar Zinzuwadia v/s. Asst. CWT
(2003) 80 TTJ 563 = 134 Taxman 155(Rajkot)

XXXIII. PENALTY

(a) CONCEALMENT

1. Whether in view of facts stated under heading income escaping assessment – Non disclosure of primary facts, penalty imposed under section 271(1)I was to be deleted.

Gujarat Credit Corpn. Ltd v/s. Asstt. CIT
(2008) 113 ITD 133 = 302 ITR 250 = 116 TTJ 619 = 9 DTR 121 (Ahd)

2. Voluntary declaration of capital gains – Assessee having herself disclosed the sale of agricultural land and declared the capital gains in a revised return which did not find any mention either in the notices issued to the assessee or the Insepector's report made before filing of the revised return, levy of penalty under s. 271(1)(c)is not justified.
   Babitaben Rameshbhai Patel, ITO v/s./
   Jignshkumar Rameshbhai Patel, ITO v/s.
   (2008) 116 TTJ 421 = 7 DTR 549(Ahd)

3. Assessee account on mercantile basis – On 25-3-1995 assessees issuing non convertible debentures carrying interest @ 6% debenture payable at the time of issue of debentures – Debentures were issued to Directors & their relatives & were redeemable at or after six years - Assessee paying full interest deducting & depositing tax at source & claiming deduction for total interest paid – A.O allowing interest only for seven days & disallowed for the balance period (225 ITR 803 relied upon) – Disallowance upheld by ITAT & Matter pending in Hon'ble High Court - In penalty proceedings Revenue holding Assessee on facts, concealed particulars of income or furnished inaccurate particulars (154 ITR 148 also relied upon) & Expln. 1 to section 271(1)(c) also invoked while levying huge penalties - Members of Division Bench has difference of opinion & matter referred to Third Member – Held assessee entering into a legal Transaction (for interest payment) & all facts on record – Decision of Hon'ble Supreme Court dated 04-04-1997 reported in 225 ITR 8003 was not available at the time of filing of return – On facts & circumstances Hon'ble Member agreed with Hon'ble Member Accountant (V.P) & held that all the four cases are not fit for levy of penalty under section 271(1)(c) – Final order also passed on 7-8-2004 as per majority opinion.
   Rupam Mercantile Ltd. & Ors. V/s. DCIT
   (2006) 190 Taxation 17 =(2004) 91 ITD 237 = 85 TTJ 609 (Ahd)

4. For concealment of income – A search was conducted upon a trust which consisted of five beneficiaries including assessee – Trust voluntarily offered an amount of Rs. 27,89,413 for taxation in which share of each beneficiary was 20 per cent - Subsequently, trust and three beneficiaries filed an application before Settlement Commission for waiver of concealment penalty which was imposed on their 20 per cent share income – But however, application of assessee and one other beneficiary for waiver of concealment penalty on same share of 20 per cent was not allowed by Settlement Commission – Since Settlement Commission had waived concealment penalty in case of family trust and other three beneficiaries who were receiving same share of income, there was no justification for levying concealment penalty on assessee and other beneficiary.
   Alin A. Shah v/s. Asstt. CIT
   (2006)150 Taxman 57 = 99 TTJ 1257(Ahd)

5. Expln. – Disclosure of additional income in revised return – After a number of dates of hearing, assessee filed revised return, in which unaccounted sales of copper scrap worth Rs. 8,70,941 was declared – Clause (B) of Expln. 1 to s. 271(1)(c) stood attracted – AO has found that assessee has never done copper casting and these were the purchases made during the year and no casting was done for copper – No evidence whatsoever has been produced by the assessee to substantiate that any testing was done for the casting of copper – No evidence has been furnished to show that when these cash sales were made – Moreover assessee concern is a partnership concern, the amount of Rs. 8,70,941 being a substantial sum cannot escape the attention of all the partners to be entered in the books of account – Thus the explanation given has not been substantiated at all by the assessee and the assessee failed to prove that explanation furnished by it was bona fide and facts relating to the same and material to the computation of its total income were disclosed – Return filed so as to include concealed income cannot be treated as revised return because omission to file the correct income in the original return cannot be said in such circumstances to be due to any bona fide mistake or omission – Return of income of assessee is filed at Rs. 4,94,458 and the amount not disclosed by assessee was almost double to the said amount and the amount was not so small which could escape the attention of the assessee from being entered in the books of account by an inadvertent mistake or omission – AO had rightly held the assessee is liable for penalty of concealment despite having filed revised return and CIT(A) was wrong in deleting the penalty - However, in the facts and circumstances of the case, penalty reduced from 200 per cent to 100 per cent.
   Grey Cast Foundry Works, Dy. CIT v/s.
   (2006) 101 TTJ 42= 99 ITD 515(Ahd)

6. **S**ince disallowanced 5 per cent secret commission had been retained on ad hoc basis it did not amount to furnishing of inaccurate particulars of income or concealment of income so as to attract provisions of s. 271(1)(c).
   Mugatlal B. Sons , ITO, Ward 5(3), Surat v/s.
   (2006)152 Taxman 29 = 100 TTJ 1042= 193 Taxation 120 (Ahd)

7. For concealment of income - In return, assessee declared sale proceeds of property, but did not declare any capital gain – When Assessing Officer pointed out, assessee filed revised its return declaring capital gains – After including short term capital gains, assessed income was nil because of adjustment of unabsorbed depreciation and unabsorbed losses - Assessing Officer levied penalty under section 271(1)(c) - Whether since there was a bona fide mistake on part of assessee in not declaring capital gains in original return, and even after inclusion of capital gains income assessed was nil, instant case was not a fit case for levy of penalty – Held, yes.
   Padra Taluka Co-op. Cotton Sale Ginning & Pressing Society Ltd. v/s. Asstt. CIT.
   (2005)142 Taxman 22 = 186 Taxation 107

8. Concealment - Assessment at loss – Two reasonable constructions of the provisions of s. 271(1)(c) as it stood after the amendment by Taxation Laws (amendment) Act, 1975, and before the amendment by Finance Act, 2002, are possible – Interpretation favourable to the assessee is to be adopted – Said view is also discernible by looking to the provisions of s. 143(1A) which are pari materia to levy of concealment penalty – Vide Finance Act, 1993, s. 143(1A) was amended with retrospective effect from 1st April, 1989, for providing for levy of additional tax where the loss is reduced, while no such amendment was made in s. 271(1)(c) at that time – Sec. 271(1)(c) was amended vide Finance Act, 2002, w.e.f 1st April, 2003, by inserting the words "if any" after the words "in addition to tax" in cl. (iii) and Expln. 4 was also amended - Therefore, before the amendment by Finance Act, 2002, penalty under s. 271(1)9c) could not be levied where the assessed income was loss – It cannot be said that the amendment was clarificatory and, therefore, retrospective in operation - In the instant case, all the returns were filed much prior to the amendment by Finance Act, 2002 and assessed income being loss in all the cases, levy of penalty was not justified.
Alchemic (P) Ltd., Asstt. CIT
Apsara Processors (P) Ltd., Asstt. CIT
Akshai Pump & Engg. (P) Ltd., ITO v/s.
Gujarat Extrusion (P) Ltd., ITO v/s.
Kushal Electronics (P) Ltd., ITO v/s.
Ketan Mehta Films (P) Ltd., Jt. CIT v/s.
Khedkar Brothers Trading Co. (P) Ltd. v/s. Asstt. CIT
Nature Care (P) Ltd. v/s. Asstt. CIT
Prayas Woollens (P) Ltd. v/s. Dy. CIT
Ravi Pharmaceuticals (P) Ltd. v/s. Asst. CIT]
(2005) 92 TTJ 645 (Ahd)(SB)

9. Concealment – Agreed addition – Assessee, a building organizer, agreed for addition of amount received on booking of property, on peak credit, subject to the condition that no penalty proceedings be initiated against it – Since the assessment was made relying on the conditional offer without independently establishing factum of concealment penalty could not be imposed.
Ruchi Organisors (P) Ltd. v/s. Asstt. CIT
(2005) 93 TTJ 242

10. When Finance Act, 2002 made amendment in section 271(1)(c) with effect from 1-4-2003, it could not be said that amendment was clarificatory and, therefore retrospective in operation. Section 271(1) (c) is a provision for imposing penalty and, therefore, normal presumption is that amendment is not retrospective unless provided otherwise expressly or by necessary implication.-Therefore before amendment by Finance Act, 2002, penalty under section 271(1)(c) could not be levied where assessed income was loss.

Apsara Processors (P) Ltd., Asstt. CIT v/s.
(2005) 2 SOT 132(Ahd)(SB)

11. Addition on account of alleged unaccounted sales – AO found certain discrepancies in maintenance of stock register by the assessee and made addition on account of sales outside books – On appeal, CIT(A) confirmed the addition partly though he disagreed with the AO's conclusion that assessee had indulged in unaccounted transactions – Tribunal confirmed the addition sustained by CIT(A) on a different ground viz fall in GP rate – Thus, it cannot be said that the assessee had concealed the particulars of income or furnished inaccurate particulars – Assessee not liable for penalty under s. 271(1)(c) .

Sudesh Khanna v/s. Asstt. CIT
(2005) 98 TTJ 106(Ahd)

12. Debentures redeemable after 6 years at par and carrying interest payable upfront on date of allotment were issued by assessee company on 25-3-1995 - Recipients of said debentures were directors of company and their relatives, and in their returns they had showed interest for period ending 31-3-1995 and claimed remaining interest as income of subsequent five years – However, assessee company claimed whole of interest as revenue expenditure but Assessing Officer disallowed same on ground that only interest for 7 days related to relevant previous year and balance interest was in fact income of assessee and since assessee had concealed true character of income chargeable to tax and tried to make false claim of expenditure - He levied penalty on assessee under section 271(1)(c) - Since assessee was obliged to pay interest upfront on date of issue of debentures, there was an accrued liability to pay whole of interest and such a liability could legitimately be claimed as a deduction - Treatment given to interest in its return by assessee was separate and distinct from that of recipients/directors or their relatives and two could not be combined - Therefore no addition could be made or no penalty could be levied on assessee on basis of treatment with interest income by recipients in their returns - Where revenue, during assessment proceedings had never asked assessee to justify how it was prudent for assessee to pay interest on date of issue of debenture itself, it should not be presumed that assessee had adopted a devise to avoid and evade tax – Since interest paid on debentures was duly disclosed in assessee's return and in statement of account and

appropriate note was made to draw attention of revenue authorities to deduction claimed and interest paid was supported by agreement, assessee could not be said to have failed to substantiate its claim during course of assessment proceedings and, therefore Explanation 1 to section 271(1)(c) was not attracted.

For concealment of income – Whether a plea or claim which is held by High Court to have given rise to a substantial question of law, cannot be treated to be frivolous or mala fide as to attract levy of penalty under section 271(1)(c).

Rupam Mercantiles Ltd. (In Liquidation) v/s. Dy. CIT
(2004) 91 ITD 237 = 85 TTJ 609 (Ahm)

13. For concealment of income – Pursuant to detection of racket of bogus NRI gifts being allegedly obtained by various tax evaders, assessee having shown in her original return about receipt of such a gift, filed a revised return offering said amount to tax, on account of her inability to produce payer of gifted money – Whether, on facts, assessee acted deliberately in defiance of law and was guilty of contumacious and dishonest conduct, liable to levy of penalty under section 271(1)(c) and filing of revised return could not wipe out contumacious conduct on assessee's part of obtaining such bogus NRI gift and of not showing said amount as her income in original return – Held, yes.

Nitaben Tribhovandas Patel(Smt) v/s. ITO
(2004) 88 ITD 202 = 84 TTJ 475 (Ahd)

14. No return filed by assessee – No penalty under s. 271(1)(c)can be levied unless the assessee submits a return of income under s. 139 or s. 147.

Bombaywala Readymade Stores, ITO v/s.
(2004) 84 TTJ 12=139 Taxman 27 =91 ITD 225 = 271 ITR 1 (Ahd)(TM)

15. For concealment of income – Pursuant to survey under section 133A, assessee filed original return, but did not offer difference in stock as his income – When assessment was in progress, he took plea that part of stock belonged to some other concern and that there was a wrong calculation of difference in stock - Later, assessee instead of giving evidence , filed a revised return offering value of excess stock for taxation – Revenue authorities levied penalty under section 271(1)(c) – Whether since assessee himself had admitted discrepancy by filing revised return after his repeated failure to reconcile difference and explain excess stock either in survey proceedings or in assessment proceedings on these facts, it was a clear case of concealment and also furnishing of inaccurate parties of income.

Hasmukh M. Patel v/s. ITO
(2003) 85 ITD 152 = (2004) 82 TTJ 150 (Ahd)

16. For concealment of income — Subsequent to filing of return a search was conducted in assessee's premises and some incriminating documents were seized - It transpired that company of which assessee was managing director had not disclosed substantial business income – Non-disclosure of income was admitted and a declaration was to be filed – Assessee had received part of undisclosed income earned by company – Amounts received by assessee and appropriated other than investment in same company had been accepted as taxable through a letter and by filing of revised return – Assessing Officer imposed penalty for concealment of that income – Since assessment of undisclosed income of assessee as well as of company was not merely on basis of disclosure made by company or by assessee but it was on basis of seized material further corroborated by admission of assessee of having concealed income case of assessee fell within ambit of section 271(1)(c) and filing of revised return or agreeing to be assessed on undisclosed income was of no consequence .

Mrudulaben B. Patel (Smt) v/s. Asstt.CIT

(2003) 85 ITD 463 = 80 TTJ 390

17. Bogus purchases and low yield - Tribunal has recorded a specific finding that the purchases said to have been made by the assessee from 33 parties are not genuine transactions and that the said parties are bogus parties – Accordingly it rejected the assessee's books of account and made addition - Further, it also confirmed the addition on account of low yield shown by assessee – Thus assessee has concealed particulars of its income and is liable for penalty – Duty is enjoined upon a person to make a correct and complete disclosure of his income - Penal provisions would operate when there is a failure of duty to disclose fully and truly particulars of income.

Vijay Proteins Ltd. V/s. Asstt. CIT

(2003) 80 TTJ 215 (2004) 137 Taxman 90 (Rajkot)

18. Revised return after search showing unaccounted income – Whether a person has concealed the income or not is to be judged with reference to the original return - Filing of the revised return does not exonerate the assessee from the default of concealment committed while filing the original return – Assessee filed the original return after the search without including the additional income admitted by him during the course of search - Same, however declared subsequently in a revised return - Mere fact that material was available with the AO and the assessee had agreed to disclose the income is not sufficient to conclude that the assessee had not concealed the income at the time of filing of the original return - Assessment of the additional income was not based purely on the statement made by the assessee but was also supported by the seized material - Therefore, assessee was liable to penalty under s. 271(1) (c) – Contention of the assessee director that the income offered for taxation which was received by him out of the undisclosed income of the company was not liable to tax is misconceived - Matter remitted to CIT(A) for deciding as to whether the AO had recorded

the satisfaction in regard to concealment in the course of assessment proceedings.
Ashwinbhai P. Patel v/s. Asstt. CIT
(2003) 80 TTJ 382

19. On 12-8-1980 assessee's premises searched & unexplained cash Rs. 1,13,592 found & loose papers containing unexplained transactions also seized - A.O making these addition in A.Y 1982-83 i.e 30-6-1981 as there was no satisfactory explanation - In quantum appeal before ITAT assessee sought set off of cash found against transactions in loose sheets – ITAT allowing the same – In the meanwhile A.O levying penalty of Rs. 1,82,648 under section 271(1)(c) - CIT(A) upholding - In assessee's second appeal, on facts held penalty under section 271(1) (c) was leviable under the main provisions as also within the Explanation 1 to section 27(1)(c) as invoked by the A.O - However, quantum to be reduced as per appeal effect to ITAT's order in quantum appeal.
Spectrum Construction Co. v/s. ACIT
(2002) 169 Taxation 61

20. Concealment – Understatement of closing stock – In respect of first year of business, notice under s. 142(1) seeking detailed inventory of the opening and closing stock – Impliedly the queries were raised in a routine manner and the notice under s. 142(1) was issued without application of mind to the facts pertaining to the year under consideration – It could not be said that the Department had detected any concealment in the form of suppression of closing stock - Assessee on the first effective date of hearing voluntarily disclosed in their letter, that one sheet of inventory was inadvertently omitted and the value of closing stock was understated - Said understatement of income had not been detected by the Department at any anterior point of time prior to submission of letter by the assesse – No discrepancy was found in the stock during the course of survey – Entirety of the relevant facts and circumstances clearly establish the preponderance of probabilities in favour of assessee and fully support the assessee's contention that the additional income being the difference in value of closing stock was voluntarily offered by the assessee – Such a mistake had allegedly resulted on account of inadvertent error on the part of the assessee's accountant – Penalty under s. 271(1)(c) not justified.
R. Vinit & Co. v/s. ITO
(2002) 76 TTJ 673

21. Penalty – For concealment of income – Following a search, Assessing Officer levied penalty under section 271(1)(c) on assessee on ground that though assessee was previously assessed to Income Tax, it had not filed return of income – Mere failure to file return of income would not tentamount to concealment of particulars of income – Both Explanation 3 and Explanation 5 were inapplicable to assessee's case –
Liberty Footwear v/s. Asstt. CIT
(2002) 124 Taxman 221

(b) <u>s. 271B</u>

1. Assessee filing return alongwith audit report on 31-3-1998 instead of 31-10-1996 which was the due date – AO levying penalty of Rs. 84,202 under section 271B rejecting assessee plea that it was the first year when turn over exceeded Rs. 40 lakhs & assessee was not aware that he was to obtain audit report – CIT(A) upholding – Held, since the turn over exceeded the prescribed limit for the first time the lost of sight inadvertently has to be considered as a reasonable cause (119 Taxman(Ahd) 77 relied upon) – No justification for levy of penalty & the same is deleted. Income Tax Act, 1961 – Section 271B.
Natvershingh R. Chauhan v/s. ITO
(2007)199 Taxation 52

2. For failure to get accounts audited – Assessee firm, which carried on business of purchase and sale of cigarettes on whole sale basis, filed its returns along with audit reports – As accounts were audited late, Assessing Officer imposed penalty under section 271B – On appeal to Commissioner (Appeals), assessee contended that its books of account were seized by Customs Department, which had been later taken over by Income Tax Department – Assessee sought extension of time for getting accounts audited – Commissioner (Appeals) allowed assessee's appeal – Whether assessee's explanation of difficulty for not getting accounts audited in time was plausible and things were not under control of assessee – Assessee had a reasonable and sufficient cause for not getting accounts audited in time as provided in Act.
Tribhovandas Tejpal & Sons, Asstt.CIT
(2003) 126 Taxman 28(Rajkot)

3. Penalty was levied as assessee failed to get its account audited within prescribed time – Penalty proceedings were initiated after three years after completion of assessment – Assessee's case was that since its accountant left service without finalizing accounts, another accountant was engaged and that resulted in delay in finalizing accounts as well as getting accounts audited – Assessment year under consideration was first assessment year for compliance of section 44AB – Whether considering entire circumstances of case, instant case was not a fit case for levying penalty under section 271B – Held, yes.
Sopariwala (S.H) v/s. Asstt. CIT
(2003) 128 Taxman 23

(c) FOR FAILURE TO GET ACCOUNTS AUDITED

1. Reasonable cause – Delay in audit for earlier year – Delay in completion of audit of the earlier year constitutes a reasonable cause for the delay in audit of the relevant year because audit cannot be completed without opening balances of the earlier year – This would be so irrespective of the fact whether the delay in the audit of earlier year was for reasonable cause or without a reasonable cause or whether or not penalty was levied in the earlier year – Assessee took 4 to 5 months in getting its accounts audited after the completed of the audit for the earlier year – This period cannot be said to be unreasonable as the audit of whole year's account generally takes that much time and the legislature itself provides for a time limit of seven months for obtaining the audit report from the end of the accounting year – At the relevant time the requirement was only to obtain the report on or before the specified date - Further requirement of furnishing the same on or before the specified date came into effect from 1st July, 1995 and has no relevance to the relevant assessment year - Therefore, levy of penalty was not justified.

Kamlesh R. Agarwal (HUF), Asstt. CIT v/s.
(2006) 100 TTJ 194 = 99 ITD 27 = 281 ITR 117 (Ahd)(TM)

2. Reasonable cause – Total sales of the assessee was less than Rs. 40 lakhs but total receipts inclusive of interest receipt exceeded Rs. 40 lakhs – Assessee did not get the accounts audited in the belief that the accounts are to be audited only if the turnover of the assessee exceeds Rs. 40 lakhs – Penalty under s. 271B not justified - Interest income shown in P & L a/c. is other income and not part of business income of the assessee – In any case, assessee entertained a bona fide belief for not getting its accounts audited – Thus, it was prevented from doing so by sufficient cause – Penalty deleted.

Patel Ambalal Somnath Sarkar v/s. ITO
(2006) 100 TTJ 735(Ahd)

3. Reasonable cause – Though the assessee had got its accounts audited within time, it did not furnish the audit report before the date as its counsel was under bona fide impression that since the income is being disclosed under s. 44AD, the same is not required to be furnished – Said bona fide impression constituted reasonable cause for the default - Apart from the default committed by the assessee was only a technical / venial breach since the audited statement was not relied upon either by the assessee or by the Revenue for determining the income of the assessee - Therefore, levy of penalty not justified.

Parjanya Associates v/s. Asstt. CIT
(2006) 100 TTJ 736(Ahd)

4. Where assessee could not get accounts audited within time due to non-availability of books of account which were in custody of Department and, thus beyond control of assessee firm, there was a reasonable cause for delay in filing audit report and case was not fit for imposition of penalty under section 271B – Held, yes.
Chempho Chem Industries v/s. Asstt. CIT
(2005) 148 Taxman 42

(d) **s. 271D & 271E**
Contravention of s. 269SS – Reasonable cause - Assessee had accepted loans in cash mainly from P for whom it is doing job work - It was compelled to accept the said loans as it had made huge investment in fixed assets and was hard pressed for funds for running day to day business – There was no willful neglect of law on the part of assessee - Penalty deleted.
Contravention of s. 269T – Repayment of loan – Amendment of s. 269T made by Finance Act, 2002, is effective from 1st June, 2002 – Amendment was not procedural – Moreover, penal provisions are never retrospective – Repayment of loan in cash was not an offence in the relevant asst. yr. 1999-2000 – Therefore, penalty under s. 271E was not leviable.
Star Electroplaters v/s. ITO
(2006) 99 TTJ 640(Ahd)

(e) PENALTY UNDER S. 272B – FAILURE TO COMPLY WITH PROVISIONS OF S. 139A
Submission of incomplete Form No. 60 – None of the rules or sub-s. (5) or (6) of s. 139A cast on obligation on the manager of a bank to ensure that Form No. 60 filed by the customer is duly filled in or not and, therefore penalty under s. 272B could not be imposed on the assessee bank for the reason that in some cases Form No. 60 obtained from the depositors / customers were not completely filled in or supporting evidence were not available.
Financial Co-operative Bank Ltd. v/s. ITO
(2008) 116 TTJ 782 = (2009) 308 ITR 236 =116 ITD 358(Ahd)

(f) PENALTY UNDER S. 272(2)(G) – FAILURE TO ISSUE TDS CERTIFICATE
Reasonable cause – Failure to deposit TDS into the Government account cannot be accepted as a reasonable cause for non-issue of certificate in Form No. 16A, and penalty under s. 272A(2)(g) is leviable for default in issuing TDS certificate even if tax is not deposited.
Labh Construction & Industries Ltd., ITO v/s.
(2006) 103 TTJ 269(Ahd)

(g) SEARCH AND SEIZURE – PENALTY UNDER S. 158BFA(2)
Validity – Revenue having not disputed the income part of the assessee, addition made in block assessment disbelieving savings part de hors of any material could not justify penalty under s. 158BFA(2).
Jashwant D. Parmar v/s. Asstt. CIT
(2007)109 TTJ 56 = 163 Taxman 39 (Ahd)

(h) PENALTY UNDER S. 271D – CONTRAVENTION OF S. 269SS

1. Reasonable cause – Assessee, a finance company procuring Rs. 5 lakhs in cash from its director and depositing the same in blank in order to ensure that cheque of Rs. 10 lakhs issued by it was not dishonoured, same constituted reasonable cause, hence penalty under s. 271D was not attracted.
   Maruti Nandan Finance Cap. (P) Ltd. V/s. Asstt. CIT
   (2008) 114 TTJ 142(Ahd)

2. A.O imposing penalties under section 271D and 271E for A.Y 1989-90 – CIT(A) upholding - Held, provisions of section 271D/271E inserted by Direct Tax Laws (Amendment) Act, 1987 w.e.f 1-4-1989 apply in relation to loan/deposits accepted or repaid on or after 1-4-1989 (50 TTJ (Ahd) 130) followed - Penalties cancelled – Appeals allowed.
   Balaji Offset and Packaging Works v/s. DCIT
   (2002) 169 Taxation 1

3. Assessee crediting account of Ambuja Agro Industries Ltd. by journal entries for various amounts as it made payments to third parties for and on behalf of assessee – AO taking such entries as deposits taken not through payee cheques etc. and for violation of Section 269SS imposing penalty of Rs. 13.45 lakhs under section 271D of the Act – CIT(A) deleting the same holding that for the journal entry wherein no money received the provisions of section 269SS cannot be invoked and even otherwise assessee prevented by sufficient cause under section 273B (121 CTR 46 relied upon) - In revenue's appeal, held assessee transferring funds from one concern to its sister concern – No evidence that money loaned or kept deposited for a fixed period or repayable on demand - Also no actual receipt of money - On facts and circumstances CIT(A) held correct - Revenue's appeal dismissed.
   Gujarat Ambuja Proteins Ltd., ACIT v/s.
   (2004) 183 Taxation 21(Ahd)

4. Assessee accepting cash deposits from four agriculturists who had no bank accounts and were illiterate – A.O for violation of section 269SS levying penalty of Rs. 1,75,000 under section 271D – CIT(A) deleting the same - Held on facts default merely technical and venial in nature & has not resulted in loss to Govt. revenue – Penalty will not be imposed merely because it was lawful to do so – Penalty rightly cancelled by CIT(A) – Appeal of Revenue dismissed - (Judgments in 83 ITR 26 & 266 ITR 258 referred to).
   Ganesh Wooden Industries , ITO v/s.
   (2003) 174 Taxation 76

5. Section 269T, read with sections 269SS and 273B, of the Income Tax Act, 1961 – Loans or deposits – Mode of repayment of –For making repayments to several depositors assessee's explanation was that due to losses credit worthiness and credibility of company was not favourable to creditors and on account of such situation creditors were insisting upon payments being made in cash only and they were not accepting cheque or draft – Whether repayment of loan or deposit in cash with a view to meet urgent business necessities and made under bona fide belief is a valid excuse and constitutes a reasonable cause, within meaning of section 273B and in such a case no penalty is leviable and, hence, in instant case no penalty was leviable - Held, yes.
   Premier Art Silk Processors (P) Ltd. v/s. Dy. CIT
   (2005) 142 Taxman 13 = 186 Taxation 211

6. Admissibility – Penalty under s. 271D levied on assessee for accepting cash deposits – Assessee explained that it accepted the cash deposit under compelling circumstances as the cheques earlier issued by a depositor could not be cleared by the bank and it urgently needed money to honour a cheque already issued to a party in order to avoid penal consequences under s. 138 of Negotiable Instruments Act – CIT(A) rightly permitted the assessee to produce bank certificate to that effect and accepted the aforesaid circumstances as a reasonable cause for deleting the penalty - No interference warranted.
   Akik Tiles (P) Ltd., Income Tax Officer v/s.
   (2005) 96 TTJ 670 (Ahd)

7. Seven members of the family making deposits with company of Rs. 10 lakhs in cash with the assessee to show the place of money lying at in the farms of voluntary disclosure of Income Scheme 1997 – As each deposits exceeded Rs. 20,000 – A.O levied penalty of Rs. 10 lakhs under section 271D for violation of section 269SS – CIT(A) upholding - Held cash deposited in company's bank account for declaration of income under VDIS – Department accepting the VDIS declarations of these persons and bonafide of assessee not relied out – Nothing adverse found otherwise – On facts & circumstances assessee prevailed by reasonable cause – Penalty under section 271D cancelled.
   Paras Brass Extrusion Ltd. V/s. DCIT
   (2005) 188 Taxation 110 (Ahd)

(i) <u>PENALTY FOR FAILURE TO ANSWER QUESTION, SIGN STATEMENTS, ETC</u>.

Non –availability of particulars to properly fill TDS form can not be treated as a reasonable cause to justify non-levy of penalty under section 272A(2)(g).
Labh Construction & Ind. Ltd., ITO v/s.
(2006) 8 SOT 475 = 103 TTJ 269 (Rajkot)

XXXIV. PLANT

Since wharves, pavements, docks including dry docks, drains, jetties, railway wagons and slidings rolling stock and various platforms are principal apparatus of a port trust, with which it carries on its business, assessee port trust would be entitled to depreciation on these items at higher rate of 25 per cent applicable to plant and machinery.

Kandla Port Trust v/s. Asstt. CIT
(2006)8 SOT 429 =104 TTJ 396 =(2008)296 ITR 88 =(2007)104 ITD 1 (Rajkot)

XXXV. PRECEDENTS

Binding nature – Ratio vis a vis conclusion – Although there should be consistency in approach and uniformity in exercise of judicial discretion respecting similar cases and the judgment of the apex Court or of jurisdictional High Court are binding on subordinate Tribunal, the judgment must be read as a whole and the observations from the judgment have to be considered in the light of the question, context and the facts of the case – Further, a decision is binding for what it actually decided and not necessarily for what logically follows from it.

Affection Investments Ltd., Asstt. CIT v/s.
Ajay Investment Ltd., Asst. CIT v/s.
Aligator Investment Ltd., Asst. CIT v/s.
Anagbhai Ajaybhai, Asstt. CIT v/s.
(2003) 80 TTJ 278 = 137 Taxman 102

XXXVI . REASSESSMENT

(a) CHANGE OF OPINION

1. Full and true disclosure – Since the facts were before the AO at the time of framing of original assessment, different view taken by him or by his successor on the same facts, clearly amounted to change of opinion, hence consequent reopening of assessment was invalid.

   Sweta Organisors (P) Ltd. v/s. Asstt. CIT
   (2008) 118 TTJ 426 = 12 DTR 513(Ahd)

2. Income escaping assessment – Non disclosure of primary facts - Where provisions of Explanation (baa) to section 80HHC escaped notice of Assessing Officer in original assessment and he computed deduction under section 80HHC on basis of profits and gains of business as shown by assessee and, consequently, allowed excessive deduction under section 80HHC, reopening of assessment to modify deduction under section 80HHC in accordance with Explanation (baa) to section 80HHC could not be said to be change in opinion –Therefore reopening of assessment was valid .

S.C Chemicals , Jt. CIT v/s.
(2006) 99 ITD 41 = 100 TTJ 1072 =(2007) 196 Taxation 65 (Ahd)

(b) CONCEALMENT - OMISSION

Full and true disclosure – Notice after expiry of four years – Assessee filed return under s. 139 and there was full disclosure of material facts necessary for assessment - Even the confirmation from the depositors were filed along with return of income and the scrutiny assessment was completed under s. 143(3) – Reopening of assessment after expiry of four years from the end of relevant assessment year not valid.

Jay Jagdish Timber Mart v/s. ITO
(2005) 98 TTJ 123(Raj kot)

(c) LIMITATION

1. Assessment year 1996-97 – Whether proviso to section 147 does not have effect of curtailing limitation period for passing order under section 147 as prescribed under section 153(2) – Held, yes.

Gujarat Credit Corpn. Ltd v/s. Asstt. CIT
(2008) 113 ITD 133 = 302 ITR 250 = 116 TTJ 619 = 9 DTR 121 (Ahd)

(d) NON DISCLOSURE OF PRIMARY FACTS

1. Assessment year 1996-97 – For relevant assessment year Assessing Officer reopened assessment of assessee under section 147 by issue of notice after more than four years from end of relevant assessment year for reason that assessee's income to some extent had escaped assessment - Whether since Assessing Officer could not point out which material fact was not disclosed by assessee which led to escapement of income reopening of assessment was in violation of proviso to section 147 – Held yes – Whether therefore, reopening of assessment was liable to be quashed – Held, yes.

Bhagyawanti S. Maradia (Smt), Asstt. CIT v/s.
(2005) 6 SOT 367(Ahd)

2. Where all material facts were disclosed by assessee fully and truly in original return and there was no failure on part of assessee to furnish returns under section 139(1), proviso to section 147 was clearly applicable and in such a case order of Assessing Officer of reopening assessment after 4 years from end of assessment year was barred by limitation.

Annapurna Industries (P) Ltd. v/s. ITO
(2004) 140 Taxman 122 = (2003) 177 TTJ 76 (Ahd)

3. Assessment under section 143(3) completed for assessment year 1992-93 on 2-3-1994 – A.O issuing notice under section 148 on 23-11-98 - Assessee contending that as per proviso to section 147 action time barred as all the particulars were duly disclosed during the original proceedings – Held, all material facts duly disclosed fully and truly in original return. Proviso to section 147 duly applicable & reopening and reassessment time barred - Accordingly reopening of assessment & order passed quashed & original order dt. 2-3-1994 restored.

Annapurna Industries Pvt. Ltd. v/s. ITO
(2003) 177 TTJ 76 = 2004) 140 Taxman 122 (Ahd)

(e) <u>REASSESSMENT - GENERAL</u>

Section 147, read with sections 148 and 263, of the Income Tax Act, 1961
Income escaping assessment – General –Proceedings under section 147/148 are for benefit of revenue and not for assessee and assessee cannot be permitted to take advantage of reassessment proceedings and seek relief which, in absence of proceedings for assessment of escaped income, he cannot have claimed – Income for purpose of assessment under section 147 cannot be a negative figure –If pursuant to notice under section 148, assessee submits a loss return and Assessing Officer is satisfied with return of income or it is really negative as claimed by assessee in his return, Assessing Officer is entitled to close proceedings, he cannot complete assessment to determine loss, thereby giving assesseee a right to claim set off in subsequent ear to determent of revenue and such act will be contrary to object scope and ambit of section 147

Videocon Leasing & Ind. Fin Ltd. v/s. Jt. CIT v/s.
(2006) 103 ITD 309 = (2007) 106 TTJ 524 = 290 ITR 32 (Ahd)

(f) <u>REASSESSMENT AFTER AMENDED S. 147 – INFORMATION NOT REQUIRED</u>.

Words 'reason to believe' as appearing in section 147 cannot mean that Assessing Officer should have finally ascertained facts by legal evidence and if Assessing Officer has a cause to believe that income has escaped assessment – Amended section 147, does not envisage that reason to believe should be as a consequence of 'information' in possession of Assessing Officer – Section 143(1) does not envisage consideration of any point and formation of any opinion by Assessing Officer for assessment purposes - Assessment was duly completed under section 143 – Subsequently, search was conducted and director admitted that company was floated with a view to invest unaccounted income in names of various benami shareholders – On other hand, after examining return Assessing Officer found that purchase and sale of shares on which loss had been claimed, had been carried out within a period of 15 days only and broker firm was a sister concern, in which director and his wife were partners – Since while processing return under section 143, Assessing Officer had no occasion for application of mind on issue whether loss in share transaction was speculation loss or not, it could not be said that there was any change in

opinion on part of Assessing Officer with regard to speculation loss – Apart from fact of search, cumulative effect of facts revealed from return provided ample justification to Assessing Officer to come to a bona fide belief that income had escaped assessment - Therefore, proceeding under section 147 was validly initiated.
Gujarat Bitumen Ltd., Asstt. CIT v/s.
(2002) 82 ITD 614 = 76 TTJ 940

(g) NOTICE

Limitation – Amendment saving notices issued under section 143(2) beyond period of one year – Effect - Income tax Act, 1961, ss. 143(2), 147, 148 (as amended by Finance Act, 2006.

Return filed in response to notice – Failure thereafter by Assessing Officer to issue notice under section 143(2) within time prescribed - Assessment not valid – Notice under section 142(1) cannot be deemed notice under section 143(2) – Returned income becomes final – Circular No. 549 dated 31-10-1989.
Sukhini P. Modi, Income Tax Officer v/s.
(2007)295 ITR 169 = (2008) 112 ITD 1 (Ahd)

(h) REASON TO BELIEVE

1. Report of DVO and defects in books of account - Report of DVO constitutes a valid foundation or information to invoke the jurisdiction of the AO to reopen the assessment – Various defects in assessee's books of account along with vast difference in cost of construction as per DVO's report as compared to the cost recorded in the books of account, qualification in DVO's report, and the difference in cost reflected in the registered valuer's report furnished by assessee itself constituted valid reasons for forming the belief that there was escapement of income and, therefore, reopening of assessments was valid.
Amit Estate Organizer v/s. ITO
(2008) 113 TTJ 1018 = 113 ITD 255 = 2 DTR 481(Ahd)

2. Scope – Question relating to admissibility of depreciation in relation to immovable properties which were not registered in favour of the assessee, was a highly debatable point in the relevant years under consideration – Matter achieved finality at a later point of time when the apex Court decided this issue – AO honestly came to the conclusion that depreciation allowed on the office buildings was a mistake and he therefore, rightly initiated the proceedings under s. 147 – Ground on which the reasonable belief as contemplated under s. 147 so formed by the AO, could not be said to be so irrational as not to be worthy of being called a reason by any honest man – Once the proceedings under s. 147 had been validity initiated, the entire assessment was open and it was the duty of AO to bring to tax all items of

income which had escaped assessment in the original assessment order or in the intimation under s. 143(1)(a).
Inductotherm (India) Ltd., Dy. CIT v/s.
(2002) 75 TTJ 728 = 123 Taxman 325

3. Reassessment-Reason to believe – Reference to valuation officer – in competent Reopening on the basis of report of DVO – Admittedly , no proceedings were pending before him when the AO made the reference to the DVO – Therefore, he was not competent to refer the matter to DVO – Sec. 142A empowers the AO to require the Valuation Officer for making the estimate of the value of any asset which the AO may require for the purpose of making assessment or reassessment - It does not empower the AO to refer the matter to the DVO for gathering information for reopening of assessment – Making of reassessment and reopening of assessment are two different things – For issuing notice under s. 148, there should be reason to believe that any income has escaped assessment - Said condition prescribed in s. 147 exists even after the insertion of s. 142A – Impugned notices under s. 148 quashed – Consequently, the assessments made by the AO in pursuance thereto are also quashed.
Umiya Co-operative Housing Society Ltd., ITO v/s.
(2005)94 TTJ 392

4. Declaration under VDIS, 1997 – On the basis of contents of declaration under VDIS, 1997, AO reopened the assessment for asst. yr. 1998-99 – However, no declaration was made by the assessee with regard to the accounting year relevant to asst. yr. 1998-99 – Thus, AO did not have sufficient information in his possession which could constitute reason to believe for reopening the assessment of the assessee for asst. yr. 1998-99 - Apart from that, assessee had been filing returns at Ahmedabad and, therefore, AO at Surat could not assume jurisdiction to reopen the assessment - Impugned order is null and void.
Kamini Hanskamal Grover (Smt) v/s. ITO
(2005) 95 TTJ 363 (Ahd)

(i) <u>TIME LIMIT FOR ISSUANCE OF NOTICE</u>
In absence of any notice as prescribed under section 163 and any order thereon by Assessing Officer, a person, holding power of attorney of a non-resident assessee, can be treated as an agent under section 163 so as to be eligible for shorter time limit for notice under section 149(3) – Held, no.
Pankaj Savailal Patel v/s. Dy. CIT
(2006)100 ITD 237(Ahd)

(j) INCOME ESCAPING ASSESSMENT - ISSUE OF NOTICE FOR

Where notice under section 148 was served on and addressed to three brothers jointly who also understood that it was meant for them, it was a valid notice.

Govindbhai Mamaiya , ITO v/s.

(2006) 100 ITD 265 = 102 TTJ 712= 195 Taxation 119 (Rajkot)

XXXVII. RECTIFICATION

1. Mistake apparent – Non-consideration of alternative claims – In addition to the claim for deduction under s. 80HHC made in the original return, assessee made alternative claims under s. 10B and s. 80-IB as a footnote in the documents enclosed with the return – AO accepted the returned income on the basis of claim for deduction under s. 80HHC – No fault can be found on the part of the AO for not considering the alternative claims made by way of footnote – There was no mistake much less a mistake apparent on record in the order which could be rectified by recourse to s. 154 moreso when the power of the AO to make correction in the returned income on the basis of information available in the accompanying documents has been taken away after the amendment of s. 143(1) by Finance Act, 1999, w.e.f 1st June, 1999 – Therefore, CIT(A) was not justified in holding that there was apparent mistake in the order of the AO and in directing the AO to allow assessee's claim for deduction under s. 10B/80-IB – Eligibility of assessee's claim under s. 10B/80-IB was a debatable issue and the question of allowability of such claim required long process of reasoning which does not come within the purview of s. 154 - However, department is duty bound to examine such claims and give cogent reasons if the same are not acceptable - Thus, the issue is restored to the AO for deciding assessee's eligibility for exemption under s. 10B and/or deduction under s. 80-IB after giving due opportunity of being heard.

   C.V M Exports, Asst. CIT v/s.

   (2006) 99 TTJ 30 = 103 ITD 251 = (2007) 288 ITR 190 (Rajkot)

2. Mistakes of Apparent from records – Assessment years 1999-2000 and 2000-01 – Whether Assessing Officer can, in exercise of his powers under section 154, amend an intimation issued under section 143(1) with regard to a matter which he cannot do or process under section 143(1) itself – Held, no.

   Packers (India) v/s. ITO

   (2006) 99 ITD 383 = 101 TTJ 232 (Ahd)

3. Appartment from records – Assessing Officer completed assessment under section 143(3) at nil income after allowing benefit of unabsorbed depreciation and brought forward business loss - Subsequently, vide order under section 154, he held that carry forward business loss could not be set off against income under head 'Capital Gains' – Whether Assessing Officer was justified – Held, no.
   Padra Taluka Co-op. Cotton Sale Ginning & Pressing Society Ltd. v/s. Asstt. CIT.
   (2005)142 Taxman 22 = 186 Taxation 107

4. Mistake apparent – Recalling of order passed under s. 250 by CIT(A) – CIT(A) allowed assessee's claim for exemption under s. 10B after considering the facts of the case as well as the case law - Later, on an application under s. 154 filed by the AO, CIT(A) recalled his order to be heard afresh - Same not permissible - There might have been an error of judgment in the order of CIT(A) but it could not be qualified as a "mistake" within the meaning of s. 154 – Thus, course adopted by CIT(A) did not fall within the scope of s. 154 – Impugned order is quashed and the original order is restored.
   Abbey Chemical (P) Ltd. v/s. ITO
   (2005)94 TTJ 275

5. Merger with appellate order – Alleged mistake in the order giving effect to the appellate order - CIT(A) had decided the issue relating to levy of interest under s. 215 in the appellate order - Therefore, order of assessment had merged with the order of CIT(A) –Mistake, if any, in the levy of interest could be rectified by the CIT(A) alone and not by the AO – Rejection of application under s. 154 by the AO was justified.
   Jayendra K. Doshi (Indl.), Asstt. CIT
   (2003) 79 TTJ 482 =132 Taxman 222

6. Wrong inclusion of exempted asset in taxable wealth – In view of the fact that the property in question was shown as business property in the balance sheet of the proprietary concern of the assessee, application of the assessee under s. 35 to exclude the same from taxable assets ought to have been accepted – Issue is restored to the AO to examine the assessee's claim on merits as per provisions of law and pass a speaking credit.
   Kiritkumar Hiralal Doriwala v/s. ITO
   (2007)107 TTJ 31(Ahd)

XXXVIII. REFUND

Set off under s. 245 against tax payable - Validity – Assessee having a valid certificate under the KVSS showing full and final settlement of tax payable for asst. yr. 1992-93, there was no occasion for the AO to adjust any tax arrears of that year against refund for asst. yr. 1997-98 that too without intimation to assessee - Refund ordered to be made with interest under s. 244A.

Radhe Investments (P) Ltd. v/s. ITO
(2006) 99 TTJ 777(Ahd)

XXXIX . REMISSION - s. 41(1)

Assessing Officer made an addition of Rs. 68.57 lakhs as deemed income under section 41(1) on ground that liabilities had been outstanding for past several years and assessee had failed to furnish postal addresses, of concerned parties and failed to prove existence of those liabilities – Important words in section 41(1) are 'remission' and 'cessation' and while remission has to be granted by creditors, cessation may occur by reason of operation of law or debtor declaring unequivocally his intention not to honour his liability – In absence of any cogent reasons and material evidence in support of finding that liabilities in instant case had ceased in year under consideration, addition made was liable to be set aside.

New Commercial Mills Co. Ltd. v/s. Dy. CIT
(2002)125 Taxman 179

XXXX . REVISION

(a) ERRONEOUS AND PREJUDICIAL ORDER

1. Non application by AO of Explanation to s. 73 – Assessee's contention that it was non banking financial company having its principal business of granting loans and advances having not been rejected by CIT, AO's order in not applying Explanation to s. 73 while granting set off of loss from purchase and sale of shares against other income could not be said to be erroneous and prejudicial to the interests of Revenue.

   Punjab Lease Financing Ltd. v/s. ITO
   (2008) 119 TTJ 395(Ahd)

2. AO taking of possible view – AO having made enquiries on the issues of gross profits as well as investment by the partners and cash credit and after considering the reply of assessee having decided not to make addition on any of those counts, the order of AO could not be said to be erroneous only on the ground that AO had not discussed the said queries and replies in the assessment order, the view taken by the AO being a possible view.

   Jet Electronics v/s. Asstt. CIT
   (2008) 116 TTJ 225 = 2 DTR 337(Ahd)

3. s. 263 - Where two views are possible and Assessing Officer has taken one view with which Commissioner does not agree, it cannot be treated as an erroneous order unless view taken by Assessing Officer is unsustainable in law - Where Assessing officer had given a specific finding by relying upon decision of Supreme Court that amount received by assessee by virtue of restrictive covenant agreement was not taxable as revenue receipt in hands of assessee, merely because Commissioner did not agree with view taken by Assessing Officer, it could not be said that assessment order was erroneous and prejudicial to interest of revenue.

   Ravi K. Mody v/s. ITO

   (2006)151axman 11 (Ahd)

4. Erroneous and prejudicial order – Non assessment of income disclosed during survey – Survey conducted at the business premises of assessee wherein he disclosed additional income of Rs. 40 lakhs and Rs. 20 lakhs for two assessment years on account of income earned by him through four activities – Subsequently a letter of retraction to disclosure was filed - While passing order under s. 143(3), AO found no material indicating that assessee was actually engaged in any of the four activities on the basis of which the disclosure was made – Accordingly, the AO after scrutinizing all the material, evidences and books of account passed the order of assessment assessing the income as returned - It cannot at all be inferred that the AO had drawn any incorrect assumption of facts or he had incorrectly applied the law in not making any addition of the income disclosed by the assessee – Order passed by the AO cannot be said to be erroneous within the meaning of s. 263 – There being no material to prove existence of disclosed income, it cannot be said that such income was assessable – In the absence of any adverse material, except a statement recorded under s. 133A(3)(iii) (which according to law had no evidentiary value) the view taken by AO cannot be said to be a view impermissible in law - Hence, it cannot also be said that the order is prejudicial to the interest of the Revenue – Order under s. 263 liable to be quashed.

   Ashok Manilal Thakkar v/s. Asst. CIT

   (2006)99 TTJ 1262(2005) 97 ITD 361 =279 ITR 143 (Ahd)

5. Where two views are possible and Assessing Officer has taken one view with which Commissioner does not agree, it cannot be treated as an erroneous order unless view taken by Assessing Officer is unsustainable in law - Where Assessing officer had given a specific finding by relying upon decision of Supreme Court that amount received by assessee by virtue of restrictive covenant agreement was not taxable as revenue receipt in hands of assessee, merely because Commissioner did not agree with view taken by Assessing Officer, it could not be said that assessment order was erroneous and prejudicial to interest of revenue .

   Ravi K. Mody v/s. ITO

   (2006)151 Taxman 11 (Ahd)

6. Lack of proper enquiry - AO having examined all materials, considered GP declared by assessee for pre and post survey period, disallowing certain portion of expenses in order to cover the lower GP and having examined all facts pointed out by CIT in his order under s. 263, the order of AO cannot be said to be erroneous and prejudicial to the interests of Revenue – There is no view taken by AO which is unsustainable in law and this is not a fit case where s. 263 can be invoked.
   Shaileshbhai Shah v/s. Asstt. CIT
   (2005) 98 TTJ 154 (Ahd)

7. There should be an incorrect assumption of facts or an incorrect application of law by Assessing Officer to bring order of Assessing Officer within category of its being erroneous under section 263 – To qualify an assessment order as an order being prejudicial to interest of revenue, order should cause lawful loss of tax to revenue – On facts stated under heading Assessment - Additions to income, order passed by Assessing Officer could not be said to be erroneous prejudicial to interest of revenue to bring case within parameters of section 263.
   Ashok Manilal Thakkar v/s. Asstt. CIT
   (2005) 97 ITD 361 = 279 ITR 143 = (2006) 99 TTJ 1262 (Ahd)

8. Erroneous and prejudicial order – Lack of proper enquiry – AO having examined all materials, considered GP declared by assessee for pre and post survey period, disallowing certain portion of expenses in order to cover the lower GP and having examined all facts pointed out by CIT in his order under s. 263, the order of AO cannot be said to be erroneous and prejudicial to the interests of Revenue – There is no view taken by AO which is unsustainable in law and this is not a fit case where s. 263 can be invoked.
   Deepakbhai S. Shah v/s. Asstt. CIT
   (2005) 98 TTJ 154 (Rajkot)

9. Of orders prejudicial to interests of revenue – An assessment cannot be said to be erroneous or prejudicial to interest of revenue because of failure of Assessing Officer to record his opinion about leviability of penalty - Therefore, Commissioner cannot invoke his revisional power only on ground that Assessing Officer has failed to initiate penalty proceeding under section 271(1)(c) in assessment order.
   Emtici Engg. Ltd. v/s. CIT
   (2004) 137 Taxman 76(Ahd)

10. Of orders prejudicial to interest of revenue - Assessment year 1992-93 – As per enquiry of CBI, assesses were found to be involved in obtaining fabricated evidence of foreign gifts – Based on that information, ITO, Kolharpur, who had jurisdiction over assesses, issued notices under section 148 to them at Kolhapur – Assessee instead of filing returns in response to aforesaid notice at Kolhapur filed returns at Rajkot and in those returns they had offered amount purportedly received as foreign gifts and paid tax thereon - Assessments were completed under section 143(3) by Rajkot ITO – Commissioner, acting under section 263, set aside order of Rajkot ITO on ground that returns filed at Rajkot were not bona fide returns – Whether fact that Rajkot ITO passed orders under section 143(3), without due enquiry and returned income was accepted, whereas Kolhapur ITO conducted detailed enquiry and income came to be assessed at higher figure was enough to cause prejudice to interests of revenue and returns filed at Rajkot were to defeat proceedings going on before Kolhapur ITO – Held, yes – Whether when assessee were permanently settled in Kolhapur and when ITO, Kolhapur had jurisdiction over them, there was no reason to respond to notice issued by him under section 148 by filing returns at Rajkot and particularly when ITO at Rajkot had no jurisdiction over those cases – Held, yes – Whether such an indisceet act on part of assesses could only cause chaps in tax administration which in turn would cause prejudice to interest of revenue – Held, yes – Whether, therefore, Commissioner was justified in invoking his powers under section 263 on ground that assessments made at Rajkot were erroneous and prejudicial to interest of revenue – Held, yes – Whether non-initiation of penalty proceedings under section 271(1)(c) could be a ground for invoking jurisdiction under section 263 – Held, no.

Master Vijay R. Oswal v/s. ITO
(2003)87 ITD 98 (Rajkot)

XXXXI. SALARIES

(a) DEDUCTIONS FROM –

1. Mere fact that employer has deducted lesser amount of provident fund under Employees Provident Fund Act is no ground for denying deduction under section 16(i) and 16(iii).

Naynesh D. Kapasi v/s. Asstt. CIT v/s.
(2004) 137 Taxman 89 (Ahd)

XXXXII. SCIENTIFIC RESEARCH EXPENDITURE

(a) Section 35

1. Whether allowability of expenditure under section 35 is not restricted to manufacturing activity alone, but same is allowable if it is related to business of assessee – Held, yes.

Anjaleem Enterprises (P) Ltd., Dy. CIT
(2005) 149 Taxman 9 = (2006) 192 Taxation 128 (Ahd)

2. Assessee engaged an institution for designing machine to be used for threshing purposes, as assessee was earlier doing threshing work manually – Assessee's claim for deduction as scientific research expenditure was disallowed by Assessing Officer on ground that it was a business activity and not research - Since "scientific research" means systematic investigation towards increasing sum of knowledge and since such a systematic investigation was not found in instant case, it could be said that mere conversion of threshing grading process of tobacco from manual system into mechanical system did not amount to scientific research – Installation of machine perfecting process to suit needs, desires and requirements of assessee did not amount to scientific research within meaning of section 35(1)(iv) and section 43(4)(i) and, therefore, disallowance was to be upheld .
Nutan Tobacco (P) Ltd. , Dy. CIT v/s.
(2003) 85 ITD 34 = 75 TTJ 329(Ahd)

XXXXIII. SEARCH AND SEIZURE

(a) BLOCK ASSESSMENT

1. Computation of undisclosed income – Addition made by AO by estimating suppressed sales on the basis of consumption of electricity having no scientific basis was rightly deleted by CIT(A) – Further, cash seized from the residence of director of assessee company and declared as his individual income could not be added in the hands of assessee.
Royal Marwar Tobacco product (P) Ltd., Dy. CIT v/s.
(2009) 120 TTJ 387 = (2008) 16 DTR 129(Ahd)

2. Computation of undisclosed income – No evidence or material indicating any suppressed sales in asst. yrs 2000-01 to 2003-04 having been found during search and no defect in the books having also been found, AO was not justified on the basis of material seized relating to asst. yr. 2004-05 indicating suppressed sales, in assuming suppressed sales for earlier assessment years, estimating the same on the basis of consumption of electricity and making additions.
Royal Marwar Tobacco product (P) Ltd., Dy. CIT v/s.
(2009) 120 TTJ 387(Ahd)

3. Return filed for block assessment beyond the period of 45 days prescribed in s. 158BC is not non est – Block assessment made without issuing notice under s. 143(2) as invalid.
Late Janak K. Kansara, Asstt. CIT v/s.
(2008) 116 TTJ 415 = 7 DTR 127(Ahd)

4. Computation of undisclosed income impugned addition of Rs. 8,221 being below the taxable limit of the relevant assessment year, same cannot be treated as undisclosed income in the block assessment. Proceedings under s. 158BD – Tribunal having held in the first round of proceedings in the assessee's case that there cannot be any addition on protective basis in the case of block assessment framed under s. 158BD and directed the AO to make fresh assessment only for the purpose of making substantive additions impugned additions made on protective basis in the fresh assessment order being contrary to the direction of the Tribunal are deleted.
   Farzana F. Desai (Smt) v/s. Asstt.CIT
   (2008) 119 TTJ 387 = 14 DTR 552(Ahd)

5. Undisclosed income - Block period 1-4-1988 to 11-12-1998 – Assessee was engaged in business of purchase and sale of gold, silver bullion and diamond – 'B' who was domestic servant of assessee was intercepted by police while he was traveling by bus and Rs. 12 lakhs were recovered from his possession – During enquiry, 'B' sated that money represented sale proceeds of 20 kg of silver – Statement of 'B' was not found correct and cash was seized in pursuance of section 132A – Subsequently, assessee approached Judicial Magistrate for returning of aforesaid money on ground that money belonged to him and 'B' was his employee – Assessing Officer, therefore, issued notice under section 158BG, read with section 15 & BD, upon assessee – During block assessment proceedings, assessee explained that amount of Rs. 12 lakhs was his business money and he had given same to be handed over to one 'R' in connection with purchase of land and that 'R' did not accept said cash - Assessing Officer did not accept explanation of assessee and concluded that said money represented undisclosed income of assessee – Whether since assessee had failed to prove that he had sent money to 'R' for purchase of land, money which was seized from 'B' represented sale proceeds of silver in which assessee dealt in - Held yes – Whether since assessee had not shown sale proceeds of silver in question in his books of account said money had rightly been held as undisclosed income of assessee - Held, yes -
   Anil Kumar Parshottamdas v/s. Dy. CIT
   (2007)11 SOT 28(Ahd)

6. Block period 1989-90 to 1998-99 – Pursuant to a search carried out atOffice premises of company 'C', certain documents relating to assessee were found and seized – During course of survey action, assessee in his statement admitted that transactions contained in seized papers were relating to discounting of various drafts received by him from various customers on account of sale of colour and various chemicals, for and on behalf of other parties on commission - In block assessment proceedings assessee's explanation that drafts discounted by assessee were on account of self or on commission was rejected and addition was made – Whether once assessee owned documents found during search, onus was on him to substantiate/explain various entries recorded therein in accordance with provisions of law or material, if found to be factual – Held, yes – Whether assessee having furnished name and address of a person at Bombay and having claimed that goods sold by him belonged to person at Bombay it was in interest of justice that dispute with regard to nature of transactions which resulted in coming of drafts in assessee's hands required to be decided afresh after making necessary inquiries including from Bombay party – Held, yes.
   Vipul Hasmukhlal Mehta v/s. Dy. CIT
   (2007)160 Taxman 131(Ahd)

7. Block period 1-4-1989 to 20-1-2000 – Pursuant to a search conducted at premises of assessee, certain loose papers were seized which contained details of investment in shares and debentures made by five persons, viz, assessee, assessee's wife, son, daughter and son-in-law – Assessing Officer found that actual investment in shares was of Rs. 9,42,100, while assessee disclosed same at Rs. 2,13,300 and in assessment for block period, assessee had offered undisclosed income of Rs. 2 lakhs – He therefore, made addition of Rs. 7,42,100 for undisclosed income – On appeal, Commissioner (Appeals) found that Assessing Officer had considered total application made by assessee for shares/ debentures, while in a large number of cases amount was refunded and noted that total refund received by assessee was of Rs. 4,94,100 – Accordingly, he held that actual investment was of Rs. 4,47,700 only – He, therefore sustained addition of Rs. 2,47,700 – Whether only net investment, after deducting refund of share application money received by assessee, was to be considered for purpose of working out unexplained investment – Held, yes – Whether since investment was made by five persons and department had not pointed out any mistake in person-wise break-up submitted by assessee and further assessee's wife and son had already been assessed under section 158BD, in such circumstances, investment made by them could not be assessed in hands of assessee - Held, yes – Whether in respect of investments made by assessee's daughter and son-in-law, since no confirmation had been filed by them that shares actually belonged to them nor assessee had explained source of investment made

by daughter, in such circumstances, investment in names of assessee's daughter and son-in-law was to be taxed in assessee's hands – Held, yes.

Block period 1-4-1989 to 20-1-2000 – Whether when an assessee is found to be carrying on money lending business which is not recorded in books of account, revenue authorities would be justified to ask for source of investment in such moneylending business and if assessee is unable to explain source of investment, same has to be treated as unexplained investment – Held, yes – Whether when details of amount advanced are available, normally, unexplained investment has to be worked out on basis of amount actually advanced by assessee and in such circumstances, pawned articles which are security against money advanced are not to be taken into consideration – Held, yes – Whether however, where details of money actually advanced against such pawned articles are not available, then as an alternative, value of pawned articles can also be taken into consideration for determining investment by assessee but, under no circumstances, both can be considered for determining unexplained investment by assessee – Held, yes.

Block period 1-4-1989 to 20-1-2000 – Whether where investment in house was already disclosed by assessee's wife in returns and balance sheet was filed year after year much before search and she was also assessed to tax, in such circumstances, investment in house property belonging to assessee's wife could not be regarded as undisclosed income of assessee – Held, yes.

Block period 10401989 to 20-1-2000 – Whether where in order to pay tax on undisclosed income, assessee had sold pawned silver articles, belonging to his undisclosed money lending business, in such circumstances, there was no question of recovery either of principal amount advanced or interest thereon and, therefore, no addition could be made for interest deemed to be receivable from said advances – Held, yes.
Chandravadan Jayantilal Chokshi v/s. Asstt. CIT
(2007) 16 SOT 41 = (2006) 100 TTJ 879 (Ahd)

8. Penalty under s. 158BF(2) – Asseessee has admitted ownership of certain jewellery – She has also paid the difference of tax i.e additional tax payable at higher rae on income assessed in block assessment vis-à-vis value of gold ornaments acquired from unexplained sources and did not agitate the matter – Penalty under . 158BFA(2) rightly deleted by CIT(A).
Jayshree M. Pethani (Smt), Dy. CIT v/s.
(2006) 99 TTJ 644 (Ahd)

9. Computation of undisclosed income – Large amount of cash recovered by police from two employees of assessee company – Affidavit filed by a director stating that the said amount of Rs. 10 lakhs belonged to the company and was being carried for depositing in the bank – Assessee company was having cash balance of Rs. 10,42,279.32 when the employees were intercepted by the police and cash was seized from them – Cash balance exceeding Rs. 10 lakhs appeared in assessee's cash book for a long time after Rs. 9,90,000 was withdrawn from the bank – All relevant details regarding the said withdrawal were given to the AO - Thus, availability of cash is explained by the cash book – Discrepancy in the statements regarding the timings when the said two persons had taken the cash to the bank or their exact denomination cannot be given much weightage as no account is normally kept for the exact denomination of the notes – There is no evidence that cash shown in cash book has been used by the assessee elsewhere – Further, the fact that the assessee could not explain as to why it retained so much cash with it for a long time cannot be a ground for rejecting the explanation of the assessee vis-à-vis availability of cash – Therefore, addition in the hands of the assessee and the protective addition in the hands of S are deleted.
Anand Autoride Ltd. v/s. Jt. CIT
(2006) 99 TTJ 1250 = 99 ITD 277((Ahd)

10. Undisclosed income, computation of Block period 1-4-1985 to 12-12-1995 – Authorised Officer conducted search at residential premises of assessee on 12/14-12-1995 and found that assessee had sold certain shares and earned capital gain - Assessing Officer therefore, issued notice under section 158BC read with section 158BB on 19-12-1996 requiring assessee to show cause as to why capital gain earned by her be not treated as her undisclosed income – Assessing ultimately filed returns of income for block period 1-4-1985 to 12-12-1995 on 2-12-1997 - Prior to it, assessee had also filed regular return of income for assessment year 1995-96 on 17-12-1995 declaring certain income – Assessing Officer completed regular assessment under section 143(2) on 29-12-1997 treating declared income as income from undisclosed sources – Assessing Officer thereafter framed assessment under section 158BC read with section 158BB and treated income disclosed by assessee for assessment year 1995-96 as undisclosed income of assessee - Assessee claimed that since income for assessment year 1995-96 had already been disclosed by her in regular return , it could not be subjected to assessment under section 158BB, read with section 158BC – It was an admitted fact that on date of search, return of income was due and had not been filed by assessee – Whether though income of assessment year 1995-96 had been assessed under section 143(3) but as return had been filed after commencement of search and date of requisition and assessment was also completed thereafter under section 143, no reduction could be given to

assessee while determining undisclosed income as per provisions of section 158BB(1) - Held, yes.
Jyoti M. Bhandari (Smt) v/s. Asstt. CIT
(2006) 6 SOT 375(Ahd)

11. Computation of undisclosed income – Undisclosed investment in shares and debentures – Only the net investment excluding refund of share application money is to be considered - Investment was made by five persons – Department has not pointed out any mistake in person wise break up submitted by the assessee - Assessee's wife and son have already been assessed under s. 158BD – Investment made by them cannot be considered in the hands of the assessee – So far as investments made by assessee's daughter and son in law are concerned no confirmation has been filed by them that the shares actually belong to them – Further, the daughter is not separately assessed and the assessee has not explained the source of her investment – Therefore, the investment in the names of assessee's daughter and son in law has to be treated as made by the assessee – Hence, addition is sustained party.

Computation of undisclosed income – Unexplained investment in silver articles and investment in money lending business which is not recorded in the books of account, unexplained investment has to be worked out on the basis of amount actually advanced by the assessee or alternatively the value of pawned articles can be taken into consideration – Both cannot be considered – Total income offered by the assessee against unexplained investment in silver articles found at the time of search and unexplained advances in pawning business is more than the total money advanced by the assessee as worked out by the AO – There is no justification for disbelieving the submission of the assessee that part of the silver ornaments seized from his business premises belong to the trading business of his son and the HUF – Value of remaining silver ornaments found at the business premises is less than the income offered to tax - Thus, further addition was not justified.

Computation of undisclosed income – Alleged unaccounted investment in house property – Investment towards purchase of land and year wise construction of house was duly disclosed in the returns filed by S, wife of assessee, year after year and also in the balance sheet prior to search – Merely because she could not state during the course of search how much amount was incurred on the cost of construction, it cannot be inferred that the investment in the house property was made by assessee and not by her – AO has also issued notice under s. 158BD and made the assessment in the hands of Smt. S. under s. 158BD – Addition deleted.

Computation of undisclosed income – Interest receivable on advances made in the course of moneylending business – Pawned silver articles

belonging to the undisclosed moneylending business were seized at the time of search – Later, assessee sold such pawned articles to pay the tax on undisclosed income – That being so, there is no question of recovery of either the principal amount or the interest thereon - Therefore, addition on account of interest receivable is deleted.

Chandravadan Jayantilal, Asstt. CIT v/s.
(2006) 100 TTJ 879=(2007) 16 SOT 41 (Ahd)

12. Undisclosed income of any other person – Block period A.Y 1987-88 to Pr. Yr.1996-97 and 1-4-1996 to 24-7-1996 – Assessing Officer is not competent to make any comment on illegality of disclosure made under VDIS specially when disclosure is duly accepted by Commissioner - Search and seizure under section 132 was conducted in case of directors of assessee company and various documents were seized relating to assessee company – In block assessment, while working out undisclosed income, assessee stated that it disclosed certain income relating to relevant assessment years under VDIS, 1997 which was duly accepted by Commissioner – Assessing Officer, while passing order under section 158BD, had allowed deduction for income disclosed under VDIS – However, subsequently, Assessing Officer rectified aforesaid assessment order under section 154 by withdrawing deduction allowed therein on ground that said sum was subject matter of search under section 132 – The issue whether assessee was entitled to deduction of income disclosed under VDIS while determining undisclosed income under Chapter XIV-B was a debatable issue and therefore it could not be said that mistake had crept in order passed under section 158BD – Therefore, Assessing Officer having no jurisdiction to pass rectifying order, order passed under section 154 was to be quashed .

Palitana Sugar Mills (P) Ltd. v/s. Addl. CIT
(2006) 99 ITD 505 = 101 TTJ 351 (Ahd)

13. Assessee & his wife 25% partner in firm - Search on 18-11-1997 when found that assessee investing Rs. 21 lakhs in purchase of plot – Assessee making declaration under VDIS - 97 for Rs. 30 lakhs on 31-12-1997 covering the investment in plot – CIT accepting such declaration & issuing certificate under section 68(2) of VDIS giving details of investment in plot – AO however, holding declaration invalid & assessing Rs. 21 lakhs in block assessment – CIT(A) upholding – Held when CIT is accepting the VDIS after disclosure of the fact of purchase of plot by assessee the AO has no right to say that VDIS was invalid – On facts & circumstances addition directed to be deleted.

Parwati Roopchand Hemrajani (Smt) v/s. DCIT
(2006) 190 Taxation 121 = 153 Taxman 3 (Ahd)

14. Burden of proof – Penalty proceedings under s. 158BFA(2) are akin to s. 271(1)(c) proceedings and burden is on the Department to prove factum of concealment - Assessee having explained entries in the books and filed confirmation of creditors burden on assessee stood discharged and penalty imposed under s. 158BFA(2) only by referring the explanation of assessee on probabilities and assumptions without independent investigation could not be sustained.
Gandi Service Station v/s. Asstt. CIT v/s.
(2006) 100 TTJ 1143(Ahd)

15. Search on assessee (a holy man) premises on 15-10-1995 when cash, ornaments & foreign gifts receipts found – Assessee admitting concealment of Rs. 6,00,785 – AO however in assessment under section 143(3) / 158BC determining undisclosed income at Rs. 67.62 lakhs & these included gifts received for love & affection by assessee & his family members from a person in England whose property was being looked after in India by assessee etc. & amounts received for traveling abroad from his other known persons – As these were entered in books of account ITAT deleting additions to be considered in regular assessments – AO treating such gifts etc. as assessee's income from vocation for propagating Jalaram Bhakti abroad – Receipts for traveling were also treated as such income less expenses incurred – Assessee placed sufficient material on record which has not been rebutted – No material/evidence brought on record to reject the plea of assessee – NRI donors donated to the assessee & his family members out of love & affection & revenue has not been able to make out the nexus between the gifts & vocation by assessee & his family Members – Moreover gift tax has been paid & the same has not been disputed – On facts & circumstances the additions for gifts in all cases deleted – Likewise additions for foreign tours directed to be deleted – Interest under section 234B consequential.
Jagdishbhai Pranjivandas Bhagat v/s. DCIT
(2006) 192 Taxation 62(Ahd)

16. Interest under s. 158BFA(1) – Chargeability – Interest under s. 158BFA(1) is in the nature of penalty – To attract the penal provisions, there has to be some element of lack of bona fides – In spite of repeated requests to various Departmental authorities, copies of seized materials were not furnished to the assessee so as to enable him to file the block return within the stipulated time – Fling of correct return is not possible unless the copies of seized materials and/or copies of the statements recorded during the search is made available to the assessee by the Department - Delay in furnishing the return was due to inaction on the part of the Department in supplying the copies of seized and there is no element of lack of bona fides on the part of the assessee in furnishing the return after receipt of seized material - Levy of interest is set aside and

the matter is restored to the AO directing him not to levy any interest for the period until the Xerox copies of all such materials were made available to the assessee.

Bachubhai S. Antrolia v/s. Asstt. CIT

(2006) 103 TTJ 73= 103 ITD 66 =(2007) 288 ITR 57 (Rajkot)

17. Block assessment – Computation of undisclosed income – Due date for filing of return under s. 139(1) for asst. yrs. 1999-2000 and 2000-01 had not expired when the search took place in June, 1999 – Cash book written up only upto July, 1998 – However, admittedly, receipt of fees from students was duly recorded in the receipt book – Expenses on account of salaries and other expenses were recorded in the salary register and vouchers - Therefore, income by way of fees which was found recorded in said documents in the normal course before the date of search cannot be treated as undisclosed income as per s. 158BB(1)(d) – Revenue is at liberty to consider the same in the regular assessment.

Block assessment – Computation of undisclosed income – Overwritings in receipt book – Amount of Rs. 2,000 changed to Rs. 1,000 in 25 receipts – No plausible explanation given for the alleged correction in the receipts – Addition sustained.

Block assessment – Computation of undisclosed income –Suppression of receipts – Receipt book found at the time of search showing total collection of fees at Rs. 24,11,500 for one year while assessee has shown only Rs. 22,05,500 for that year – Assessee's explanation that some receipts were issued twice for fees received once cannot be accepted – Addition sustained.

Computation of undisclosed income – Donations received from students – Receipts from students by way of donations are duly disclosed by the assessee and recorded in the books of account/receipt books and are credited in the bank account of the assessee – It cannot be said to be undisclosed income and is out of the purview of block assessment – Whether the donation is voluntary donation or a donation towards the corpus of the assessee trust is relevant only for working out exemption under s. 11, if claimed by the assessee – Addition deleted.

Computation of undisclosed income – As per books f account found at assessee's premises, it had taxable income in the asst. yr 1996-97 – However, return was not filed for that year – Said income rightly considered as undisclosed income for the purpose of block assessment.

Denial of exemption under s. 10(22) – Whether the assessee is entitled to exemption under s. 10(22) or not should be evaluated each year and a decision for the whole block period of 10 years cannot be taken –

Exemption can be denied only if it is found on the basis of material found at the time of search that the claim of the assessee for exemption under s. 10(22) is false – In the regular assessments Revenue has accepted that assessee is existing solely for educational purposes and not for the purpose of profit – Mere change of opinion cannot bring the assessee's case within the ambit of "false" claim - Allegation that the assessee has charged compulsory donation was not found to be correct in the enquiry conducted by the Education Department – Further, registration of the assessee trust under ss. 12A and 80G has not been revoked by the CIT after the search or even after the block assessment - AO is directed to follow the view taken by Department regarding assessee's claim for exemption in the regular assessments of the respective assessment years.

Shaun Trust v/s. Asstt. CIT
(2005) 97 TTJ 678(Ahd)

18. In search cases – Undisclosed income, computation of - Block assessment years 1990-91 to 2000-01 and assessment year 2001-02 – Regular income, which was being disclosed by assessee year after year prior to search, could not be said to be undisclosed income merely because return for one assessment year could not be filed by it in time.

    Surcharge is not leviable in respect of searches conducted prior to 1-6-2002, though proviso to section 113 specifically provides that surcharge is leviable in case of searches under section 132 initiated on or after 1-4-1999.

    Suganchand C. Shah v/s. Asstt. CIT
    (2005)149 Taxman 30 (Ahd)

19. Block assessment - Retraction of statement - Computation of undisclosed income – Ships purchased for breaking accounted for by assessee in the books of account - No material on record that assessee sold scrap out of books – In the stock estimation by the AO there is only difference of about 1 per cent (approx) – If shortage in ship breaking is taken at 12 per cent as adopted by assessee against 15 per cent as adopted by AO there would be no excess stock - Assessee having retracted the admission by proper reasons and evidence, the addition was not warranted.

20. Computation of undisclosed income - Disclosure of Rs. 5 lakhs made by assessee on account of household expenses could not be said to have included silver articles and source of these articles having not been explained, addition on that count was justified.

    Rajendra Shivchand Gupta v/s. Dy. CIT
    (2005) 93 TTJ 743 = 148 Taxman 46

21. Search and seizure - Assessment years 1992-93 and 1993-94 – Statement given under section 132 (4) is an important piece of evidence against assessee - Statement given under section 132(4) is not conclusive and person giving statement can retract same under certain circumstances – Time gap between statement and retraction of statement would be one of the important points to be taken into account while deciding whether statement was voluntary or not and other circumstances is where statement was given under mistaken belief – Burden is upon person making statement to prove that statement given by him was not voluntary or was factually incorrect or was untenable in law –Assessee can discharge said burden by giving a direct evidence of coercion or threat by authorized officer or by circumstantial evidence in that regard –Where assessee retracted statement made under section 132(4) after three and a half months of disclosure and there was not an iota of evidence to support retraction. Assessing Officer was justified in not accepting assessee's retraction.
Bhogilal Mulchand, Dy. CIT v/s.
(2005) 3 SOT 211 = 96 ITD 344 = 98 TTJ 108 (Ahd)

22. Retraction of statement under s. 132(4) – Validity - An admission statement under s. 132(4) can be used as evidence against the assessee – Any retraction thereof has to be based on evidence accompanied by justifiable reasons - In view of repeated admissions of assessee in his statement under s. 132(4), amount of Rs. 2 lakhs was rightly added in undisclosed income towards renovation of house notwithstanding the assessee's retraction which was not based on any evidence and reasons.
Rameshchandra R. Patel v/s.Asst. CIT
(2005)94 TTJ 361=(2004) 89 ITD 203

23. Validity of notice under s. 158BC – Notice issued in the name of assessee adding the word 'limited' with it – Notice also mentioning that return is required to be filed for the block period mentioned in s. 158B(a) – Date of search known to the assessee – Assessee correctly understood the notice and filed return in the correct status for the appropriate period – There is no ambiguity in notice and assuming that there is some infirmity in the notice, same is curable under s. 292B.

Computation of undisclosed income – Addition towards bogus purchases – Certain blank bill books, signed cheque books etc. of five alleged suppliers found during search – Post search investigation clearly indicated that the five alleged suppliers were mere billing agents or name lenders and did not in fact supply any material – Parties blatantly refusing to have made any supplies to the assessee – Falsity of claim on the basis of bogus purchases or inflated purchases will surely come within the ambit of undisclosed income under s. 158BB(b) as emended by the Finance Act, 2002 w.e.f 1st July, 1995 – "Such other material or information as are

available with the AO used in s. 158BB(1) would include material gathered in post search investigation on the basis of evidence found during search - Term "authorized officer" used in s. 158BB(1) is different from AO and such post search investigation can validity be made by the Dy. DIT/Addl. DIT – Such items having escaped assessment in regular assessments already made come within the ambit of block assessment under Chapter XIV-B – AO has provided full opportunity of hearing to the assessee in respect of such material and complied with the rules of natural justice – Onus of proof in such cases squarely lies on the assessee when the parties flatly denied to have made any supplies to the assessee – Their retraction affidavits submitted at the fag end of limitation for assessment – No request was made by assessee to cross examine these suppliers and they were not produced even before Tribunal despite opportunity provided by Tribunal – True that material was in fact received by the assessee but as the assessee is not willing to disclose the parties, inference was drawn that unaccounted material was purchased by assessee using his undisclosed money and thereby earning unaccounted profits – However, in view of the settled legal principle that only real income can be brought to tax, entire addition cannot be sustained and addition should be reduced to 25 per cent.

Computation of undisclosed income - Addition on account of bank deposits in the names of bogus suppliers – Burden is on the Department to prove that these suppliers were benamidars of the assessee(s) and the funds were in fact provided by the assessee(s) – No positive and clinching evidence brought by Revenue on record – CIT(A) justified in deleting the addition.

Computation of undisclosed income – Addition towards undisclosed income cannot be made by disallowing depreciation on assets owned by assessee and ready for use.

Computation of undisclosed income – Unexplained deposits - Undisclosed income found as a result of search, would include within its ambit the undisclosed income found as a result of presearch, investigation leading to search, material found during the search and post-search investigation made in relation thereto and all that would be assessable in the block assessment – Search and seizure proceedings of shroff group showed unaccounted transactions with assessee's group and consequential search of assessee's group – Addition could be made in the hands of assessee on the basis of documents and material seized from shroff group – Matter however remanded for providing adequate opportunity to the assessee.

Computation of undisclosed income – Suppressed sales – Finding of AAIFR that assessee had indulged into clandestine sales and siphoning away sale proceeds and manipulated accounts after shortage came to the

notice of the creditors (banks), etc. – Addition of 10 per cent of gross profit on such clandestine sales was rightly made by AO.

K.V Patel & Co., Dy. CIT v/s.
N.K Industries Ltd., Dy. CIT v/s.
N.K Proteins Ltd., Dy. CIT v/s.
Nilesh K. Patel, Dy. CIT v/s.
(2004) 83 TTJ 904 (Ahd)

24. Undisclosed income, computation of - Assessee declared unaccounted income of Rs. 25 lakhs being earned from business of sale and purchase of shares - A broker /middleman, though acknowledged transaction, could not file any details as to from whom he purchased shares and to whom they were sold – Identity of another middle man was not even proved on account of his absence before revenue - Even no details of distinctive numbers or share scrip numbers were given either for purchase or sale - Full payment was made for purchases without deducting therefrom sale price even though shares were sold much prior to such payment - Though brokers were not under control of assessee, when loss was claimed as deduction it was for assessee to prove that he had incurred loss and in absence of examination of broker, his books of account and other material it was not proved, particularly when no details of distinctive numbers/certificate numbers of shares purchased and sold, claimed to have been taken or given through brokers, were brought on record – Share transactions claimed by assessee were not genuine, and a show was made to create a loss to reduce tax on his income - Therefore, addition was to be made on that account.

Undisclosed income, computation of – Addition was made by Assessing Officer under head investment in renovation of house primarily on basis of assessee's statement under section 132(4) made voluntarily in presence of witnesses – Subsequently, he retracted on basis of panchnama which only showed household goods and furniture and not investment in house - Whether said panchnama could not be a ground for demolishing assessee's version made under section 132(4) stating that he had invested Rs. 2 lakhs in house and household goods, which he had admitted a number of times – Therefore, it was to be held that there was disclosure of repair and renovation included in said sum of Rs. 2 lakhs which was to be added to his income.

Rameshchandra R. Patel, Asstt. CIT v/s.
(2004)89 ITD 203 =(2005) 94 TTJ 361 (Ahd)

25. Computation of undisclosed income – Block period assessment years 1986-87 to 1996-97 and 1-4-1995 to 11-10-1995 – Where block period income for an assessment year is below taxable limit and, therefore, no return is filed, such income cannot be considered as undisclosed income for purpose of block assessment year – Assessee is entitled to deduction under Chapter VI-A and rebate under section 80L and 88 in calculating block income.
Naynesh D. Kapasi v/s. Asstt. CIT v/s.
(2004) 137 Taxman 89 (Ahd)

26. Before due date for filing returns for assessment year 1995-96 – Entries relating to transactions entered into books of account – Other documents maintained in normal course - No proof that books of account were not genuine – Additions to income on the basis of estimate – Not justified.
Babros Machinery Manufacturers Pvt. Ltd. v/s. Dy. CIT (Assessment)
(2004) 269 ITR 36= (2003)84 ITD 91 =78 TTJ 857 (Ahd)

27. There was difference of opinion between the Hon'ble members of the Bench as to whether the share application money/deposits duly entered into the books of account on the date of search could be considered only in regular assessments and not in block assessment – Matter referred assessments and not in block assessment - Matter referred to Hon'ble Third member – Held, when section 158BB(2), section 158BH & section 68 are read in conjunction with each other it becomes abundantly clear that section 68 could be invoked in block
Cas Card Finance Ltd. & Ors. V/s. ACIT
(2003) 174 Taxation 79 = 78 TTJ 55 = 84 ITD 1(Ahd)

28. Cash credit – Computation of undisclosed income – Sec. 68 can be invoked in block assessment – Share application forms and other incriminating documents pertaining to the assessee companies/firms were found during search at the premises of BJ who is controlling all the companies and the firms – BJ admitted having introduced undisclosed income purported to be share application money and deposits in Benami names – On investigation ADI found that the persons shown as shareholders/depositors were not genuine - Assessees failed to establish the genuineness of the entries – Affidavits filed in respect of some of the shareholders were found to be unreliable or false and did not carry any evidentiary value – Thus, AO was justified in invoking s. 68 in the block assessment – Foundation for invoking s. 68 being the evidence found as a result of search, enquiry and requisition of material by the AO, additions in respective block assessment were justified.
Cas Card Finance Ltd. v/s. Asstt. CIT
Jaisati Syntex (P) Ltd. v/s. Asstt. CIT
Mahi trading Co. v/s. Asstt. CIT

Rathore Finance Co. v/s. Asstt. CIT
Rathore Investment v/s. Asstt. CIT
(2003)78 TTJ 55 = 84 ITD 1 =174 Taxation 79 = 16 DTR 480(Ahd)(TM)

29. Block assessment in search cases – Computation of undisclosed income – Provisions of section 145 could not be applied while assessing undisclosed income under Chapter XIV-B – Relying on statement of director of assessee company given during course of search, Assessing Officer estimated profit on sales disclosed in assessee's books of account for assessment year 1995-96 and treated same as undisclosed income of block assessment period – When due date of filing return under section 139(1) for assessment year 1995-96 had not expired prior to date of search, revenue having failed to prove that books were being maintained for purpose other than provisions of Act, income on basis of books regularly maintained in normal course of business could not be treated as undisclosed income .

Babros Machinery Mfrs. (P) Ltd v/s. CIT
(2003) 84 ITD 91 = 78 TTJ 857 = (2004)269 ITR 36 (Ahd)(TM)

30. Block assessment in search cases - Assessment of undisclosed income – Block period 1-4-1985 to 8-9-1995 - Assessee firm derived income from manufacture and sale of machinery - Pursuant to search and seizure operation carried out at residential as well as business premises of partners, 'H', a technical executive, admitted that assessee firm had earned unaccounted income to extent of Rs. 9.77 lakhs due to under invoicing of sale price of machinery and parts which were sold to four parties – Assessing Officer on basis of statement of one of other parties to whom other machines were sold, estimated under invoicing at an average of 20 per cent in respect of entire sales of machinery and parts, and additions of Rs. 55,63,025 in respect of stenter machinery and Rs. 13,36,982 in respect of machinery other than stenter machinery, were also made - There was any categorical assertion or acceptance by either 'H' or 'A' that there was an organized and systematic activity of receiving 'on money' on each and every transactions which resulted in addition of Rs. 9.77 lakhs, in instant case, it was not their stand that 'on money' was received in each and every transaction and both additions other than that of Rs. 9.77 lakhs could not be upheld.

B & Brothers Engg. Works v/s. Dy. CIT
(2003) 84 ITD 243 = 78 TTJ 876= (2004) 178 Taxation 41 (Ahd)(TM)

XXXXIV . <u>TAX DEDUCTION AT SOURCE</u>

1. Co-operative society engaged in manufacture of sugar – Purchase of sugarcane from member farmers – Member farmers bound by bye-laws to deliver cane at factory gate - Payment to farmers routed through samiti formed by farmers to facilitate harvesting cutting and transporting – Payments by Samiti out of advance from assessee society on behalf of farmers to transporters and mukadams for transport of cane to factory – Samiti is separate entity – Assessee society not liable to deduct tax at source on payments by Samiti to cane growers – Income tax Act, 1961, ss. 194C, 201 – Gujarat Co-operative Societies Act, 1961.

   Kamrej Vibhag Sakhkari Khand Udyog Mandli Ltd. v/s. ITO
   SayanVibhag Sahakari Khand Udyog Mandli Ltd.v/s. ITO
   (2008) 304 ITR 1 = 116 TTJ 425(Ahd)

2. Short deduction – Interest – Employees of assessee claiming deduction under section 80GGA – Deduction under section 80GGA not to be considered for determining tax deductible at source – Assessing Officer finding that receipts brought by employees not genuine and levying interest on employer – Proper – Order against employer to be modified if assessments against employees completed and final and employees paid tax - Income tax Act, 1961, ss. 80GGA, 201 – CBDT Circular No. 6 of 2004 dated 6-12-2005.

   Drawing and Disbursing Officer v/s. Asst. CIT
   (2008) 306 ITR 293(Ahd)

3. TDS – s. 194J -Payment to SBI for MICR charges – Assessee bank availing services of MICR Centre run by SBI for identifying, reading and clearing cheques through special kind of machines involving human skill, payment made by assessee to SBI constitutes fee for technical services within the meaning of s. 9(1)(vii), Expln. 2, hence liable to deduction of tax at source under s. 194J.

   Canara Bank v/s. ITO
   (2008) 116 TTJ 689= 305 ITR 189 = 9 DTR 251(Ahd)

4. Winnings from lottery or crossword puzzles – Whether winning of prize by draw of lots or by chance was not included in ambit of work “lottery” prior to amendment of section 2(24)(ix) brought with effect from 1-4-2002 – Where assessee’s case fell in period prior to amendment, assessee was not liable to TDS on distribution of prize under lucky draw scheme .

   Jhaveri Industries v/s. ITO
   (2005) 3 SOT 93 (Ahd)

5. Failure to deduct tax on payment of usance interest – High Court only interprets the law and does not make it and therefore jurisdictional High Court having held that the payment of usance interest is chargeable to tax, assessee was liable to deduct tax from the date of payment of such interest as per law so pronounced – Interest under s. 201(1A) is chargeable from the date of payment of usance interest for not deducting tax from such payment.
Adani Export Ltd. v/s. Asstt. CIT
Adani Wilmar Ltd. v/s. Asstt. CIT
(2007)111 TTJ 556 = 109 ITD 101 = 295 ITR 241 (Ahd)ITM)

6. Contractors / sub-contractors, payments to –Assessment year 2003-04 – Assessee was a co-operative society which carried out business of manufacturing sugar from crushing sugarcane purchased from its member-farmers – After scrutiny of TDS return as filed by assessee during survey proceedings, Assessing Officer noticed that society was not deducting tax from payments made to mukadams and transporters for cutting and transporting sugarcane from sugarcane fields of member farmers to factory – Assessee explained that a samiti was formed by farmers for managing affairs of harvesting and transportation of sugarcane and said samiti itself made payment to mukadams and transporters and hence, assessee was not responsible for deducting tax at source on payments made to them – Assessing Officer after examining all details concluded that third party, i.e samiti, did not have its own existence and it did not have any fund of its own and all money required for purpose of making payments to mukadams and transporters were made available by assessee only and, therefore, he considered samiti as branch of assessee and found assessee liable for deducting tax at source on payments made to mukadams and transporters and, accordingly, raised demand under section 201 and 201 (1A) – On appeal , Commissioner (Appeals) confirmed said order – On second appeal, assessee contended that in case revenue was considering 'samiti' to be assessee's benami unit/organization/outfit, onus was on revenue to establish same - Since total funds advanced to samiti belonged to assessee and had flown from assessee to samiti for carrying out jobs which assessee was under obligation to perform and surplus remaining with samiti was being enjoyed by assessee and further rules and regulations for sugarcane plantation and resolution showed that it was unilateral in nature and farmers were not party to them, it could be said that samiti was nothing but a branch office of assessee or assessee's own organization/outfit and, accordingly, onus cast on revenue to establish that samiti was nothing but a benami outfit of assessee stood discharged – In view of said fact assessee was liable to deduct tax at source on payments made to mukadams and transporters and that not being done, Assessing Officer rightly raised demand under section 201 and 201(1A) .
Shree Chalthan Vibhag Khand Udhyog Sahkari Mandli Ltd. v/s. ITO
(2006)156 Taxman 33(Ahd)

7. Assessee engaged in setting up of an oil refinery – Entire work of refinery entrusted to Essar Projects Ltd. as per contract signed on 7-11-1994 - On 25-3-1997 three separate contracts signed : (1) for supply of Indian sourced equipment/material, (2) labour earn erection & (3) for construction of refinery – On all these, original contract dated 9-9-1997 under section 197(1) for deduction of tax @ 1% for payments made to EPL & claiming it was applicable from 1-4-1997 & also no tax was deductible at source in regard to agreement for supply of material - Revenue holdings on facts, it was a composite contract in regard to all the three contracts & contract for supply of material was a works contract & payment for same was liable for TDS under section 194C – Tax deduction certificate under section 197(1) also applicable from 10-9-1997 & not from 1-4-1997 – Revenue creating demand for the payments made during 1-4-1997 to 9-9-1997 – Held on facts Revenue correct & assessee's appeal dismissed.

Essar Oil Ltd. v/s. ITO (TDS)
(2005)185 Taxation 31 (Rajkot)

8. Payment for supply of pre-printed packing materials - Assessee made payments towards supply of printed packing materials viz., tubes, cartons, corrugated boxes, etc. on the basis of purchase order – It was a contract for sale and not a works contract – Same was outside the purview of s. 194C – In any case, Explanation to s. 191 is effective from 1st June, 2003, and therefore, tax cannot be recovered from the assessee in respect of period prior to June, 2003 – Since assessee was not liable to deduct tax from the said payments, it is not liable to pay interest under s. 201(1A) for failure to deduct tax.

Balsara Home Products Ltd., v/s. ITO
(2005) 94 TTJ 970=(2006) 191 Taxation 4

9. Consequence of failure to deduct or pay - Assessees took short-term loan from FFSL in 1992 which was secured and pledged on certain shares – As per terms of loan, more than 20 per cent of loan amount was repaid within 60 days – In meantime, FFSL was declared to be a notified party under Special Courts Act - Special Court accepted assessee's ownership of shares and held that they could get back said shares on repayment of balance loan along with interest till date of repayment – Based on decision of Special Court, assesses made provision for interest payable from year to year but no tax was deducted at source thereon - Assessing Officer imposed penalty on assessees under section 201, read with section 221 for non deduction of tax at source and non payment of same – Admittedly, Special Court by its order dated 9-9-1996 in case of FFSL held that now no bank etc. could pay to income tax department tax deducted at source and directed assessees to deposit tax deducted in a separate account under intimation to custodian and income tax department – Till 9-9-1996, assessees were not justified in not deducting and paying tax deducted at source undersection 194A and , hence they had to be treated as assessee in default and penalties for years

1995-96 and 1996-97 were justified – However, for assessment years 1997-98 to 1999-2000 assessee though guilty of non deduction, could not be held to be guilty for non payment of tax as liability was only to deduct tax and payment could not be made to credit of Central Government as it was required to be deposited in a separate account in view of specific order of Special Court - Therefore, penalty for those years was to be cancelled.

Rakshak Chemicals (P) Ltd. v/s. ITO
(2005) 97 ITD 135 = 98 TTJ 357

(a) TAX DEDUCTION AT SOURCE - s. 194C

1. Agreement for operation and maintenance of power project – Payments made by appellant company to Gujarat Electricity Board for entire operation and maintenance of power plant under a comprehensive contract could not be treated as payment of fees for professional services as contemplated in s. 194J – Such payment would come within the limb of exclusionary part, viz "consideration for like project" excluded in the definition of "fees for technical services" given in Expln. 2 to s. 9(1)(vii) – Such a contract was covered under s. 194C – Deduction of tax at source at 2 percent as per s. 194C was justified – Demand for short-payment was not proper also for the reason that the Board had suffered heavy losses and was not liable to pay any tax for the year under consideration – Demand under s. 201)1) quashed.

   Gujarat State Electricity Corpn. Ltd. v/s. ITO
   (2004) 82 TTJ 456(Ahd)

2. Rent – Assessment years 1998-99 and 1999-2000 – Whether payment made for use of cold storage can be subjected to deduction under section 194-I – Held, no.

   Ganesh Alu Bhandar v/s. ITO
   (2003) 87 ITD 588 = 81 TTJ 756(Rajkot)

(b) INTEREST ON TDS

1. Assessee company paid interest to a lender and deducted tax at source – Assessee had not deposited TDS in Government account till penalty order under section 272A(2)(g) was passed against it – Lender (payee) filed its return of income and paid due tax – Assessee was only liable to pay interest under section 201(1A) from date of deduction of TDS to date of completion of assessment of payee or up to date of actual payment of TDS whichever was earlier.

   Labh Construction & Ind. Ltd., ITO v/s.
   (2006) 8 SOT 475 (Rajkot)

2. Provision for interest vis-à-vis direction of Special Court - Assessee had made provision for interest payable to FFSL and claimed deduction thereof – It amounted to credit of income by way of interest to the payee's account and thus the assessee incurred liability to deduct tax and pay the same to the credit of the Central Government – Tax which was deducted at source was diverted at source and did not accrue to FFSL and consequently no debt accrued to it which could be said to be subject matter of distribution by the Special Court under s. 11 of Special court (Trial of Offences Relating to Transactions in Securities) Act, 1992 – Further, Special Court directed all the concerned persons not to pay the TDS to the IT Department but to deposit the same in a separate account under intimation to the custodian and the IT Department vide its order dt. 9th Sept, 1996 – Thus, assessee was under obligation to deduct tax and pay the same to the credit of the Central Government for the prior period and have to be treated as assessee in default for not complying with the provisions of s. 194A – However, levy of penalties equivalent to the amount of arrears of tax is not justified on the facts of the case – Penalty of Rs. 1 lakh each for asst. yrs. 1995-96 and 1996-97 sustained – For the years 1997-98 to 1999-2000, though the assessee committed default in not deducting tax, it cannot be held guilty for non payment of tax as payment was not to be made to the credit of Central Government in view of specific direction of the Special Court, and consequently there was no default within the meaning of s. 201.
Esthetic Finvest (P) Ltd. v/s. ITO,
Ethnic Holdings (P) Ltd. v/s. ITO
Shatatataraka Holdings (P)Ltd. v/s. ITO
Shivpada Holding (P) Ltd. v/s. ITO
Sovereign Holdings (P) Ltd. v/s. ITO
Rakshak Chemicals (P) Ltd. v/s. ITO
(2005)98 TTJ 357 = 97 ITD 135 (Ahd)

XXXXV. TRUSTS

(a) ASSESSMENTS OF TRUST – PROTECTIVE ASSESSMENTS

1. Settlement of assessment of main trusts under KVSS – Main trusts having settled the dispute under KVSS and paid the tax under the Scheme in respect of assessments completed in their hands on substantive basis, the corresponding protective assessments made in the hands of beneficiary trusts did not subsist and the demands raised in those protective assessments were no longer valid – AO was justified in allowing refund along with interest to the assessee trusts -

2. Income of a trust, assessed on substantive basis and liability finally settled under Kar Vivad Samadhan Scheme, 1998, could not be again assessed in hands of corresponding beneficiaries who had been assessed on a protective basis – Therefore, amount paid by beneficiary trusts along with return, subject to protective assessment, would become refundable to them.
Punitaben Karsanbhai Patel Oral Specific Deferred Family Trust & Ors. V/s. ITO
(2006) 103 ITD 175 = 104 TTJ 773 (Ahd)(SB)

3. Trust – Direct assessment on beneficiary - Section 166 - Direct assessment or recovery not barred – Ex-ruler, father of assessee, created two UK trusts and three USA trusts in year relevant to assessment year 1964-65 – Settlement Commission, on petition filed by assessee (son of settlor) for taxability of income or assets of aforesaid trusts for assessment years 1970-71 to 1982-83, held that USA trusts were discretionary trusts and fell within mischief of section 63(a)(ii) and since entire income from these trusts had been received by assessee after death of his father, it was liable to be assessed in his hands – As regards UK trusts, Settlement Commission held that these were specific trusts and entire income from these trusts was received by settlor during his lifetime and, on his death, by assessee and, that on that basis also entire income was liable to be included in assessee's total income after settlor's death – On appeal Supreme Court upheld order of Settlement Commission with regard to USA settlements and also took note of reasoning and finding of UK settlements–On basis of above judgment income of UK trusts for assessment year 1987-88 were assessed in hands of assessee – Assessee contended that decisions of Settlement Commission and Supreme Court in preceding years were not binding for assessment years under consideration as facts were different and that distinguishing feature of instant appeals was that assessee had not included income from UK trusts in his returns of income for assessment years 1984-85 to 1989-90 whereas in case before Settlement Commission, such income had been included by settlor as well as by assessee himself in returns filed before department – Assessee further contended that UK trusts like USA trusts, were also discretionary trusts and not specific trusts and he had not received any income in UK or in India and that so long as trustees decided not to exercise discretion to distribute income, no income arose to any of beneficiaries – UK settlements gave power of appointment of discretion exercisers to Maharaja, however, even after lap of about 38 years, no such appointment had been made - As per UK settlements, in case of any default in appointment of discretion exercisers, income of trusts would accrue to settlor and after his death to assessee– UK trusts were specific trusts–In view of decisions of Settlement Commission and Supreme Court in assessee's case for earlier assessment years, income from UK trusts was assessable in hands of assessee for assessment year under appeal –Even if UK trusts were to be treated as discretionary trusts as claimed by assessee still income from UK trusts had been rightly assessed in hands of assessee by

virtue of section 166 for assessment years under appeal – Assessee claimed that no distribution had been made by UK trustee – When called upon to substantiate claim, he expressed his helplessness to furnish any such evidence - Assessee had also indicated in Income Tax returns for assessment year 1987-88 break-up of income in respect of each of three US trusts subject to Supreme Court's decision – Since facts and circumstances of instant case for assessment years 1984-85 to 1989-90 with regard to US trusts, were substantially similar to those of earlier assessment years, there was no reason whatsoever to take a contrary view which was not in conformity with conclusion of Supreme Court and Settlement Commission for earlier assessment years – Therefore income from USA trusts was includible in hands of assessee for assessment year 1987-88..

Jyotindrasinhji of Gondal v/s. Asstt. CIT
(2003) 85 ITD 125 = 80 TTJ 1006 (Ahd)

XXXXVI. <u>UNEXPLAINED EXPENDITURE</u>

1. Assessment year 1997-98 – Assessee, engaged in business of manufacture and sale of ceramic tiles, filed return for assessment year in question along with trading account in which assessee had shown gross profit at Rs. 4,93,114 – Assesssing Officer noticed that assessee had shown closing stock at Rs. 7,10,590 against against aggregate of opening stock and of cost incurred during year Rs. 7,01,194 i.e, in excess of Rs. 9,396 – Assessing Officer inferring that assessee had suppressed cost of production/purchases, made addition – Whether since total of assessee's suppressed production cost and resultant gross profit worked out to Rs. 4,73,610 which was lower than its disclosed gross profit of Rs. 4,93,114, assessee's account though liable for rejection as not representing its correct trading result for relevant period, did not warrant any addition on account of suppressed cost of production – Held, yes-

Ambica Tiles v/s. ITO, Ward-3, Nadiad
(2007)159 Taxman 39(Ahd)

XXXXVII. <u>UNEXPLAINED INVESTMENTS</u>

1. Assessment years 1992-93 and 1993-94 – Assessing Officer made addition of Rs. 75,000 for alleged unexplained investment made by assessee in flat – Whether since it was evident from assessee's bank statement that during relevant period there was no withdrawal of Rs. 75,000 and various evidences produced by assessee proved that flat in question was registered with Municipal Corporation in names of other persons, addition was liable to be deleted – Held yes.

Maheshbhai B. Parekh v/s. ITO
(2007)160 Taxman 85(Ahd)(SMC)

2. On 28.10.1989 assessee purchasing plot No. 339 from one Smt. Paniben Fakirbhai for Rs. 1,95,000/- - The plot could not be registered in assessee's name in view of Land Ceiling Act & he returned the plot & got back money – AO's Inspector made enquiries from lady's (seller) son who told that there were three houses on plot & its value was 4,75,000 – AO making addition of Rs. 2,80,000 (4,75,000 – 1,95,000) under section 69/69A although in cross examination the seller's son admitted his mistake that he referred to plot no. 338 & not 339 – CIT(A) setting aside assessment directing AO to re-examine the case & other witness – In reassessment AO repeating the addition without examining the witness on the plea that inspite of service of summons he did not appear – Although he was existing assessee – CIT(A) deleting the addition – In revenue's appeal held that the AO had sufficient powers of imposing presence of the witness – On facts & circumstances & statement of witness to the documents for plot no. 339 CIT(A)'s order upheld & appeal dismissed. Income tax Act, 1961 – Sections 69, & 69A.

Shri Maneklal Bhagwandas Reshamwala, ACIT v/s.
(2007) 198 Taxation 4 (Ahd)

3. Assessment years 1991-92 and 1992-93 – During previous year relevant to assessment years 1991-92 and 1992-93, assessee builder had started construction of a residential building and filed return of income declaring cost of construction - Assessing Officer having found that assessee had shown consumption of building material in process of construction, asked assessee to produce stock register wherein quantitative details regarding purchase, consumption and closing stock of materials had been recorded – Assessee, however, failed to produce any such register - Assessing Officer found it difficult to work out actual consumptions of respective materials and vale of work-in-progress shown in books of account vis-a-viscost of construction debited in books of account with reference to different purchasers and observed, inter alia, that in absence of inspection record of architect, extent of construction carried out at site and technical details of beams, columns, etc. could not be verified, in absence of which, extent of material consumed in foundation could not be verified – During course of scrutiny assessment, assessee stated that during previous year, it carried out only construction work of skeleton of building hence, it was not possible for him to state as to what proportion of total built-up area was constructed – Accordingly, Assessing Officer concluded that accounts of assessee did not reflect true and fair view of cost of construction recorded in books of account and profitability and rejected books under section 145 – Thereafter, Assessing Officer made a reference to Departmental Valuation Officer (DVO) on 3-7-1992 as on date when construction was completed – DVO valued cost of construction in toto and apportioned expenses over two years relevant to assessment years in question – On that basis, Assessing Officer made additions under sections 69 and 69C for assessment years 1991-92 and 1992-93, respectively – Whether in view of amended provisions of section

142A and assessee's failure to maintain and furnish quantitative details of major building material actually used in building construction vis-à-vis records in books of account, there was no infirmity in action of Assessing Officer for making reference to DVO for determining quantum of unexplained investment involved in cost of construction – Held, yes – Whether since scrutiny assessment for assessment year 1991-92 was already under consideration and building was duly completed by 31-3-1992, Assessing Officer was justified in making reference to DVO even when return for assessment year 1992-93 was not filed in which major construction cost was incurred – Held, yes – Whether, however, expenditures not found to be recorded in books of account on account of such building construction, but were actually found to be incurred and an addition for which was made by Assessing Officer under section 69C, were to be allowed as deduction while computing profit on sale of such building - Held, yes – Whether since no major defects were found for rejection of accounts outrightly and for adoption of DVO's valuation , in toto, orders of lower authorities were to be modified and Assessing Officer was to be directed to sustain addition to extent of 15 per cent of cost of construction shown by assessee in its books of account – Held, yes.

Nalanda Housing Development Ltd., Asstt. CIT v/s.
(2007) 16 SOT 50 (Rajkot)

4. Pursuant to survey under section 133A, which disclosed excess stock as against book stock at assessee's business premises, assessee after reducing value of stocks, admittedly belonging to its two sister concerns, admitted balance difference as income from unexplained investment and declared same in its return – Assessing Officer, however, in course of assessment proceedings, having found wide variation between book stock and stock statements submitted to bank for availing of credit facilities inferred excess investment as assessee's unexplained investment, and made addition after working out deemed income with reference to peak value of stock, allowing credit for book stock as also stock surrendered on survey operation – Whether a heavy burden lay on assessee to prove that books of account alone gave a correct picture and its own statement given to Bank was motivated, and courtesy survey operations, such burden in proving that its books did not reflect true picture and statements submitted to Bank were, in fact, inflated, was amply discharged and, therefore, it would be incorrect as well as inconsistent with facts on record to ignore same – Held, yes – Whether in view of fact that stock of assessee or any business entity for that matter, could not be held at constant levels throughout year, assessee's plea that its entire excess stock stood discovered and surrendered at time of survey could not be accepted – Held, yes - Whether in view of above addition made by Assessing Officer to extent of Rs. 26,21,865 subject to reduction made to extent of stock of its two sister concerns as at 30-6-2000 was to be upheld, and since addition was being

sustained on basis of peak value of stock addition on basis of stock found on survey was to be simultaneously deleted –

Harish Hosiery Mart , ITO v/s
(2006) 6 SOT 175(Ahd)

5. Section 69B, read with section 68, of the Income Tax Act, 1961 –Assessment year 1992-93 – During year under consideration assessee company had issued, subscribed and paid up capital of Rs. 99 lakhs and contribution was received through private placement in promoters' quota from 373 applicants – Out of 50 persons enquired, only 30 people confirmed their investment and since assessee failed to prove whereabouts of remaining investors, Assessing Officer added amount in respect of which assessee could not furnish confirmation – Before Commissioner (Appeals), assessee submitted that in case of disputed allottees, shares were allotted through brokers and they were genuine - Commissioner (Appeals) deleted additions on ground that entire share application money being share capital, could not be treated as assessee's income from undisclosed sources - In view of facts that only details of addresses and amount invested by all allottees was given to Assessing Officer, that some application forms carried no signature that it was a case of private placement by promoters which had to be brought in from their friends and relatives and question of their investment through broker did not seem to be probable that assessee may produce broker, if any through whom investment was made that field enquiries conducted at assessee's back had to be made available to assessee for comments, and that submission of forms by itself did not establish identity of allottees and investments made by them unless documents were proved by confirmation of parties and sources of investment by them, it was a fit case for further verification and Assessing Officer would readjudicate issue on basis of material brought and sufficiency thereof in light of provisions of section 68.

Modern Cement Industries Ltd., Asst. CIT v/s.
(2004) 90 ITD 170 = (2005) 95 TTJ 341 (Ahd)(TM)

6. Alleged payment of "on money" for purchase of shops – It is undisputed that the vendor JJ did charge "on money" from the customers while selling the shops as it has made a disclosure to that effect during the course of search proceedings and also subsequently while filing the return - However, AO has not brought any material on record to indicate that the assessees who belong to one family which is having 50 per cent share in JJ have in fact paid any "on money" to JJ in respect of the shops purchased by them – Addition made on account of alleged unexplained investments in the purchase of shops was not therefore sustainable.

Shankerlal Nebhumal (HUF) & Ors.. v/s. Dy. CIT
(2003) 80 TTJ 69

7. Assessees were five HUFs and seven companies belonging to 'V' group - Group companies were under direct control and management of 'V' brothers, kartas of respective HUFs, who had total control over Board of Management as well as general body meeting of share holders - Pursuant to search operations under section 132, substantial agricultural income was shown by assessee – HUF by way of cash deposits in bank accounts was admittedly not genuine - Such deposits made on day to day basis were later withdrawn for investments in seven companies as well as for advancing loans to family members - Assessing Officer treated inflation of agricultural income as undisclosed income and made additions on substantive basis in block assessments of HUFs while making protective additions in respect of seven companies - Since no evidence whatsoever with regard to agricultural activities carried out by assessee as well as details of sale bill of agricultural products and particulars of agricultural expenses had been produced, estimate of agricultural income of entire 'V' family during block period made by Assessing Officer was to be upheld along with addition on account of inflation - Cash deposits in banks of HUFs to extent of inflation of agricultural income having remained unexplained were liable to be treated as undisclosed income under section 69 – Income had to be assessed substantively in hands of HUFs in light of realities and actualities of situation whereunder assessee – HUFs had received income by utilizing instrumentality of corporate entity as mere puppets - When corporate veil was lifted very applicability of section 88 of Indian Trusts Act, 1882 became redundant and gains arising to directors under such circumstances would not be governed by said provision - For above reasons, substantive additions made in case of HUFs were to be sustained whereas corresponding protective additions in cases of group companies were to be deleted .

Vachhani (V.D) (HUF) v/s. Asstt. CIT
(2003) 86 ITD 652

8. Assessing Officer having found discrepancies in stocks as hypothecated to bank for availing overdraft facilities and stock as reflected in inventory filed during assessment, made two additions one representing excess stock of certain goods and other representing less stock shown - Commissioner (Appeals), on appeal, deleted additions - Since no evidence whatsoever had been furnished by assessee before tax authorities below in support of its contention that quantities of various stocks as reflected in hypothecation statement were inflated proposition of law is unexceptionable that heavy onus lay upon assessee to prove that said stock hypothecation statement duly signed and authenticated by partners of assessee firm was false – Addition in respect of excess stock found with assessee had to be made in accordance with accounting year of assessee and not financial year – Commissioner (Appeals) was not justified in deleting addition in view of fact that appellant very much needed money and credit facilities from bank –

Vikas Agency, Asstt. CIT v/s.
(2003) 85 ITD 536 = 80 TTJ 999

9. Where Assessing Officer accepted explanation for substantial part of cash during search, balance, which was too small would not warrant any disbelief or suspicion – Therefore, it would be unjustified to treat balance of a meagre amount as unexplained money

   During search 95 tolas of gold ornaments belonging to three married ladies of assessee's family were seized – In view of CBDT's instruction that ornaments of 50 tolas per married lady should not be seized, gold ornaments seized in instant case should be treated as duly explained and no addition was required to be made.

   Unexplained money – Assessment year 1988-89 – Commissioner (Appeals) found map of undivided India on silver bars seized – He accepted assessee's contention that said bars were acquired by inheritance and deleted addition – Whether Commissioner (Appeals) was justified in deleting addition – Held, yes.

   Pundrikrai C. Hathi, ITO v/s.
   (2002) 125 Taxman 81

10. Pursuant to execution of agreement for sale of property, assessee received consideration through cheques – Said agreement was subsequently cancelled and assessee repaid consideration by account payee cheque – Both execution and cancellation of agreement had been registered – Whether merely because purchaser could not be produced, genuineness of transaction could not be doubted and no addition could be made to assessees income – Held, yes.

    Paresh H. Adalja, Asstt. CIT v/s.
    (2002) 125 Taxman 317

11. Where Assessing Officer relied only on Valuation Officer's report which was based on estimate and difference between such estimation and value shown by assessee was less than 4 per cent of total cost, addition could not be made under section 69.

    Paresh H. Adalja, Asstt. CIT v/s.
    (2002) 125 Taxman 317

XXXXVIII. UNEXPLAINED MONEYS

Whether where assessee proved by evidence and material, identity of donors, genuineness of transaction and capacity of donors, gifts received by assessee cannot be added in total income of assessee - Held, yes.

Prakash H. Shroff, Dy. CIT v/s.
(2005) 142 Taxman 54 = 184 Taxation 63

XXXXIX. VALUATION

(a) CLOSING STOCK

Change in method of valuation – Change in order to comply with mandatory requirement – New method followed in subsequent years – Change valid – Consequential loss deductible - Income Tax Act, 1961.

Matrix Logistics Ltd. v/s. ITO
(2008) 298 ITR 163(Ahd)

XXXXX. WEALTH TAX ACT

1. Asset - Stock exchange card – Property - The stock exchange card is a property and consequently an asset under s. 2(e) – It can be sold by nomination for a price, though hedged by the Rules of stock exchange.

Gajjar V.G & Ors. V/s. Dy. CWT & Ors.
(2005) 93 TTJ 70= 1 ITAT 702 = 93 ITD 624

(a) PENALTY UNDER S. 18(1)(C) – CONCEALMENT

Bona fide claim of exemption under s. 5(1A) – Department having allowed exemption to the assessee for the last 20 years, same constituted a valid basis for the bona fide belief of the assessee that the property in question was exempt – Further, there existed a dispute as to whether the property belongs to the assessee as an individual or to his HUF and the same was subject matter of a civil suit and arbitration award – Assessee had supplied the primary details and claimed the exemption under bona fide belief – Penalty was not therefore sustainable.

Shah K.M (Dr.) v/s. Dy. CWT
(2006) 99 TTJ 767(Ahd)

(b) RECTIFICATION OF MISTAKE

Assessment years 1993-94 to 1995-96 – Whether if basis and relevant material are on record to claim/support exemption /deduction it is duty of Assessing Officer to guide assessee to enable him to claim such deduction / exemption and if it is not so granted assessee would be entitled to get it by way of rectification – Held, yes - Whether department cannot shut door of assessee to prove that claim of assessee is in accordance with law by merely rejecting claim of assessee on ground that there is no mistake apparent from record - Held, yes – Assessee engaged in activity of property development under name of his proprietary concern had included value / cost of relevant property under head 'Immovable property' in wealthy tax returns and paid tax accordingly. Subsequently he found that said property being stock in trade was not an asset within meaning of section of section 2(ea) and thus there was mistake in computation of net wealth – Accordingly, assessee filed an application for rectification under section 35 – However, WTO rejected said application – Whether since balance sheet of proprietary concern, under which relevant property had been held by assessee revealed that property was held as business property material / facts were there in wealth tax

return itself to support claim of assessee – Held, yes – Whether since department had not discharged its duty to assessee taxpayer in matter f claiming and securing relief matter was to be restored to file of Assessing Officer to examine claim of assessee on merits – Held, yes.

Kiritkumar Hiralal Doriwala v/s. WTO
(2008)26 SOT 27(Ahd)(URO)

(c) VALUATION

1. Merely because Assessing Officer has held that rent was collusive, it can not be said that it is not practicable to apply provisions of rule 3 & Schedule III – Where property in question was on rent and rental income was accepted by Assessing Officer in income tax assessment, valuation adopted by Assessing Officer and confirmed by Commissioner (Appeals) by invoking rule 8(a) would not in accordance with law – Since property had been accepted as a let out property in income tax proceedings, and since rent shown had been accepted as actual rent Assessing Officer shall adopt either actual rent or rent assessed by local authority, whichever was higher, as gross maintainable rent and determine value of property accordingly.

   Shri Pratap Villas Palace Trust, WTO v/s.
   (2004) 141 Taxman 10(Rajkot)

2. Residential house property – Benefit of third proviso to r.3 of Sch. III in the year of purchase – Expression "exclusively used by the assessee for his own residence throughout the period of twelve months" used in third proviso means that the house should be exclusively used for own residence at all times in the relevant previous year and should not be used for any other purpose whatsoever at any time during that year – Condition of occupying house for his own residence throughout the period of 12 months immediately preceding the valuation date can be fulfilled only in subsequent years following the initial year in which the property was purchased – Assessee purchased a residential property on 29th July, 1988, for Rs. 13 lakhs – CWT(A) erred in upholding the value of said self occupied property at Rs. 13 lakhs as against the value of Rs. 87,178 worked out as per third proviso to r. 3 of Sch. III on the ground that the assessee did not occupy the said new property for full period of 12 months in the previous year under consideration i.e the year of purchase – AO directed to adopt the value of such property as declared by the assessee.

   Bharatbhai Vithalbhai Patel (HUF) v/s WTO
   (2002) 77 TTJ 142

(d) VALUATION OFFICER – WHETHER REFERENCE COMPETENT

Discovery, production of evidence, etc. – Reference to Valuation Officer – No proceedings were pending before him when the AO made the reference to the DVO – AO was not competent to refer the matter to the DVO.

Umiya Co-operative Housing Society Ltd., ITO v/s.
(2005)94 TTJ 392

(e) VALUATION – IMMOVABLE PROPERTY

Assessee selling residential house on 29-7-1988 & purchasing another on the said date for Rs. 13 lakhs – Assessee declaring its value at Rs. 87,178 which was accepted in all subsequent years – In this year however A.O taking value at Rs. 13 lakhs as house purchased on 29-7-1988 was not self occupied for 12 months – Held expression "exclusively used by the assessee for his own residence throughout 12 months used in 3rd proviso to rule 3 schedule III means that house should be exclusively used for own residence at all times in the relevant previous year - Interpretation of rule 3 read with provisos has to be purposive - On facts & circumstances held the house purchased on 29-7-1988 & used for self residence throughout the previous year covered by third proviso to rule 3, Schedule III – Value to be taken at Rs. 87178 and appeal allowed.

Bharatbhai Vithalbhai Patel (Shri) (HUF) V/s. WTO
(2003) 175 Taxation 116 (Ahd)

XXXXXI. WORDS AND PHRASES

1. 'Tax' as occurring in section 244(1)(b) of the Income Tax Act, 1961.
   Alembic Glass Industries Ltd., Asstt. CIT v/s.
   (2008) 111 ITD 320 = 21 SOT 19(Ahd)

2. "Scientific research:, as occurring under section 43(4)(i) of the Income Tax Act, 1961 – Systematic investigation for increasing sum of knowledge required.
   Nutan Tobacco (P) Ltd. , Dy. CIT v/s.
   (2003) 85 ITD 34 = 75 TTJ 329(Ahd)

Xxxxxxxxxx

ADDENDA

ITAT DIGEST

UP TO MARCH, 2009

P – 1

ACCOUNTS - VALUATION OF CLOSING STOCK

Cost or net realizable value whichever is less - Assessee having produced no evidence including the subsequent invoice to verify the value actually realised to justify the net realizable value put by it on the closing stock of polished diamonds. AO was justified in valuing the closing stock at average cost by adopting per carat rate.

D. Subhashchandra & Co. v/s. Asstt. CIT

(2008) 15 DTR 125(Ahd)

P – 5

APPEAL TO TRIBUNAL - POWERS - ADDITIONAL GROUND

Admissibility - When the additional ground of appeal raised by the assessee before the Tribunal does arise from the facts which are on record and the omission to raise such ground is not wilful but inadvertnt the assessee should be permitted to raise the additional ground.

Pan Drugs Ltd. V/s. Dy. CIT

(2008) 14 DTR 593(Ahd)

P – 12

ASSESSMENT NOTICE IN WRONG STATUS

Validity - Notice under s. 143(2) in wrong status - Notice under s. 143(2) having been served in the status of individual without citing PAN assessment on the basis of said notice on assessee HUF was without jurisdiction.

Karamshibhai M. Thumar (HUF) v/s. ITO

(2008) 12 DTR 534(Ahd)

P – 19

BUSINESS EXPENDITURE - CAPITAL OR REVENUE

Deferred expenditure - Corporate advertisement and expenses on sale promotion - Revenue expenditure - Revenue expenditure - Expenditure for obtaining fixed deposits - Revenue expenditure - Expenditure on computer software depends on period of benefit - Matter remanded - Income Tax Act, 1961.

Ashima Syntex Ltd., CIT (Asset) v/s.

(2009)310 ITR 1 =117 ITD 1 = 18 DTR 91(Ahd)

P – 33

BUSINESS EXPENDITURE - SALES PROMOTION

Allowability - Sales promotion exemption - In the facts and circumstances of the case, claim of sales promotion expenses allowed by CIT(A) on appreciation of evidence produced by assessee and in compliance of r 46A called for no interference.

Ramdev Food Products Ltd., Asstt. CIT v/s.

(2008) 13 DTR 103(Ahd)

P – 34

BUSINESS EXPENDITURE - SPECIAL RESERVE CREATED BY FINANCIAL CORPN.

Income by way of interest on inter-corporate deposits and discounting charges - Discounting charges from the business of discounting the investments and interest on bank and inter-corporate deposits are not eligible for deduction under s. 36(1)(viii).

Gruh Finance Ltd., Asstt. CIT v/s.

(2009) 121 TTJ 527 = 20 DTR 32(Ahd)

P – 36

BUSINESS EXPENDITURE - YEAR OF ALLOWABILITY

Prepaid lease rent relating to next financial year - Assessee is not entitled to deduction of prepaid lease rent pertaining to the next financial year as no liability can be said to have been incurred merely on the basis of advance payment irrespective of the terms of the lease agreement requiring the assessee to make payment of lease rent in the month of March preceding the financial year in which the asset is to be used - Lease rent being the period cost is to be allowed only in the year to which such payment relates in view of the theory of matching concept.

FAG Bearings India Ltd., Asstt. CIT v/s.

(2008) 13 DTR 298(Ahd)

P - 40

CAPITAL GAINS - CHARGEABILITY - SURRENDER OF TENANCY RIGHTS

Order of the CIT(A) on the point of taxability of long term capital gain earned on surrender of tenancy rights is set aside and he is directed to decide the same afresh in accordance with law after considering the assessee's objection that the long term capital gain earned by it was not at all taxable as per the decision of the CIT(A) in the case of co-owner.

Vasudev Pranjivandas & Co. v/s. ITO

(2008) 10 DTR 628(Ahd)

P – 44

CAPITAL GAINS -TRANSFER-CONVERSION OF FIRM INTO CO.

Chargeability - Conversion of partnership firm into company under Part IX of the Companies Act after revaluation of assets and vesting of such assets into the company in terms of s. 575 of the Companies Act, 1956, does not constitute transfer under s. 2(47) so as to give rise to taxable capital gains under s. 45(1) or s. 45(4).

Baroda Refrigeration Industries v/s. Dy. CIT
(2008) 10 DTR 4(Ahd)

P – 71

DISALLOWANCE U/S. 40A(2)

Purchase from related concerns - No disallowance under s. 40A(2)(a) can be made by comparing the purchase price of goods with the rates at which the said goods stand valued as at the year end as the valid comparison would only be with reference to the market value of relevant goods as at the date of their respective purchases.

Jai Sati Syntex (P) Ltd., ITO v/s.
(2009) 121 TTJ 376(Ahd)

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DISALLOWANCE u/s. 40A(9)

Contribution towards PF and ESI - Payment of employer's contribution towards PF and ESI after due date but before filing return could not be disallowed under s. 43B.

State Bank of Saurashtra v/s. Addl. CIT
(2008) 3 DTR 487(Ahd)

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EXEMPTION U/S. 10B - PROFITS AND GAINS DERIVED FROM EXPORT BUSINESS

Foreign exchange gain - Gain on account of foreign exchange rate fluctuation qua export proceeds credited / deposited in EEFC account of assessee in foreign exchange is export realization, hence constitutes profits derived from export business eligible for exemption under s. 10B.

Banyan Chemicals Ltd., ITO v/s.
(2009) 20 DTR 410 = 310 ITR 384(Ahd)

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INCOME – ADDITIONS

On basis of operations of Narcotic Control Bureau at premises of assessee companies - Additions made by Assessing Officer on basis of statements by purchasers to Bureau on ground of bogus sale of controlled substance - Retraction of statements before court and also before Assessing Officer - Acquittal by court on scrutiny of evidence - No credence to be given to initial statements given under duress - Additions deleted - Income Tax Act, 1961, s. 133A.

Magatic Intermediates P. Ltd. v/s. ITO

&

Novacid (P) Ltd. v/s. ITO

(2009) 310 ITR 237 = 121 TTJ 193 = 17 DTR 481(Ahd)

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INCOME - CAPITAL OR REVENUE RECEIPT

(1) Forfeiture of share application money - Share application money forfeited by assessee in terms of prospectus and credited to capital reserve account is capital receipt not chargeable to tax.

Brijlami Leasing & Finance Ltd., Dy. CIT v/s

(2008) 12 DTR 150(Ahd)

(2) Company – Forfeiture of share capital – Assessee engaged in financing and leasing business - Issue of shares not business of assessee – Receipt not in normal course of business – Amount credited to capital reserve account – Capital receipt – Income Tax Act, 1961.

Jaya Publications, CIT (Deputy) v/s

(2009) 309 ITR 211(Ahd)

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INCOME FROM UNDISCLOSED SOURCES - ADDITION U/S. 69

(1) Discrepancy in stock - Assessee having submitted complete details to its bank of the opening stock, purchases, sales and closing stock for each month and which are in precise figures its claim of the same being mere paper figures given only for availing of higher credit therefrom cannot be accepted - However, as additions were not worked out on objective basis, reworking directed by issuing appropriate guidelines.

Jai Sati Syntex (P) Ltd., ITO v/s.

(2009) 121 TTJ 376(Ahd)

(2) Addition on the basis of statement under ss. 131 and 132(4) - In the absence of corroborative evidence to prove that the assessee has earned undisclosed income, addition cannot be made only on the basis of the statement of the assessee recorded under s. 131 by the Addl. Director of IT apparently by adopting threatening tactics and which has been validly retracted by the assessee.
Ramanbhai B. Patel, Asstt. CIT v/s.
(2008) 12 DTR 471(Ahd)

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INCOME FROM HOUSE PROPERTY - ANNUAL VALUE Expenditure for maintenance of facilities like electricity, lift etc. - Rent being only a surrogate measure of annual value has to be reduced by the expenses not connected with property but incurred by landlord for enjoyment of property by tenants, such as salary and bonus to sweeper, pumpman and liftman and electricity charges for pump motor and common passage.
J.B Patel & Co (Co-owners) v/s. Dy. CIT
(2009) 120 TTJ 1127(Ahd)

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ADVANCE TAX - INTEREST u/s. 234C
Interest - Company - Income computed under section 115JA - Liable to advance tax - Default in payment of advance tax - Interest leviable under section 234C - Income Tax Act, 1961, ss. 115JA, 234C.
Ashima Syntex Ltd., CIT (Asset) v/s.
(2009)310 ITR 1 =117 ITD 1 = 18 DTR 91(Ahd)

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LOSS - RETURN - DELAY
Rectification of defective return vis-à-vis absence of AO's reply for extension of time - Assessee having made a written request seeking extension of time for rectifying the defects in its return by two months and the Department having failed to intimate the refusal of such extension to the assessee, and the latter having removed the defects by furnishing audited accounts within the period for which extension was sought the original return as well as the revised return filed by the assessee were valid and therefore carry forward of loss could not be denied.
PIC (Gujarat) Ltd., ITO v/s.
(2008) 13 DTR 474(Ahd)

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LOSS - SET OF

Loss on sale of units vis-à-vis dividend stripping transactions - Loss arising out of genuine transactions in purchase of mutual fund units as cum dividend and sale thereof as ex-dividend could not be disallowed and could be set off against other income.

Chandresh Zaverilal Mandalla, .
Bharatkumar Pranjivandas Soni,
Kishorkumar Pranjivandas Mandalia,
Zaverilal V. Mandalla, Dy. CIT v/s.
(2008) 4 DTR 636(Ahd)

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TRADING LOSS

Allowability - Similar claim of business loss on account of judgment /decree of Special Court having been allowed by the Tribunal in assessee's own cases for asst. yrs. 1996-97 and 1997-98, same also to be allowed in assessment year in question.

State Bank of Saurashtra v/s. Addl. CIT
(2008) 3 DTR 487(Ahd)

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PENALTY U/S. 272(1)(c) - APPLICABILITY OF EXPLN.5

Assessment under s. 153A - Assessment of assessee having already been completed before the date of search on a return filed under s. 139 said assessment did not abate and return filed in response to notice under s. 153 A could not be treated as one filed under s. 139 so as to extend benefit of Expln. 5 to s. 271(1)(C) to the assessee.

- Conditions precedent - Assessee having no time left for filing return under s. 139(1) in respect of undisclosed income declared in statement under s. 132(4) immunity from penalty under s. 271(1)(c) by application of cl. (2) of Expln. 5 thereto will not be available.

Rupesh Bholidas Patel, Asstt. CIT v/s.
(2008) 16 DTR 369(Ahd)

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PENALTY U/S. 271(1)(c)- CONCEALMENT

Bona fide explanation for non inclusion of income receipt - Assessee's explanation that under a bona fide belief he has set off the interest received against the interest paid of similar amounts seemed to be bona fide not attracting penalty under s. 271(1)(c).

Harsh Bhupendra Patel v/s. ITO
(2008) 5 DTR 421(Ahd)

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REASSESSMENT - FULL AND TRUE DISCLOSURE

Notice after expiry of four years - Assessee having disclosed all material facts for its assessment and the AO having categorically admitted in the notice under s. 148 that he has wrongly allowed deduction on account of provision for price variation in raw material for export in the original assessment under s. 143(3), reopening of assessment under s. 147 after expiry of four years from the end of the relevant assessment year is bad in law.

Pan Drugs Ltd. V/s. Dy. CIT

(2008) 14 DTR 593 = 121 TTJ 81(Ahd)

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REASSESSMENT - LIMITATION u/s. 149

Finding or direction in appeal - Proceedings for reopening the assessments had become barred by limitation even before the Court passed the order granting interest to the assessee on 29th Sept. 1998, and therefore notices issued for reopening of assessments for assessing the interest income for asst. yrs. 1991-92 to 1993-94 were time barred and not saved by s. 150(1) - However, since the time limit of four years in respect of later years had not expired on the date of the order of the Court the notices for those years cannot be held to be barred by limitation.

Late Gopalbhai Ishwarbhai Patel v/s. ITO

(2008) 2 DTR 130(Ahd)

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ASSESSMENT - GENERAL - SCOPE ON REMAND

Specific directions - In the fresh assessment the AO was not justified in assessing the total on money at Rs. 2.25 crores on the basis of the statements of two directors instead of proceeding in accordance with the directions of the CIT(A) to assess on money at Rs. 1.4 crores.

Paritosh Developers (P) Ltd. V/s. ITO

(2008) 7 DTR 580 (Ahd)

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REASSESSMENT - NOTICE u/s. 148

Validity of notice in the name of deceased assessee - AO having issued notice in the name of deceased assessee without knowing that the assessee has died, and the legal heir having accepted the same notice cannot be held to be invalid.

Late Gopalbhai Ishwarbhai Patel v/s. ITO

(2008) 2 DTR 130(Ahd)

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REASSESSMENT - REASON TO BELIEVE

(1) Information relating to bogus gifts - Statement of M recorded during search to the effect that he was engaged in giving hawala entries nowhere mentioning the name of assessee or her donors and donors having confirmed gifts even after search of M. reopening of assessment of assessee on the basis of M/s record seeking addition of gifts under s. 68 was invalid.
Vijayakumar Kakaram Bansal, Asstt. CIT v/s. &
Kusumlata Bansal (Smt) v/s. Dy. CIT
(2008) 10 DTR 82(Ahd)

(2) Absence of nexus between material and belief - Reopening on the ground that the statement of the taxpayer recorded on 19th Sept. 2005 revealed that the tax payer has received Rs. 4,32,331 by way of gift from his sister for which no details have been filed, being based on statement of facts, could not constitute reason to believe for a valid reopening of assessment.
Shah Unmesh Indravadan v/s. ITO
(2008) 6 DTR 318(Ahd)

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REFUND - INTEREST u/s. 244A

Applicability of proviso to s. 244A(1)(a) - Interest under s. 234C payable by assessee cannot be treated as 'tax' for purposes of determining if amount of refund is less than 10 per cent of the tax determined so as to disentitle assessee for grant of interest under proviso to s. 244A(1)(a).
Paritosh Developers (P) Ltd. V/s. AO
(2008) 14 DTR 36(Ahd)

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REVISION - ERRONEOUS AND PREJUDICIAL ORDER

AO taking a possible view - AO having issued notice under s. 148 in respect of deduction under s. 80-IA relating to restrictions imposed by s. 80-IA(9) and after considering the reply of the assessee and judicial pronouncements in favour of assessee dropped the reassessment proceedings the view taken by AO was one of the possible views hence not amenable to revisional jurisdiction of CIT - Merely because the AO did not pass a detailed order and dropped the proceedings on the file itself would not make the order of AO erroneous.
Siddh International v/s. CIT
(2009) 19 DTR 281(Ahd)

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SEARCH & SEIZURE - BLOCK ASSESSMENT

Computation of undisclosed income - In the absence of any material on record to suggest that the assessee has received higher amounts than the sale price shown in the books of accounts, addition cannot be made in the proceedings under s. 158BC r/w s. 158BD.

Rushil Industries Ltd. v/s. Dy. CIT

(2008) 9 DTR 601(Ahd)

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SEARCH & SEIZURE – PENALTY – IMMUNITY

Special procedure for assessment – Penalty – Concealment of income – Immunity from penalty – Assessee filing return under section 139(1) in 1998 and later in response to notice under section 153A(a) in 2003 – No time available for filing of return under section 139(1) as it was filed already in 1998 no immunity – Matter remitted to adjudicate penalty on merits – Income Tax Act, 1961, ss. 139, 153A, Expl. 5 to 271(1)(c) not attracted.

Rupesh Bholidas Patel, CIT (Asst). v/s.

(2009) 309 ITR 217(Ahd)

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TDS - CREDIT OF TDS

(1) Tax deducted at source but not paid by deductor to the account of Central Government - Where tax is deductible at source and has actually been deducted deductee is not liable to pay tax to that extent and direct demand from deductee is barred by s. 205 nothwithstanding that tax so deducted has not been paid to the credit of the Central Government - Consequently AO has to give credit of tax so deducted to the deductee.

Ahluwallia & Associates v/s. ITO

(2009) 19 DTR 462(Ahd)

(2) Credit for TDS - Person eligible - Assessee a transport agent engaged in arranging trucks from truck operators/ owners, is entitled to credit of entire amount to TDS which was deducted by the consignees in respect of full freight charges as the TDS certificates were issued by them in the name of the assessee - Allowance of credit for such TDS to the assessee was not an apparent mistake which could be rectified by the Revenue in proceedings under s. 154.

Shushiladevi Anilkumar Singhal v/s. ITO

(2008) 10 DTR 558(Ahd)

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