SUPREME COURT & HIGH COURT DIGEST,

FROM

AUGUST, 2001 TO FEBRUARY, 2009

1 A.O.P

(1) Trust having family trusts for minor as beneficiaries - Settlor creating trust for benefit of her twelve grand children but naming forty-five trusts as beneficiaries instead of twelve grand children – Tribunal finding trust created for carrying on business and not a genuine trust – No infirmity – No finding that twelve grand children of settlor opted to join together for purpose of conducting business – Tribunal holding assessment to be in status of association of persons at maximum marginal rate – Incorrect - Tribunal to determine as to who is correct person and in whose hands income to be taxed - Matter remanded – Income-tax Act, 1961, ss. 164, 167A.
Ganesh Chhababhai Family Trust v/s. CIT
(2008) 296 ITR 129(Guj)

(2) Applicability of s. 167A – Admittedly, on the date of formation of the association, the shares of members were determinate or known – Tribunal has found that no new member was admitted after the AOP was formed and throughout the existence of the AOP, the same members continued – Tribunal rightly held that the clauses contained in the trust deed enabling the trustees to enroll more members did not convert the specific determinate shares of the existing members into indeterminate shares – Hence, provisions of s. 167A were not applicable – Mere possibility of admission of new members to the association in future did not change the determinate shares of existing members.
Mani Enterprices , CIT v/s.
(2004) 187 CTR 215 =267 ITR 157=180 Taxation 84 =
136 Taxman 507 (Guj)

(3) Discretionary Trust – Status of individual and not as AOP – Special deduction under section 80L for individuals – Available - Trust – Interest paid to beneficiaries – Deductible.
Harjivandas Juthabhai Zaveri & Anr. Dy. CIT
(2002) 258 ITR 785 (Guj)

(4) Income from house property – Property in the hands of co-owners - Rent from lease separately assessable in hands of individual co-owners and not as an association of persons.
Shivsagar Estate, CIT v/s.
(2002) 257 ITR 59 = 177 CTR 107 = 124 TAXMAN 606(SC)

2. ACCOUNTING - METHOD OF

1. Bona fide change from mercantile to cash system – In the absence of finding of the AO that he is not in a position to deduce the income of the assessee on the basis of the changed method of accounting (from mercantile to cash system) employed by the assessee or any evidence to show that the new method of accounting has not been consistently followed by the assessee, the finding of the Tribunal that the change was not a bona fide change cannot be accepted and therefore the change in the method of accounting could not be rejected.
Echke Ltd. v/s. CIT
(2009) 221 CTR 642 = (2008) 173 Taxman 79 = 207 Taxation 57= 5 DTR 1(Guj)

2. Accounting Standards, AS – 22 – Companies Act. 1956, s. 211(2).
Bilhari Investment P. Ltd., CIT v/s.
(2008) 299 ITR 1= 215 CTR 201 =168 Taxman 95 = 204 Taxation 191 (SC)

3. Change by Dept. - Method adopted by assessee – Accepted by Department over several years – Subsequent decision of Department to change method – Department has to record a finding that assessee's method distorts profits – Income Tax Act, 1961, s. 145.
Bilhari Investment P. Ltd., CIT v/s.
(2008)299 ITR 1 = 215 CTR 201 = 168 Taxman 95 = 204 Taxation 191 = 3 DTR 329(SC)

4. Assessment years 1984-85 and 1985-86 – Merely because by virtue of change in method of accounting employed by assessee its taxable income stands reduced in a particular year it can by no stretch of imagination be treated as a factor that said action was undertaken with an intent to deliberately reduce tax burden – Whether merely because change in method of accounting is undertaken after having filed estimate of income during accounting period in question on basis of earlier method of accounting it can be learned as a half hearted act or can be considered to be a relevant factor for considering bona fides of action – Held, no – Term change itself indicates that it is a change from an existing state of affairs and hence fact that assessee had been following mercantile system of accounting since its inception can have no relevance while determining whether change in method of accounting is bona fide or not - Where Assessing Officer had not recorded any finding that due to change in method of accounting from mercantile to cash, he was not in a position to property deduce income of year under consideration and in fact assessment order itself showed what was amount which could be treated as commission receipt on accrual basis and what was amount actually received by assessee as commission on basis of cash system of accounting finding of Tribunal that change in method of accounting was such that change disabled Assessing Officer to property deduce income was a finding without any basis and Tribunal was not justified in not accepting change in method of accounting.
Echke Ltd. v/s. CIT
(2008) 173 Taxman 79 = 207 Taxation 57 = 5 DTR 1 =
(2009) 221 CTR 642(Guj)

5. Change of - Assessment year 1986-87 – In accounting year 1984-85, assessee company had given loan to a company 'A' on interest – Since its inception, it was following mercantile system of accounting and accordingly even though there was no specific stipulation with regard to periodicity of payment of interest on loan given to 'A' interest on it used to be accounted for an accrual basis – However subsequently assessee started facing certain difficulties in following mercantile system of accounting in respect of interest income, viz compulsion of payment of tax without receipt of interest not allowing TDS while calculating interest under section 215, commencement of penalty proceedings under section 273 not

giving credit while raising demand of tax deductible etc. – Assessee therefore decided to change its method of accounting for interest income and interest payment from mercantile system to cash system of accounting – Change in method of accounting adopted by assessee was genuine and bona fide.

Coromandal Investment (P) Ltd., Asstt. CIT v/s.
(2008)174 Taxman 194 = 12 DTR 152(Guj)

6. Closing stock – Valuation – Established principle – To value at cost or market price whichever was lower – No export during financial year – Adopting London Metallic Exchange Price at less than cost price – Not permissible.

Hindustan Zinc Ltd. ,CIT v/s.
(2007)288 ITR 391= 161 Taxman 162=210 CTR 282 = 201 Taxation 335 (SC)

7. Estimation of GP rate – IT authorities having rejected assessee's books of account citing several defects and low GP rate, there is no reason to take a different view – AO having estimated the GP of the assessee on the basis of a comparable case, and the CIT(A) and the Tribunal having successively reduced the same, there is no arbitrariness on the part of IT authorities.

Kachwala Gems v/s. Jt. CIT
(2006) 206 CTR 585(SC)

8. Contract receipts – Percentage completion method – By the time the contract was completed, the total receipts had borne charge of tax and assessee had derived no advantage as such – Apart from that, Department is bound to accept the assessee's choice of method regularly employed, except where it is found that true income, profits and gains cannot be arrived at by the method employed by the assessee – Also, a regular method adopted by an assessee cannot be rejected merely because it gives benefit to the assessee in certain years – Assessee's method of accounting is in consonance with standard accounting practice and has been constantly followed by the assessee and Revenue has accepted the same in subsequent years – Thus, the impugned amount which has been added in working out the profit is not chargeable to tax in the year under consideration.

Advance Construction Co. (P) Ltd., CIT v/s.
(2005) 193 CTR 127 = 143 Taxman 61 =275 ITR 30 = 186 Taxation 55(Guj)

9. Valuation of stock – Assessee firm was engaged in export of woolen blankets – Assessee valuing its closing stock of finished goods at market rate filed its return – Assessing Officer found that said method resulted in abnormal gross profit ratio and invoking section 145 adopted method of valuing closing stock at cost or market price, whichever was lower, and made addition – By showing market value of closing stock, assessee had earned potential profit out of itself inasmuch as stock in trade remained with assessee at closing of accounting year and putting stock at market value did not and could not bring in any real profit which was necessary for taxing income under Act and, therefore, rejecting of accounts maintained by assessee for valuation of closing stock by Assessing Officer was not in accordance with law..
Sanjeev Woolen Mills v/s. CIT
(2005) 149 Taxman 431 =199 CTR 509 = 279 ITR 434 (SC)

10. Method adopted by Assessing Officer has to be consistent with principles of accountancy – Income Tax Act, 1961, s. 145.
Indo Nippon Chemical Co. Ltd., CIT v/s.
(2003)261 ITR 275=182 CTR 291= 30 Taxman 179 =
176 Taxation 1(SC)

11. Valuation of closing stock - Cost or market value, whichever is less - Assessee having valued the stock of transformers at market price on the basis of the quotation of a third party after the original customer refused to accept delivery thereof, said market price, in the absence of any basis or evidence, could not be substituted by the price which was subsequently realized by the assessee.
Voltamp Transformers Ltd. v/s. CIT
(2008) 217 CTR 254 = 207 Taxation 155 = 7 DTR 84(Guj)

12. Accounting Standards - Vires of Accounting Standard 22 – Sec. 642 of the Companies Act, 1956, gives power to the Central Government to make rules in addition to its power to alter the Schedules and thereof, the rule framed under s. 642 adopting AS 22 is not ultra vires – AS 22 which requires the companies to make provision for deferred tax arising out of timing difference is meant to give effect to the concept of true and fair account contemplated by s. 211(1) and supplements the requirements of measurements and recognition and therefore, it is not inconsistent with the provisions of the Companies Act, including Sch. VI.

J.K Industries Ltd. & Anr v/s. Union of India & Ors.
(2007) 213 CTR 301 = 165 Taxman 323 = (2008) 297 ITR 176 (SC)

3. <u>ACCRUAL – TIME OF</u>

(1) Entire interest on debentures taxed in subsequent year – Tribunal justified in deleting the said interest income from the total income of the year under reference.

Sabarmati Investment (P) Ltd., CIT v/s.
(2004) 188 CTR 570(Guj)

(2) Interest on deferred sale consideration – As per revised agreement interest was chargeable on accrual basis w.e.f 1st July, 1979, instead of 1st July, 1978 – Tribunal erred in deleting the amount of interest on accrual basis for asst. yrs. 1981-82 and 1982-83 merely by relying on its order in the case of the assessee for earlier years.

Sarabhai Chemicals Pvt. Ltd., CIT v/s.
(2002) 176 CTR 43= 122 Taxman 734 = 170 Taxation 674=
258 ITR 747(Guj)

(3) Accrual - Cash incentive for exports - Mercantile system of accounting - Right to receive incentive accrues when claim filed.

Punjab Bone Mills , CIT v/s.
(2001) 251 ITR 780 = 170 CTR 558(SC)

(4) Disputed claim for subsidy - Assessee's claim under fodder subsidy scheme not accepted by Government - Although a decree was passed by the Civil Court for the amount of subsidy assessee did not receive the payment of subsidy and the matter was pending in appeal - Income had not accrued to the assessee - Mere fact that the assessee has credited the amount in its books is not decisive - Said amount not assessable in the assessment year in question.
Bavla Gopalak Vividh Karyakari Sahakari Mandli Ltd., CIT v/s.
(2001) 171 CTR 602(GUJ)

4. ACTUAL COST

(1) Amount of subsidy is not to be deducted from the cost of assets for the purpose of calculation of depreciation -
Amol Dicalite Ltd. , CIT v/s.
(2006)205 R 521= 286 ITR 648 = 197 Taxation 330 (Guj)

(2) For Investment allowance & depreciation – Actual cost – Government subsidy not deductible in computing actual cost.
Swastik Sanitary Works Ltd. , CIT v/s.
(2006) 286 ITR 544= 205 CTR 517 (Guj)

(3) Interest payable on purchase of machinery – Assessee purchased machinery under a scheme of payment by instalments financed by ICICI – Interest included in instalments required to be paid was for the period after the asset in question was first put to use – Hence, Expln. 8 to s. 43(1) is clearly attracted and the interest paid or payable in connection with the acquisition of the machinery cannot be included in the actual cost of such asset either for the purpose of depreciation or investment allowance.
Anang Polyfil (P) Ltd. , CIT v/s.
(2004) 187 CTR 576 = 136 Taxman 692= 267 ITR 266 = 180 Taxation 217 (Guj)

(4) Depreciation/Investment allowance – Subsidy for establishing industry in backward area – Should not be deducted from the cost of plant and machinery for allowing depreciation and investment allowance.

Cadila Chemicals (P) Ltd., CIT v/s.
(2003)179 CTR 37 = 259 ITR 692 (Guj)

(5) Depreciation - Assets used by another person – Power of Assessing Officer to determine actual cost - Effect of explanation 3 to section 43(1) – Assessing Officer empowered to determine actual cost only if transfer of assets was for claiming depreciation on enhanced cost - Company taking over assets of firm on its dissolution – Depreciation claimed on enhanced value of only three items – Valuation of such assets by registered valuer prior to dissolution of firm – No evidence that transfer was made with a view to claiming depreciation on enhanced cost - Assessee entitled to depreciation on such enhanced cost.

Ashwin Vanaspati Industries v/s. CIT
(2002)255 ITR 26 = 174 CTR 90 = 125 Taxman 59 (Guj)

(6) Plant and machinery received under loan-cum grant scheme from Indian Dairy Corporation – Machinery in question was imported by the Indian Dairy Corporation and supplied to the assessee under loan cum grant assistance scheme – Such subsidy does not partake of the incidents which attract the conditions for their deductibility from actual cost - Therefore, depreciation was admissible on full value of machinery without deducting 30 per cent of the value of plant and machinery.

Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002)177 CTR 333 = 258 ITR 780 (Guj)

5. <u>AQUISITION (PURCHASE) OF IMMOVABLE PROPERTY</u>

(1) Agreement of sale – Form No. 37-I filed - Appropriate Authority passing order for purchase by government - High Court – Writ petition challenging order on ground provisions invalid – Interim stay of purchase order vacated by High Court – Department paying entire sale consideration and putting the property to auction sale – Highest bidder paying amount and put into possession – Original purchaser thereafter questioning auction sale on ground that grounds for purchase by government not disclosed – Not permissible.

Krishna Swamy S. Pd. V/s. Union of India
(2006)281 ITR 305 = 151 Taxman 286 = 201 CTR 183 = 193 Taxation 194 (SC)

(2) S. 269UD - Purchase of immovable property by Central Government - Writ petition challenging purchase order - Single judge of High Court setting aside order and directing owner to return amount paid by appropriate authority with interest at 15 per cent per annum – Division Bench directing that no interest be paid – Appeal to Supreme Court - Supreme Court directing payment of interest at 7½ per cent.

R.Shanmuganathan, Appropriate Authority, Income Tax Department v/s.
(2006) 287 ITR 558(SC)

(3) Payment or deposit of consideration - Withdrawal of challenge to order of purchase – In view of dispute as to apportionment of the amount of consideration between the vendors and the purchasers, the consideration of Rs. 240 lakhs was deposited with the Appropriate Authority as required under sub-s (2) of s. 269UG – Amount kept in fixed deposit and same renewed periodically – Parties not interested any more in pressing their challenge to the order of purchase and subsequent consequential orders that if they are paid entire amount of consideration with interest thereon in the agreed ratio – In view of consensus between the vendors and the purchasers, all of whom are now agreeable to the order of purchase being operated, acted upon and implemented, the order of purchase stands and it is open to the IT authorities to act upon the same without any objection from any of the parties – Further, the Appropriate Authority is directed to encash the fixed deposit and pay over the amount with interest accrued

thereon till the date of encashment to each of the vendors and the purchasers in the agreed proportion – Also vendors are to hand over vacant possession of the property to the Department.

Shivram Vishwanath Deshmukh v/s. Sexena P. CIT & Ors.

&

Rasiklal M. Dhariwal & Anr. V/s. Sexena P. CIT & Ors.

&

Ravindra Kuries (P) Ltd. v/s. ITO & Ors.

(2005)193 CTR 370 = 185 Taxation 317 = 277 ITR 363 (Guj)

(4) Payment or deposit of consideration - Failure to pay interest despite directions of the Court - Purchase price was deposited in fixed deposit during the course of pendency of the petitions challenging the order of purchase – Subsequently, said order was acted upon the basis of consensus arrived at between the parties – Court had given specific directions to Appropriate Authority to encash the fixed deposit along with accrued interest and pay over the amounts to the respective parties in the specified proportion after deducting tax at source on the interest amount - Review applications against the said order of the Court stand rejected and the Court categorically directed the Department to pay the amounts along with interest accrued thereon by 15th Dec. 2004 – Payment of interest not made despite the aforesaid specific directions – Accordingly respondent is directed to pay over the amount of interest as per directions of the Court along with interest till the date of payment - Respondent having not complied with the directions issued by the Court, it is also directed to pay costs of Rs. 2,500 to the petitioners.

Shivram Vishwanath Deshmukh V/s. Appropriate Authority

(2005) 193 CTR 386 = 277 ITR 381 (Guj)

(5) Rights of auction purchaser – Vesting of property in Central Government – Order under s. 269UD(1) passed by the Appropriate Authority on 25th Nov. 1989 – Property vested in the Central Government on that date, free from all encumbrances - No injunction was operating on that date either against the original owner or the IT Department – Therefore, SBI, to whom the transferor was indebted, was not required to be heard at all in proceedings under Chapter XX-C – Again, once the auction was conducted as agreed by all the respondents before the DRT, the successful bidder was entitled to obtain execution of conveyance in his favour – In view of the directions of DRT to deposit the sale proceeds with the bank in interest bearing deposit, it cannot be contended that conveyance can be executed only on depositing the sale consideration in ZAO (CBDT) account - Directions issued to execute conveyance deed in favour of the petitioner.

Panorama Builders (P) Ltd. v/s. Union of India
(2005) 196 CTR 515 = 149 Taxman 634 (Guj)

(6) Payment or deposit of consideration - Interest on delayed payment – Merely because the petitioner transferor had not made any application for investment of the amount of consideration deposited with the Appropriate Authority, the Authority was not absolved from his duty to exercise his discretion under s. 269UG(4) to invest the amount so as to earn interest - Further, the fact that the petitioner had issued a receipt that amount was received in full and final settlement of the payment of apparent consideration, would not come in the way of claim for interest as the receipt did not indicate that the petitioner was giving up his claim for interest – Hence, petitioner is entitled to receive interest on the delayed payment of amount of apparent consideration - However, interest is not payable on the amounts paid by the Appropriate Authority to the intending transferee towards refund of earnest money and to SBI against the outstanding dues of the petitioner – Having regard to the rates of interest prevailing at the relevant time, respondents are directed to pay interest @ 6 per cent per annum – However, interest on interest is not payable.

Ratilal H. Nayak v/s. Union of India
(2005)194 CTR 151 =142 Taxman 55 =186 Taxation 267= 275 ITR 333 (Guj)

(7) Payment or deposit of consideration - Review petition vis-à-vis undertaking to pay interest on agreed consideration – Appropriate Authority itself had taken the stand that the parties would be paid the amount of consideration deposited in the fixed deposit along with interest thereon - Order under s. 269UD passed on consensus of the parties – Provisions of s. 269UG(4) do not prohibit the Appropriate Authority from paying over the interest on the amount of consideration - There was no illegality either on the part of Appropriate Authority in making the said submission or on the part of standing counsel – Thus, the argument of the Revenue that a concession made by a counsel which is not in consonance with the statutory provisions cannot bind the party is misconceived – In fact, the stand of the Appropriate Authority and of the standing counsel at the hearing was in consonance with the provisions of sub-s. (4) of s. 269UG – No case is made out for review of directions of the Court vis-à-vis payment of interest - Power of review can be exercised for correction of a mistake and not to substitute a view – Vendors having written several letters to the Department asking it to take over possession of the property, Department is not justified in refusing to pay interest on the ground that it did not have possession of the property in question during the pendency of the petitions.

Rasiklal M. Dhariwal & Ors. , Appropriate Authority v/s.
(2005)193 CTR 377 =185 Taxation 317= 144 Taxman 704= 277 ITR 370 (Guj)

(8) Acquisition of immovable property by Central Government Condition precedent – Public notice in Official Gazette – Service of notice on transferor, transferee and other concerned persons prior to notice in official gazette – Does not affect validity of acquisition – Gets jurisdiction from publication of notice in official gazette – Notice on transferor, transferee and other concerned persons – Requirement of natural justice – Not basis for jurisdiction.

Pearl Mech. Engg. And Foundry Works P. Ltd., CIT v/s.
(2004)267 ITR 1 =188 CTR 289 = 136 Taxman 586 =
181 Taxation 35 (SC)

(9) Validity – Limitation – Appropriate Authority filed the statement in Form No. 37-I as being defective – Assuming that the 'filing order' of the Appropriate Authority was illegal, the appellants could have challenged the same – Instead they voluntarily filed a fresh statement in Form No. 37-I and requested the Appropriate Authority to act on the same – It was the appellants' and the transferor's act of filing the fresh statement under s.269UC which gave rise to a fresh period of limitation – Therefore, it was open to the Appropriate Authority to act on the second statement and pass the purchase order within a period of two months from the receipt of that statement – The first order could not, in the circumstances, be said to be invalid on this ground – Besides, the appellants' challenge to first purchase order does not really survive after the disposal of the first writ petition.

Validity – Description of property – Agreement for transfer of 1/3rd undivided share of L in the property – Original order under s. 269UD set aside - By the time fresh order was passed the property was partitioned among the co-owners by an oral partition and the portion falling to the share of L became identifiable – There was nothing wrong in mentioning the identified property in the purchase order – Order under s. 269UD giving description of property by boundaries was valid.

Applicability of Chapter XX-C – Date of transfer – Appellants or their nominees who were purchasers of the property took possession of the demarcated portions of the premises pursuant to eight deeds of sale executed in April/May, 1989 and not prior thereto – It could not be contended that the transfer had taken place before Chapter XX-C came into operation in the State of Andhra Pradesh – Moreover, having given up the case before the High Court the appellants cannot be permitted to reopen the issue at this stage.

Fair market value – Interference in writ proceedings – Apart from comparable Sale instances, the Appropriate Authority considered the location of the property, its frontage and accessibility in coming to the conclusion that the consideration was understated – High Court has affirmed this valuation – There is no reason to disturb the finding of fact.

Payment of deposit of consideration - Contention not raised earlier – Contention that the Central Government had not deposited or tendered the amount of apparent consideration within the time prescribed under s. 269UF r/w s. 269UG(1) is an issue of fact raised for the first time before the Supreme Court and is liable to be rejected on this ground alone – Nevertheless, the deposit was made by the Central Government within one month from the first purchase order and admittedly received by the transferor without any protest - Contention not valid.

Hans Raj Agarwal & Anr. V/s. Chief CIT & Ors.
(2003)179 CTR 89 = 259 ITR 265 = 126 Taxman 603 =
174 Taxation 221(SC)

(10) Notice by appropriate authority – Reasons and materials considered for tentative conclusion should be disclosed -

Jagdish Electricians India P. Ltd., Appropriate Authority
of Income Tax v/s.
(2003) 264 ITR 468(SC)

(11) Appropriate Authority – Order for pre-emptive purchase – Failure of Central Government to tender amount of apparent consideration within time fixed by state – Order abrogated.

Garg (A.K)(Dr.) , Union of India v/s.
(2002) 256 ITR 660, 124 Taxman 315 = 171 Taxation 177 (SC)

(12) Assessee purchasing certain property and filing Form 37 – I for issue of no objection certificate – Appropriate Authority making order of pre-emptive purchase and asking the owner to give possession of the property – Writ petition filed in High Court – High Court granting interim stay order restraining the department to proceed – Revenue filing an appeal before Apex Court – Apex Court holding bids for the property may be called but confirmation of sale to be made by the Court – Highest bidder applying for confirmation of sale - Sale confirmed by the Apex Court – In view of the writ pending before the Hon'ble High Court, order of pre-emptive purchase quashed – On appeal, to Supreme Court by Department,it was held that it was not proper for the High Court to cancel the order of pre-emptive purchase – Order of the High Court set aside and sale confirmed.

Shatabadi Trading & Investment (P) Ltd. & Ors.,
Union of India & Ors. V/s.
(2002) 167 Taxation 354 (SC)

(13) Fair market value - Scope of interference under Art. 226 - Where several methods are available for finding out the value of the property and if one or the other method is adopted by the Department and that may be reasonable, it may not call for any interference - However, if there are loopholes or lacunae in the process of reasoning adopted by the Appropriate Authority in determination of fair market value of the property there is scope for interference - High Court quashed the order of the Appropriate Authority on the ground that the authority had compared the value of incomparable properties and arrived at the value of the property in question relying on baseless presumption that the tenants would vacate the property soon and also adopted different methods of valuation for different properties - No interference warranted by S.C.

Kailash Suneja & Anr. , Appropriate Authority & Anr. v/s.
(2001) 169 CTR 401 = 118 TAXMAN 295 = 251 ITR 1(SC)

(14) Fair market value - Relevant considerations - Basis for concluding that the salvage value of the building was 10 times more than that indicated in the show cause notice was not disclosed - Valuation reports obtained before the issue of show cause notice did not indicate any undervaluation - Instances of property relied upon by the parties was rejected on irrelevant consideration - Order of Appropriate Authority rightly quashed by High Court.

Chiranji Estate (P) Ltd. & Anr., Union of India v/s.
(2001) 169 CTR 406(SC)

(15) Fair market value - Relevant considerations - Approach of the High Court that where the property is tenanted and is being sold the Department cannot adopt the stand of invoking the provisions of Chapter XX-C may not be correct - Appropriate Authority allowed due deductions for tenancy while making comparison of subject property with other properties which were not tenanted-High Court was not correct in holding that the approach of the Appropriate Authority was illegal, irrational or arbitrary - Further, Department had given details of valuation report and other materials in the show cause notice itself - Non supply of valuation report itself was not ground to interfere with the order of Appropriate Authority - Besides, when the transferor allowed the property to be sold pursuant to the orders of the Court and the Supreme Court having allowed auction of the property, High Court could not have brushed aside the same - Order of Appropriate Authority

restored.
Shatabadi Trading & Investment (P) Ltd,& Ors., Union of India v/s.
(2001)169 CTR 408(SC)

(16) Agreement for sale of immovable property - Submission by parties of Form No. 37 - I for no objection certificate - Appropriate Authority - Notice to parties without giving sufficient opportunity of being heard - Instance relied on for holding apparent consideration to be very low - Document relating to not furnished - Principles of natural justice - Gross breach - Order for pre-emptive purchase set aside -
Sona Builders v/s. Union of India
(2001) 251 ITR 197 = 170 CTR 180= 167 Taxation 372(SC)

(17) Appropriate authority - Order of pre-emptive purchase - Should be a speaking order - Property under consideration compared with sale instance property on basis of FSI - No indication in order as to what that FSI was and how it was calculated - Order for pre-emptive purchase not valid.
Hindumal Balmukand Investment Co. P. Ltd. v/s Appropriate Authority.
(2001) 251 ITR 660 (SC)

(18) Fair market value - Comparable sale instance - Appropriate Authority had allegedly compared the immovable property in question with a sale instance which was not appropriate and did not consider the comparable sale instance cited by the appellants - Difference in time between the transaction in question and the said comparable sale instance was not so vast that the sale instance should have been altogether ignored - Order of Appropriate Authority set aside and restored to its file for reconsideration in the light of said sale instance.
Rakesh C. Rastogi & Anr. v/s. Appropriate Authority & Anr.
(2001)171 CTR 185(SC)

6. ADVANCE RULING

Double taxation avoidance agreement - Article providing for non-discrimination - Non resident company - Application for ruling on whether lesser rate of tax applicable to domestic companies should be available to it - Authority for advance rulings - Jurisdiction - Department raising objection - Authority seeing that objection was of some substance but ruling on merits against applicant - Supreme Court - Appeal by special leave by applicant - Ruling set aside -

Societe Generale v/s. CIT
(2001) 251 ITR 657(SC)

7. ADVANCE TAX

(1) Tax paid after the relevant financial year – Tax paid after the relevant financial year is not in the nature of advance tax as envisaged under the provisions of ss. 207 to 219 and therefore, assessee is not entitled to payment of interest under s. 214(1) on the refund of said tax.

Garden Silk Mills Ltd. v/s. Dy. CIT & Ors.
(2006) 204 CTR 441= 195 Taxation 618 (Guj)

(2) Refund pursuant to appellate order – Assessee was entitled to interest under s. 214 on refund arising on account of Tribunal's order on appeal.

Industrial Machinery Mfg. (P) Ltd. , CIT v/s.
(2006) 202 CTR 83 = 193 Taxation 435= 282 ITR 595 (Guj)

(3) Unanticipated addition to income pursuant to revisional proceedings – Once the addition to income is kept out of consideration, the advance tax paid by the assessee is not below the stipulated limit of 75 per cent of the total tax payable – Nothing has been brought on record to rebut the findings of the CIT(A) and the Tribunal that the assessee could not have anticipated the upward revision in income at the time when he filed the estimate of advance tax – Therefore, assessee cannot be held liable to pay interest under s. 215 – Tribunal justified in deleting the levy of interest.

Jayendra H. Kharawala, CIT v/s.
(2006)200 CTR 420 = 282 ITR 205=193 Taxation 127 Guj)

(4) Advance Tax - Interest payable by assessee u/s. 217 - Requirement to file estimate of Advance Tax – Only for purpose of ensuring that tax in advance is paid on stipulated dates – Intention of legislature – Returned income and assessed income of latest previous year and subsequent years nil – No tax paid by way of self assessment – No liability to pay advance tax – Requirement of filing statement does not arise - No interest under section 217 can be levied against assessee – **Gujarat Alkalies & Chemicals Ltd., CIT v/s. (2005)276 ITR 535 = 146 Taxman 278 = 197 CTR 495=189 Taxation 736 (Guj)**

(5) Addition to income on account of undervaluation of closing stock – It could not anticipate any addition of this nature and magnitude at the time of filing of estimate of advance tax – Therefore, it cannot be said that the assessee had committed any default – Levy of interest under s. 215 rightly deleted even though the additions made by AO stand confirmed by the Tribunal and advance tax paid by the assessee is less than 75 per cent of assessed tax. **Rainbow Industries (P) Ltd., CIT v/s. (2005) 196 CTR 180 = 277 ITR 507 = 148 Taxman 267 = 189 Taxation 397 (Guj)**

(6) Underestimation of income – CIT(A) found nothing on record to suggest that the default, if any, on the part of the assessee was deliberate and cancelled the levy of interest – Tribunal right in confirming the order of the CIT(A) – Further, amount involved being small i.e Rs. 11,940, it is not necessary to set aside the orders of the Tribunal and the CIT(A) merely for remanding the matter to the AO. **Synbiotics Ltd., CIT v/s. (2004) 187 CTR 472 = 266 ITR 674(Guj)**

(7) Interest payable by assessee in case of underestimate – Assessing Officer called upon assessee to explain under estimation of advance tax payable in first two instalments – Assessing Officer held that assessee had not produced any evidence to show that in earlier quarters its sales were less and sales had shot up in subsequent quarter and also held that assessee failed to prove with help of any figures regarding sales, purchase, etc., that estimate filed was based on any reasonable data – Since assessee had underestimated advance tax payable by it and had not given any satisfactory

explanation for same, Tribunal was right in holding that interest under section 216 was rightly charged.
Baroda Electric Meters Ltd. v/s. CIT
(2003)128 Taxman 72 = 184 CTR 134 (Guj)

(8) Advance Tax - Interest Payable by Govt. u/s. 214
Excess payment of Advance Tax – Interest payable by Government - Assessee entitled to interest under section 214 on excess advance tax payment.
Gujarat State Warehousing Corpn. , CIT v/s.
(2002) 256 ITR 596 = 172 CTR 546 = 166 Taxation 117 = 122 Taxman 373(Guj)

(9) Advance Tax – Interest Payable by Assessee u/s. 215 Shortfall in payment of Advance Tax - Levy of interest under section 215 is mandatory.
Sarabhai Chemicals Pvt. Ltd. , CIT v/s.
(2002) 257 ITR 355 = 173 CTR 193 = 121 Taxman 755(Guj)

(10) Discretion of ITO – Interest under s. 215 becomes payable by the assessee as a result of operation of law and it is not made dependent upon the discretion of the ITO - Discretion which is conferred upon the ITO is in respect of reduction or waiver of interest – While deciding as to whether the interest is payable by the assessee or not the ITO has only to consider whether the required conditions are satisfied or not.
Fabriquip (P) Ltd. , CIT v/s.
(2002)177 CTR 149 = 123 Taxman 820 = 171 Taxation 291(Guj)

(11) Advance Tax - Interest payable by assessee u/s. 216 - Interest payable by assessee in case of understimate - ITO had not given any reason for levying interest under section 216, nor had he recorded requisite finding as contemplated by clause (a) of section 216 – Tribunal held that charging of interest was not justified - Tribunal ought to have set aside order of ITO and remanded matter to ITO for passing a fresh order as contemplated by section 216.
Synbiotics Ltd. v/s. CIT
(2002) 122 Taxman 743 = 176 CTR 330 = 170 Taxation 650 (Guj)

8. ADDITIONAL TAX

(1) Additional Tax - on adjustment u/s. 143(1)(a) - Loss – Law applicable – Effect of amendment of section 143(1A) with effect from 1-4-1989 – Loss returned by assessee – Reduction of loss under section 143(1)(a) – Additional tax can be levied – Income Tax Act, 1961, s. 143 -
Gujarat State Co-op. Marketing Federation Ltd. CIT v/s.
(2007) 290 ITR 160 = 196 Taxation 189(Guj)

(2) Assessment - Intimation on basis of return - Assessee declaring loss in return - Loss reduced after adjustment - Additional income tax on difference - Can be imposed - Income Tax Act, 1961, s.143(1)(a), (1A) (as retrospectively amended in 1993).
Indo Gulf Fertilizers & Chemicals Corpn. Ltd.,Union of india.v/s.
& Modi Cement, Union of India v/s
(2001) 251 ITR 200(SC)

9. AGRICULTURAL INCOME

(1) Income from sale of tree leaves grown on trees and tea manufactured by assessee - Sale of green tea leaves – Income from sale of green tea leaves is purely income from the agricultural product and not income derived from the combined activities i.e growing of tea leaves and manufacturing of tea and, therefore it is assessable only under the Bengal Agrl. IT Act, 1944 and cannot be treated as incidental to business and taxed under the 1961, Act .
Belgachi Tea Co. Ltd. & Ors., Union of India & Anr. V/s.
(2008)216 CTR 337 = 304 ITR 1 = 170 Taxman 209 =
206 Taxation 547 = 7 DTR 100 (SC)

(2) Subsequent user for non- agricultural purposes by the buyer – If the land is recorded as agricultural land, it has to be treated as agricultural land irrespective of inflation or escalation in price thereof – Sale of agricultural land in the later year at a higher rate did not change the character of the land -
Shashiben, CWT v/s.
(2006)205 CTR 298(Guj)

(3) Agricultural Development Allowance – Weighted Deduction Quantification – Entire expenses incurred on dissemination of information or demonstration of modern techniques and methods of agricultural animal husbandry or dairy or poultry farming or advice on such technique or method is eligible for deduction under s. 35C.
Mehsana District Co-op. Milk Produceres Union Ltd. v/s. CIT
(2002)175 CTR 612 = 256 ITR 322 = 166 Taxation 339 = 121 Taxman 689(Guj)

(4) Assessee incurred expenditure on agricultural development and claimed weighted deduction of entire expenditure - Tribunal held that only 10 per cent of such expenditure was eligible for weighted deduction – Tribunal was wrong in holding that only 10 per cent of expenses incurred was eligible for weighted deduction and not entire expenditure under section 35C.
Kaira Dist Co-op Milk Producer Union Ltd., CIT v/s.
(2002) 124 Taxman 473(Guj)

(5) In view of decision in case of Kaira District Co-operative Milk Producers' Union Ltd. V/s. CIT (2002) 253 ITR 766/ 120 Taxman 910 (Guj), entire expenses incurred on dissemination of information or demonstration of modern techniques and methods of agricultural animal husbandry or dairy or poultry farming or advice on such techniques or method is eligible for deduction under section 35C.
Mehsana District Co-op. Milk Producers Union Ltd. , CIT v/s .
(2003) 130 Taxman 281

(6) Agricultural Land - Computation of capital gains – Cost of acquisition – Transfer of land converted from agricultural to non-agricultural - Circular stating that cost of acquisition would be value on date of such conversion - Circular in force in assessment year 1971-72 – Cost of acquisition to be calculated as per circular for assessment year 1971-72 .
Vyas B.B , CIT v/s.
(2003)261 ITR 73 =128 Taxman 166 =174 Taxation 556 = 183 CTR 108 (Guj)

10. APPEAL

(a) ADDITIONAL EVIDENCE

Additional evidence not produced before Assessing Officer despite grant of time – Concurrent finding by appellate authorities that sufficient opportunity was granted – Question of fact – Income tax Act, 1961, s. 256 – Income tax Rules, 1962, r. 46A – Income Tax (Appellate Tribunal) Rules, 1963 r. 29.

Fairdeal Filaments Ltd. v/s. CIT

(2008)302 ITR 173=205 Taxation 285 = 219 CTR 351= 3 DTR 170(Guj)

(b) FAILURE TO APPEAL IN THE CASE

(1) Decision against Revenue – Failure of Department to appeal - General rule – Departure from – Cases in which small revenue involved – Policy decision not to prefer appeals where revenue involved is below certain amount – Where effect of decision revenue neutral – Provide foundation for making departure from general rule – Where facts situation same in earlier years – Revenue cannot appeal, if no appeal filed for earlier year.

J.K Charitable Trust , CIT v/s.

(2008) 308 ITR 161 = 15 DTR 41(SC)

(2) Failure on the part of Department to appeal from a decision – Whether a bar to appeal in another case – Not where there is just cause, or it is in the public interest or where divergent views expressed by tribunals of High Courts.

Gangadharan (C.K) v/s. CIT

(2008) 304 ITR 61 = 11 RC 248 = 172 Taxman 87 =

218 CTR 1 = 206 Taxation 626 = 10 DTR 161 (SC)

(c) GENERAL

(1) Right of appeal – Nature of – Conditions imposed on right should not in effect take away right.

Bhavya Apparels P. Ltd. v/s. Union of India

(2007) 9 RC 531(SC)

(2) Prior Deposit - Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Appeal – Right to – Requirement of deposit of 75 per cent of amount claimed before entertaining an appeal (petition) under section 17 is an oppressive, onerous and arbitrary condition against all canons of

reasonableness and such a condition is invalid and it is liable to be struck down – .

Mardia Chemicals Ltd. v/s. Union of India
(2004) 136 Taxman 360 = 182 Taxation 1 (SC)

(3) Powers of appellate authority to annul the assessment - Power to remand – Provision of s. 128(2) of the Customs Act, 1962 vests the appellate authority with powers to pass such order as it deems fit confirming, modifying or annulling the decision appealed against - This implies that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority below for fresh decision.

Umesh Dhaimode, Union of India v/s.
(2002) 176 CTR 97, 124 Taxman 422 (SC)

(d). <u>LOW TAX EFFECT</u>

Appeal to Supreme Court – Leave to appeal - In view of low tax effect and CBDT Instructions regarding filing of appeal, etc. application filed by the Revenue seeking leave to appeal to the Supreme Court against the judgment of Gujarat High Court in CIT v/s. Kiranbhai H. Shelat & Anr. (1998) 147 CTR (Guj) is rejected.

Dineshchandra S. Shah , CIT v/s.
(2008) 219 CTR 247 = 13 DTR 98(Guj)

(e). <u>MONITARY LIMIT</u>

Assessment years 1995-96 and 1996-97 – Filing of an appeal is a statutory right but it can certainly be regulated by Board by issuance of orders, instructions or circulars this would not amount to taking away right of filing of appeal or that such right is prohibited by executive instructions – When Supreme Court or territorial High Court has declared law on a question it is not open to Tribunal to direct that circular issued by Board prescribing monetary limit for filing appeal should be given effect to and not decision of Supreme Court or territorial High Court - However such decision of Supreme Court or High Court must be brought to Tribunal's notice by department and an objection to that effect must be raised by department – If no such objections are raised by departmental representatives at time of hearing of appeal against applicability of that circular despite there being an exception and Tribunal dismisses appeal by applying that circular matter can not be remanded to Tribunal for deciding appeal on merits – However, in

matters where such objections are raised and Tribunal has dismissed appeal only on ground of low tax effect an indulgence is required to be shown by Court and for this limited purpose, department is permitted to move an appropriate application before Tribunal for deciding appeal on merits.

Concord Pharmaceuticals , CIT v/s.
(2008) 174 Taxman 529 = 220 CTR 117=208 Taxation 420 =
14 DTR 186 (Guj)

11. APPEAL TO CIT(A)

ADDITIONAL GROUND

(1) Claim for deduction of expenditure disallowed in another year – Assessee's claim for a genuine expenditure made bona fide in asst. yr. 1986-87 having been rejected, additional ground raised by assessee before CIT(A) claiming the said expenditure in asst. yr. 1985-86 - Appeal for which assessment year was pending before CIT(A) was rightly held to be admissible by the Tribunal.

Vadilal Industries Ltd., CIT v/s.
(2008) 217 CTR 318 = 6 DT 98(Guj)

(2) Maintainability – Advance tax – Interest – Order to give effect to appellate order–Refusal to grant interest – Interest payable under section 214 part of assessment and deemed to be tax– Appeal maintainable –Income Tax Act,1961, ss.214, 244.

Prabhudas Kishoredas Tobaco Products (P) Ltd. CIT v/s.
(2007) 295 ITR 61= (2008) 203 Taxation 256(Guj)

(3) Maintainability - Penal Interest - Order of AO refusing to grant interest under s. 214 whilegiving effect to Tribunal's order –Order under s.154 which has the effect of enhancing the assessment or reducing refund or an order refusing to allow a claim is appealable before CIT(A) – Further, order passed by AO giving effect to the appellate order has the same characteristic as the original order against which appeal is maintainable – Therefore, Tribunal was justified in holding that the order refusing to grant interest under s. 214 was an appealable order.

Industrial Machinery Mfg. (P) Ltd. , CIT v/s.
(2006) 202 CTR 83 = 282 ITR 595 = 193 Taxation 435(Guj)

12. APPEAL TO HIGH COURT

(1) Filing of appeal or application for reference by Income tax authority -Whether revenue can be precluded from filing an appeal if in respect of some other years involving an identical dispute no appeal has been filed by it – Held, yes.
J.K Charitable Trust, CIT v/s.
(2008) 262 Taxman 105 = 15 DTR 41(SC)

(2) Reference - Appeal - Question of fact or law – Payments made by company -Whether for benefit of shareholder – Question of fact – Income Tax Act, 1961, s. 260A.
Mukundray K. Shah, CIT v/s.
(2007) 290 ITR 433 = 209 CTR 97 = 160 Taxman 276 =
200 Taxation 272 (SC)

(3) Powers – Concurrent findings of fact - No jurisdiction to reappraise evidence – Income Tax Act, 1961, s. 260A.
P. Mohanakala, CIT v/s
(2007) 291 ITR 278= 210 CTR 20 = 161 Taxman 162=
200 Taxation 349 (SC)

(4) Decision of Tribunal based on findings of fact – No question of law arises – Search and seizure - Block assessment – Undisclosed income – Property purchased by assessee – Commissioner (Appeals) holding that Revenue had not proved understatement of price – Appellate Tribunal - Upholding decision of Commissioner (Appeals) – Decision based on questions of fact – Income-tax Act, 1961, ss. 158BC, 260A .
Kalyanasundaram (P.V), CIT v/s.
(2007) 294 ITR 49 = 212 CTR 97=164 Taxman 78 =
(2008) 202 Taxation 206 (SC)

(a) SUBSTANTIAL QUESTION OF LAW

(1) Expenditure incurred to create brand name with enduring benefit, whether allowable–Short term loans, whether could be allowed under section 35D–Miscellaneous income from sale of empty containers, whether qualifies for deductions under sections 80HH and 80-I-Are substantial questions of law – Matter remanded to High Court for consideration– Income tax Act, 1961, ss. 35D, 37, 80HH, 80-I, 260A.
Core Health Care Ltd., Deputy CIT v/s. Deputy CIT v/s.
(2008) 298 ITR 194 = 167 Taxman 206 = 215 CTR 1 =204 Taxation 107 (SC)

(2) Penalty under s. 18(1)(c) – Question whether penalty under s. 18(1)(c) could be cancelled on the ground that the assessee was entitled to benefit under the Amnesty Scheme, particularly when the assessee had revised his return several times subsequent to search operation is a substantial question of law– High Court having erred in not answering the question, impugned order is set aside and the matter remitted to the High Court for fresh consideration in accordance with law .
Taktawala, C.A, CIT v/s.
(2008)215 CTR 399 = 14 DTR 34(SC)

(3) Notice under s. 143(2) vis-à-vis reassessment - Assessee having challenged the reassessment proceedings on the ground that notice under s. 143(2) was not issued within one year and the High Court having not recorded any finding based on law on the question of applicability of s. 143(2) to the reassessment and dismissed the appeal summarily, impugned order is set aside and the High Court is directed to entertain the appeal under s. 260A and to reappraise the matter in the light of the arguments raised by the parties.
L.N Hota & Co. v/s. CIT & Anr
(2008) 215 CTR 481 = 168 Taxman 313 = 301 ITR 184= 5 DTR 34(SC)

(4) Delay in depositing TDS – Salary -Assessee had deducted TDS from salary paid to expatriate employee – However, only after survey conducted under section 133A, it deposited TDS so deducted with Government – High Court dismissed appeal filed by department under section 26OA on ground that no question of law arose – Matter was to be remitted to High Court since a question of law, namely, as to whether assessee was entitled to plead reasonable cause for not depositing tax, arose in instant case – Held, yes.
Air Liquide India Holding (P) Ltd., CIT v/s.
(2008) 167 Taxman 221(SC)

(5) Contractors / Sub-contractors, TDS on payments to - Question which arose before High Court in appeal was whether assessee was liable or not liable to deduct TDS under section 194C – High Court dismissed appeal summarily – Whether question that arose before High Court was a substantial question of law and High Court ought to have decided said question.
Sirmour Truck Operators Union, CIT v/s.
(2008) 170 Taxman 242 = 4 DTR 170, 171(SC)

(6) Deduction of tax source – Contractors / sub contractors payments to - Whether question as to whether freight paid by assessee (AOP) to truck owners who in turn were members of said AOP was subject to TDS under section 194C(2) is a substantial question of law – Held, yes.
Sirmour Truck Operators Union, CIT v/s.
(2008)170 Taxman 489(SC)

(7) Assessment – Book profits basis - Tax credit in respect of tax paid on deemed income of certain companies - Short payment – Interest – Whether penal or mandatory – Substantial question of law – Income tax Act, 1961, ss. 115JAA, 234B, 234C, 260C, 260A.
Xpro India ltd., CIT
(2008) 300 ITR 337 = 215 CTR 400 = 168 Taxman 181=4 DTR 217(SC)

(8) High Court dismissed appeals summarily rejecting as to whether assessee was liable or not liable to deduct TDS section 194C – Whether question under consideration was a substantial question of law and High Court ought to have decided said question – Held, yes.
Ambuja Darla Karsog Mangu Transport Co-op. Society Ltd., CIT v/s.
(2008)168 Taxman 223 = 4 DTR 172 (SC)

(9) Case was to be remanded to High Court for a fresh decision in accordance with law, after framing a substantial question of law, in light of judgment of Supreme Court in Manish Maheshwari v/s. Asstt. CIT (2007) 289 ITR 341/159 Taxman 258 – Held yes.
Anwar Pasha v/s. CIT
(2008) 167 Taxman 222(SC)

(10) Assessment year 1989-90 – Where High Court had disposed of appeal without considering as to whether a substantial question of law was involved or without framing question(s) of law, case was to be remitted to High court for a fresh decision – Held, yes.
Consolidated Engg. Enterprises v/s. Asstt. CIT
(2008) 167 Taxman 223(SC)

(11) Where High Court failed to frame substantial question of law as required under section 260A and interfered with concurrent findings given by Commissioner (Appeals) and Tribunal without giving any reasons, matter was to be remitted to High Court for consideration – Held, yes.
P. Iya Nadar Charitable Trust v/s. CIT
(2008) 167 Taxman 224(SC)

(12) Non speaking order – High Court having dismissed the appeal by a non speaking order merely stating that no substantial question of law arises for consideration, impugned order is set aside and the matter is remitted to the High court for fresh consideration on merits and in accordance with law.
Speed Lines (P) Ltd. V/s. CIT
(2008) 214 CTR 13 = 170 Taxman 243(SC)

(13) Transfer - Assessment year 1995-96 – Assessee firm had enhanced value of depreciable assets by revaluation and thereafter it was converted into a company under Chapter IX of Companies Act, 1956 – Assessing Officer held that capital gain had arisen on transfer of assets from partnership firm to company and made addition accordingly – On appeal, Tribunal deleted addition holding that revaluation of assets of assessee firm and subsequent conversion of firm into limited company which had taken over such assets at enhanced value would not result into any capital gain liability under Act – High Court dismissed appeal of revenue holding that no question of law, much less substantial question of law arose out of order of Tribunal – Questions of law raised by revenue before High Court were substantial questions of law which arose from order of Tribunal – Therefore impugned order of High Court was to be set aside and High Court was to be directed to record its finding on those questions .
Well Pack Packaging , CIT v/s.
(2008) 174 Taxman 102 = 220 CTR 538 = 16 DTR 73(SC)

(14) Appeal to High Court – Summary dismissal – Effect - Summary dismissal – Effect – while hearing an appeal even for deciding whether a substantial question of law arises or not from the order of the Tribunal, the High Court does not exercise either original jurisdiction or the jurisdiction to issue writs – Only jurisdiction that the High Court exercises is the appellate jurisdiction – Therefore, merely because the High Court decides in the first instance whether or not a substantial question of law arises from the order of the Tribunal, it cannot be stated that the High Court does not exercise the appellate powers or that there is no decision on appeal when the High Court dismisses an appeal holding that no substantial question of law arises from the order of the Tribunal – Contention that the powers exercised by the Court at the stage of admission of appeal are akin to powers exercised by the apex Court under Art. 136 of the Constitution is not sustainable – Whenever an order of a subordinate forum is carried in appeal, operative part thereof merges into the judgment, order or decision of the superior Court after the confirmation, reversal or modification, as the cases may be,and the order of the lower Court or the forum does not have any independent existence thereafter in relation to the issue which was carried before the appellate Court or forum – Thus, where the High Court comes to the conclusion that no substantial question of law arises on a particular issue, it cannot be stated that the subject matter of the controversy between the parties has not been dealt with by the High Court – Decision of the Tribunal is affirmed on the issue brought before the High Court and for all intents and purposes it is the decision of the High Court which is operative and which is capable of being given effect to.
Nirma Industries Ltd. v/s. Dy. CIT
(2006)202 CTR 198 =283 ITR 402=155 Taxman 330=194 Taxation 157(Guj)

(15) Appeal under section 260A on substantial question of law - Cannot be dismissed without a decision – Income Tax Act, 1961, s. 260A.
Nabhinandan Digamber Jain , CIT v/s.
(2003)263 ITR 516 = 185 CTR 197= 133 Taxman 663 =
(2004)178 Taxation 393 (SC)

(16) Nature of right to appeal – Statutory and not inherent - Substantial question of law - To be stated in memorandum of appeal – Tests to determine – Questions to be formulated at the time of admission - High Court cannot formulate questions after conclusion of arguments - Income Tax Act, 1961, s. 260A.
Janardhana Rao (M) v/s. Jt. CIT
(2005)273 ITR 50=142 Taxman 722=193 CTR 585=185 Taxation 433(SC)

(17) Findings of fact of Appellate Tribunal – Cannot be disturbed – Income Tax Act, 1961, s. 260A.
Janardhana Rao (M) v/s. Jt. CIT
(2005)273 ITR 50=142 Taxman 722=193 CTR 585=185 Taxation 433(SC)

(18) Question not formulated earlier – Nothing in sub.s (5) of s. 100 takes away or abridges power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial question not formulated earlier, if it is satisfied that the case involves such question –However, no reason recorded nor the memorandum of appeal indicated any other question and, therefore, High Court's judgment was liable to be set aside.
Phool Pata & Anr. V/s. Vishwanath Singh & Ors.
(2005) 197 CTR 598 = (2006) 191 Taxation 415 (SC)

(19) Formulation of substantial question of law – Where the High Court is satisfied that any substantial question of law is involved, it shall formulate that question under sub.s (4) of s. 100 of CPC – Second appeal has to be heard on the question so formulated – Impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated – Impugned judgment is set aside and the matter is remitted to the High Court for disposal in accordance with law.
Ram Sakhhi Devi (Smt) v/s. Chhatra Devi & Ors.
(2005)197 CTR 602 (SC)

(20) Interest on Advance tax – Assessment order – Order to "charge interest" but no specific direction to charge interest under section 234B – Appellate Tribunal's decision following Ranchi Club that interest could not be charged in notice of demand – Whether decision in Ranchi Club that interest could not be charged in notice of demand affected by subsequent decision in Anjum M.H Ghaswala on this point - Question of law arises– Income Tax Act, 1961, ss. 234B, 260A.
Insilco Ltd., CIT v/s.
(2005) 278 ITR 1 = 198 CTR 114=149 Taxman 112(SC)

(21) Order or affirmation - Points urged have to be dealt with by High Court - Reasons for affirmation to be given though not elaborately – Income Tax Act, 1961, s. 260A.
Mangalore Ganesh Beedi Works v/s. CIT
(2005)273 ITR 56=142 Taxman 720=193CTR 590=185Taxation 440(SC)

(22) Depreciation on leased machinery – Boiler leased out by assessee carrying on business of leasing of assets – Tribunal upheld the finding of the CIT(A) allowing depreciation on the boiler – As regards rate of depreciation, the Tribunal held that the depreciation of 40 per cent allowed by the AO did not call for any interference - Once a leasing or finance company, which owns machinery and leases it to third party is found to have satisfied the other requirements of the provision, it is entitled to depreciation in respect of such machinery or plant - In view of the aforesaid settled position of law, no substantial question of law arose out of the order of the Tribunal – Appeal dismissed.
Pinnacle Finance Ltd., CIT v/s.
(2004) 188 CTR 446 = 268 ITR 395 = 139 Taxman 328 (Guj)

(23) Industrial undertaking - Special deduction – Liquidated damages on account of breach of contract – Whether part of profits received from industrial undertaking - Substantial question of law - Appeal to be heard on merits –
Alpine Solvex Ltd., CIT v/s.
(2003) 259 ITR 719 = 181 CTR 21 = 129 Taxman 16 (SC)

(24) Income from undisclosed sources – Tribunal deleted the addition made by the AO on account of 'on money' allegedly paid by the assessee for purchase of shops and substantially reduced the addition made on account of low household expenses shown by the assessee – Tribunal has appreciated the facts and evidence on record to come to its conclusion - No substantial question of law arises – Appeals dismissed.
Jivanlal Nebhumal (HUF), Dy. CIT v/s.
(2003) 182 CTR 370 = (2004) 134 Taxman 660 (Guj)

(25) Erroneous and prejudicial order – After considering the facts and circumstances of the case and the affidavit filed by the assessee during the course of proceedings under s. 158BC, the AO came to the conclusion that the cash of Rs. 20 lakhs seized from the assessee formed part of of Rs. 40 lakhs which were already disclosed by the assessee under VDIS, 1997 – Simply because the CIT does not agree with that view, it cannot be said that the order passed by the AO was erroneous and prejudicial to the interests of the Revenue–A different view is hardly possible – Tribunal having endorsed the view taken by the AO after proper appreciation of facts on record and evidence produced before it, the finding arrived at is absolutely a finding of fact, and no substantial question of law arises – Appeal dismissed.
Karai, D.P, CIT v/s.
(2003) 185 CTR 497 = (2004) 178 Taxation 605 = 266 ITR 113 (Guj)

(26) Appellate Tribunal – Direction to allow adjustment of interest expenses – Direction to grant relief with respect to profit on sale of raw materials – Direction not to charge interest for default in payment of advance tax and deferment of advance tax – Raise substantial questions of law.
Nirma P. Ltd. , CIT (Asst.) v/s.
(2002) 257 ITR 57 = 177 CTR 105 = 124 Taxman 608(SC)

(27) Cash Credit – Identity of creditors proved – Amounts received by account payee cheques – Initial burden of proving credits discharged – Source of credits need not be proved - Fact that explanation was not satisfactory would not automatically result in deeming amounts as income of assessee – Tribunal holding amount representing cash credits not including in total income of assessee - Justified - No substantial question of law.
Rohini Builders, CIT (Deputy) v/s.
(2002) 256 ITR 360 = (2003) 127 Taxman 523=182 CTR 373 (Guj)

(28) Cost of construction of building - Besides relying on the report of the DVO, the AO referred to other aspects like cost of construction of other buildings in the same locality and the quality of construction in arriving at the cost of the buildings in question – Estimation of correct cost of construction would involve re-appreciation of evidence – Appeals not admitted as they do not raise substantial questions of law – Matter not remanded to the AO having regard to the amount of tax effect and lapse of time.
Mahavir Builders, ITO v/s.
(2002) 178 CTR 72 (Guj)

(29) Scope and parameters of - No need to be of general importance - Memorandum of appeal - Failure of appellant to formulate question - Opportunity to be granted -
Santosh Hazari v/s. Purushottam Tiwari
(2001) 251 ITR 84(SC)

13. <u>APPEAL TO SUPREME COURT</u>

(1) Nature of jurisdiction – Can make order for doing complete justice – Petition for special leave to appeal – Power of Supreme Court – Constitution of India, arts. 136, 142
Tanna and Modi v/s. CIT
(2007) 292 ITR 209 =210 CTR 273 = 161 Taxman 329 = 200 Taxation 194 (SC)

(2) More than one questions framed – High Court answering one question – Remanding matter to Appellate Tribunal for fresh consideration on questions relating to whether expenditure was capital in nature – Supreme Court - Holding remand to be proper owing to paucity of material for decision -
S.T.N Textile Ltd. , Dy. CIT v/s.
(2005) 279 ITR 209 = 199 CTR 209=149 Taxman 348 = 192 Taxation 7 (SC)

(3) Decision in the case of one assessee - Department accepting and not challenging correctness – Not open to department to challenge in the case of other assessees, without just cause.
Berger Paints India Ltd. v/s. CIT
(2004)266 ITR 99 =187 CTR193 =135 Taxman 586 = 180 Taxation 10 (SC)

(4) High Court – Decision differing from decisions of other High Courts – Appeal to Supreme Court – Certificate of fitness to be granted - Income Tax Act, 1961 s. 261.
Berger Paints India Ltd. v/s. CIT
(2004)266 ITR 99 =187 CTR193 =135 Taxman 586 =
180 Taxation 10 (SC)

(5) Appeal to – Where High Court had found in relation to same assessee in other cases that assessee could not be taxed because doctrine of mutuality applied to it, in these circumstances no useful purpose would be served in proceeding with other questions in appeal in relation to that assessee.
Cawnpore Club Ltd., CIT v/s.
(2004) 140 Taxman 378 = (2005) 184 Taxation 205 (SC)

(6) Department not appealing from an earlier decision – Rule that Supreme Court will not grant leave to appeal from a later decision – Applies only in cases of decisions of Jurisdictional High Courts – When there are divergent views of High Courts - Supreme Court would set conflict at rest.
Hemalatha Gargya v/s. CIT
(2003)259 ITR 1=128 Taxman 190= 182 CTR 107=174 Taxation758 (SC)

(7) Petition for special leave to appeal – Dismissal in limine – Effect – Constitution of India, Art. 136. Central Board of Direct Taxes – Power to issue order to avoid genuine hardship –Wheter such power can be exercised in relation to voluntary disclosure scheme which does not form part of Income Tax Act is doubtful.
Hemalatha Gargya v/s. CIT
(2003)259 ITR 1=128 Taxman 190= 182 CTR 107 =
174 Taxation758 (SC)

(a) MAINTAINABILITY

Rule of consistency - Question raised in the appeals being covered by an earlier decision of the same High Court, which has not been challenged by the Revenue and has attained finality appeal is not maintainable before the Supreme Court.
Surat City Gymkhana, Asstt. CIT v/s.
(2008) 216 CTR 23 = 300 ITR 214 = 170 Taxman 612= 5 DTR 115(SC)

14. APPEAL TO TRIBUNAL

(1) Scope - Subject matter of appeal – Neither the AO nor the CIT(A) having undertaken the exercise of quantification of loss said to have been incurred by the assessee on sale of non convertible debentures, the Tribunal could not have undertaken the said exercise on its own without first deciding the controversy before it i.e whether the transaction was genuine and the loss was allowable.

Deepak Nitrite Ltd. v/s. CIT
(2008) 220 CTR 374 = 206 Taxation 422 = 307 ITR 289
= 175 Taxman 230 = 7 DTR 313 (Guj)

(2) Tribunal to deal with contentions raised and evidence produced before it – Assessee maintaining gold ornaments account in rojmel – Additions in absence of stock register and quantitative tally – Assesssee filing overall quantity details in rojmel and contending same was practice in line of business – Tribunal failing to deal with contention but finding no evidence or material to support contention – Prima facie not correct – Tribunal's order set aside and matter restored to Tribunal for decision afresh – Income Tax Act, 1961.

Dagina v/s. Deputy CIT
(2007)290 ITR 622=(2005) 199 CTR 239=147 Taxman 599(Guj)

(3) Tribunal directing Assessing Officer to apply relevant High Court decision – Order valid.

Industrial Machinery Manufacturing P. Ltd., CIT v/s.
(2006) 282 ITR 595 = 282 ITR 595= 193 Taxation 435 (Guj)

(4) Duty of Tribunal follow decision of jurisdictional High Court – Failure to follow such decision – Order of Tribunal invalid.

New Sorathia Engineering Co. v/s. CIT
(2006) 282 ITR 642 = 202 CTR 188= 155 Taxman 513=193 Taxation 422 (Guj)

(5) Duty of Tribunal – Reasoned order – CIT(A) restricted the disallowance in respect of discount and rebate allowed by assessee to various parties – Tribunal reversed the order of the CIT(A) without recording any reason as to why the basis on which the CIT(A) accepted the explanation of the assessee was not correct – Once the Tribunal was inclined to reverse the order of CIT(A), it was necessary for it to record,

howsoever briefly, the reasons for [the same – Impugned order of the Tribunal is quashed and set aside and the appeals are restored to the Tribunal for fresh adjudication.
Vipul Fashions (P) Ltd. v/s. Asst. CIT
(2006) 202 CTR 299 = 284 ITR 332 (Guj)

(6) Powers of Tribunal – Modifying the order of CIT under s. 263 – CIT had initiated action under s. 263 on the basis that the AO had not verified the claim for deduction of additional commission and directed the AO to disallow the claim – In appeal, Tribunal modified the order passed under s. 263 with a direction to the AO to make further inquiries and then decide whether the claim of additional commission is allowable or not – Same permissible.
Harsiddh Specific Family Trust v/s. CIT
(2006)202 CTR 390 = 193 Taxation 361 = 284 ITR 105=
(2007)163 Taxman 603 (Guj)

(7) Powers of Tribunal – Revision - Tribunal has power to modify order passed on revision – Commissioner directing Assessing Officer to disallow additional commission - Tribunal modifying order and directing Assessing Officer to investigate claim for deduction of additional commission – Order valid –
Hindustan Lever Ltd. v/s. Joint CIT
(2006)284 ITR 105(Guj)

(8) Tribunal to record reasons where reversing order of Commissioner (Appeals) – Survey – Admission by director of unaccounted purchases – Commissioner (Appeals) accepting retraction coupled with evidence - Tribunal restoring additions without discussion of evidence with reasons why retraction coupled with evidence not acceptable – Not proper – Matter remanded .
Nirman Textile Mills P. Ltd. v/s. Asst. CIT
(2006) 284 ITR 325= 204 CTR 423 = 155 Taxman 502 =
195 Taxation 302(Guj)

(9) Duty of the Tribunal - Reasoned order – It is necessary for the order of the Tribunal to reflect that the Tribunal was aware of the controversy that it was called upon to decide and application of mind by the Tribunal to the said controversy – Tribunal confirmed the rejection of books of account of the assessee as well as the addition made by the AO without recording as to what were the issues which arose for consideration and the reasons for rejecting

the contentions raised on behalf of the appellant - Accordingly, the impugned order is quashed and set aside and the appeal is restored to the Tribunal for being decided afresh.
Dagina v/s. Dy. CIT
(2005)199CTR 239=147 Taxman 599 =(2007) 290 ITR 622 (Guj)

(10) Additional ground – Waiver of ground of appeal before CIT(A) – Assessee had challenged the reassessment before the CIT(A) on the ground that the original return was pending on the date of issuance of notice under s. 148 – However, assessee did not press the aforesaid point after the assessing authority clarified that the assessment under s. 143(1) had been completed earlier – Challenging to reassessment proceedings before the Tribunal was on entirely different grounds and had nothing to do with pendency of the original return Therefore, Tribunal was wrong in holding that the assessee had waived its right to challenge reassessment proceedings before the CIT(A) and was not entitled to raise such ground before the Tribunal.
Ramilaben Ratilal Shah v/s. CIT
(2005)199 CTR 340= 282 ITR 176= (2006) 152 Taxman 192= 192 Taxation 351 (Guj)

(11) Appeal to Commissioner (appeals) – Commissioner (appeals) setting aside assessment on preliminary ground – Tribunal Overruling Commissioner (appeals) – Matter to be restored to Commissioner (appeals) – Tribunal cannot consider appeal on merits.
Sheth Construction Co. v/s. ITO
(2005)274 ITR 304 =195 CTR 398 = 148 Taxman 271(Guj)

(12) In view of section 253, in case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by other party, from that it cannot be inferred that said party has accepted order or part thereof which was against it.
Dahod Sahakari Kharid Vechan Sangh Ltd. V/s. CIT
(2005) 149 Taxman 456 (Guj)

(13) Disposal of appeal without considering application under r. 29 of ITAT Rules – Tribunal was required to dispose of the application under r. 29 for adducing evidence before hearing the appeal on merits – High Court not justified in holding that s. 254(2) was not attracted - Order of the Tribunal set aside and matter remitted to Tribunal to dispose of the application under r. 29 on merits and thereafter to proceed to dispose of the appeal on merits.
Jyotsna Suri v/s. ITAT & Ors.
(2003) 179 CTR 265 = 128 Taxman 33(SC)

(14) Duty of Tribunal to consider all facts and give reasons for its decision – Tribunal giving finding contrary to decision of CIT (Appeals) without giving reasons - Matter remanded.
Ramesh Chandra M. Luthra v/s. Asstt. CIT
(2002)257 ITR 460 = 176 CTR 39 = 169 Taxation 662 (Guj)

(15) Powers of Tribunal - Power to remand - Cash Credits - CIT(A) considering evidence and holding that assessee proved genuineness of transaction - Tribunal not justified restoring matter to Assessing Officer - Income Tax Act, 1961, s. 254.
Rajesh Babubhai Damania v/s. ITO
(2001) 251 ITR 541 = 169 CTR 346(Guj)

(16) Search and Seizure - Documents seized from residence of director of company - Tribunal finding that there had been no enquiry regarding documents - Tribunal not justified in holding that income disclosed in documents belonged to director - Matter remanded - Income Tax Act, 1961, s. 132.
Mansukhlal Nanjibhai Patel v/s. Deputy CIT
(2001) 251 ITR 341(Guj)

(17) Application of Income or Diversion at Source -Clubbing of income – Partition of HUF's share in a firm vis-à-vis sub - partnership – In terms of partition deed, right of the assessee (karta) to receive 50 per cent share from the firm was subject to 1/2 of it being given to his wife who had a prior charge over the share income firm – This is a case of diversion of the profit at source – Partnership is not to be inferred - No sub partnership was formed between the assessee and his wife - Share of wife could not be included in the income of the assessee.
Natvarlal V. Desai, CIT v/s.
(2002) 177 CTR 476 = 124 Taxman 39 (Guj)

(18) Assignment of right, title and interest in firm – When a third person becomes entitled to receive an amount under an obligation of the assessee even before he could lay a claim to receive it as his income, there would be diversion of income by overriding title – However, when after receipt of income by the assessee, the same is passed on to a third person in discharging the obligation of the assessee, it is a case of application of income and not of diversion of income by overriding title – Assessee partner having ten per cent share in partnership, assigned fifty per cent of his share in right, title and interest (excluding capital) in the firm in favour of a trust created by him – This is not a case of diversion by overriding title – It cannot be treated as a case of sub-partnership, though in view of s. 29(1) of the Indian Partnership Act, the trust, as an assignee is entitled to receive the assigned share in the profits of the firm – Consequently, the share of income of the assessee assigned in favour of the trust has to be included in the total income of the assessee.

Sunil J. Kinariwala, CIT v/s.
(2003)179 CTR 15=259 ITR 10=126 Taxman 161=172 Taxation 389 (SC)

(19) Diversion by overriding title - Compulsory deductions at instance of Government towards funds – Society collecting from members and paying over to funds – Deductions not income of society.

Siddheshwar Sahakari Sakhar Karkhana Ltd. V/s. CIT
Shri Chatrapati Sahakari Shakar Karkhana Ltd., CIT v/s.
(2004)270 ITR 1 =139 Taxman 434 = 191 CTR 66 = 183 Taxation 477 (SC)

(20) Cross objections having been filed after a delay of one of one year and eleven months and assessee having failed to show any cause on merits in any manner whatsoever, as to how s. 41(1) is applicable, Tribunal was justified in refusing to condone the delay.

Vareli Textile Industries v/s. CIT
(2006)201 CTR 403 = 284 ITR 238= 154 Taxman 33 = 193 Taxation 448(Guj)

Also See "Tribunal".

15. ASSESSMENT

(a) ADDITION TO INCOME

(1) Assessment year 1989-90 – Assessee company had written off an amount on account of obsolete items which were not moving for last three years – Assessee valued closing stock of obsolete items at 10 per cent of cost – Assessing Officer, however holding that assessee failed to furnish list of obsolete items, added back certain amount by taking realizable value of obsolete items at 50 per cent of cost – Tribunal also confirmed view taken by Assessing Officer - It was found from records that assessee had placed auditor's items at 10 per cent of cost – Such obsolete items were in fact sold in subsequent year at a price less than 10 per cent of cost - Moreover Assessing officer had also not doubted correctness of auditor's report nor concluded that assessee failed to furnish list of obsolete items or had made valuation arbitrarily and therefore addition made by Assessing Officer was without any basis and was liable to be set aside - On facts order of High Court was to be upheld.

Alfa Laval (India) Ltd., CIT v/s.

(2008)170 Taxman 615(SC)

(2) Assessment year 1989-90 – Whether a statement recorded under section 132(4) at midnight can be considered to be a voluntary statement if it is subsequently retracted assessee and necessary evidence is led contrary to such admission – Held, no – During search conducted at assessee's premises his statement was recorded under section 132(4) wherein he disclosed certain undisclosed income – After two months, he retracted from said disclosure contending that it was made at midnight under pressure and coercion – He also gave proper evidence in support of his retraction – Assessing Officer, however made addition on basis of disclosure made by assessee in statement recorded under section 132(4) – Whether merely on basis of admission assessee could be subjected to such addition when despite retraction revenue could not furnish any corroborative evidence in support of such admission – Held no.

Kailashben Manharlal Chokshi v/s. CIT

(2008) 174 Taxman 466 = 220 CTR 138 = 14 DTR 257(Guj)

(3) Business transactions – Additions on the basis of entries in diary – Assessee claiming it as personal transaction - Additions to income deleted by Tribunal – Justified – Income-tax Act, 1961.

Gujarat Distributors, CIT v/s.
(2007) 199 Taxation 508(Guj)

(b) <u>NOTICE u/s. 143(2)</u>

Notice under s.143(2) - Limitation – Admittedly notice under s. 143(2) was issued beyond the statutory period of limitation prescribed under proviso to s. 142(2) i.e one year from the end of the month of filing of return - CIT(A) and the Tribunal were correct in holding that the assessment was void ab initio.

Mahi Valley Hotels & Resorts, Dy. CIT v/s.
(2006) 201 CTR 308 = 193 Taxation 418(Guj)

(c) <u>DISALLOWANCE u/s. 43b</u>

Disallowance under s. 43B – Question whether interest on unpaid sales tax is a part of tax and the provisions of s. 43B would be applicable to the unpaid amount is not a debatable one and, therefore, provisions of s. 143(1)(a) were rightly invoked for disallowing the unpaid interest by way of prima facie adjustment.

Shree Digvijay Cement Co. Ltd. v/s. CIT
(2006) 206 CTR 1(Guj)

(d) <u>SPECIAL AUDIT</u>

(1) Opportunity of being heard – Question as to whether the assessee was to be given an opportunity of being heard before issuance of direction for special audit under s. 142(2A) being covered by the decision in Rajesh Kumar & Ors. Vs. Dy. CIT & Ors (2006) 206 CTR(SC) 175: 2007 (2) SCC 181, impugned judgment of the High Court is set aside and the matter is remitted to the High Court for consideration of the writ petition afresh on merits.

Delhi Development Authority & Anr. V/s. Union of India & Ors.
(2008) 214 CTR 106 (SC)

(2) Assessment - Special audit - Nature of – Direction for special audit – Not administrative – Is of quasi-judicial nature – Notice to assessee to be given -
Rajesh Kumar v/s. Deputy CIT
(2006) 287 ITR 91= 206 CTR 175= 157 Taxman 168 (SC)

(3) Special Audit - s. 142(2A) - Enquiry – Special audit – Voluminous details to answer questions raised by assessing authority – Assessing authority directing special audit of accounts to be carried out -On basis of nature and complexity of accounts – Valid.
Living Media Ltd. v/s. CIT
(2002) 255 ITR 268 = 124 Taxman 75 = 175 CTR 299 = 170 Taxation 86(SC)

(e) <u>SCOPE ON REMAND</u>

New source of income or new addition - AO while reframing assessment in set aside proceedings could not have added an item which was not subject matter of original assessment - This is so because there was no occasion for the CIT(A) to issue any direction in respect of a matter not in appeal before him – Further, the AO is not competent to make addition in respect of income which has been declared under VDIS, 1997 accepted by CIT and certificate issued and tax paid by the assessee, so long as the certificate holds the field – That apart, AO could not have referred to the provisions of s. 158BD in the absence of statutory conditions being satisfied.
Nitin P. Shah alias Modi v/s. Dy. CIT
(2005)194 CTR 306 =276 ITR 411= 146 Taxman 536 = 187 Taxation 390 (Guj)

(f) <u>PRIMA FACIE ADJUSTMENT</u>

Intimation of basis of return – Additional tax – Contention not dealt with – matter remanded.
Bhuna Co-op. Sugar Mills Ltd. V/s. CIT
(2005)273 ITR 212 =194 CTR 1 = 143 Taxman 369= 187 Taxation 182(SC)

(g) DRAFT ASSESSMENT ORDER - LIMITATION

(1) Extended period of limitation where draft assessment order is forwarded to inspecting Assistant Commissioner – Inspecting Assistant Commissioner exercising jurisdiction to assess by virtue of order conferring powers of Assessing Officer on him – Extended period of limitation not available - Income Tax Act, 1961, ss. 125A, 144B, 153.
Saurashtra Cement and Chemical Industries Ltd., CIT v/s.
(2005) 274 ITR 327 = 195 CTR 33= 187 Taxation 599(Guj)

(2) Draft Assessment - Directions u/s. 144A – Valid - Assessment - Directions under s. 144A - Pendency of reference under s. 144B(4) - Assessment is not complete where a draft assessment is framed by the ITO, until he completes the draft assessment by passing an effective order under sub-s (3) of s. 144B in accordance with the directives issued by IAC - Power under s. 144A to issue directions for the guidance of the ITO exists throughout the period during which assessment is pending - A proceeding is in pendency from the date of its institution till its conclusion before the concerned authority - Jurisdiction under s. 144A relates to area not covered by draft assessment order under s. 144B and extends to issuing direction for holding inquiry - Therefore, IAC can issue directions under s. 144A during pendency of a reference before him under s. 144B(4).
Kashiram Textile Mills (P) Ltd. , CIT v/s.
(2001) 170 CTR 11 = 252 ITR 162(GUJ)

(3) Levy of penal interest and show-cause notice for penalty not mentioned in draft order s. 144B - In the draft order, the AO did not propose to charge interest under the provisions of ss. 139(8) and 217(1A) and did not make any reference to initiation of penalty proceedings under ss. 271(1)(a) and 273(2)(a) - However, AO charged interest and gave a direction to issue show-cause notice for imposition of penalties in the final assessment order - Same not valid - Object of s. 144B is to ensure that the assessee gets an opportunity to represent his case as regards the changes which might be made by the AO in the returned income or loss, which would not only result in the reduction in litigation but would also obviate undue hardship to the assessee - Said purpose stood defeated by the procedure adopted by the AO - Apart from that, draft order was varied by AO without the directions of IAC under s. 144B(4) - Same not permissible -

Moreover, once the draft order did not mention anything regarding levy of interest, assessee could presume that the AO had exercised his discretion to waive interest - Such exercise of discretion could not be changed after the draft order was approved - Therefore, it was not open to the AO to charge interest or give a direction to issue a show-cause notice for imposition penalty proceedings in the final assessment order.
Maharaja Exhibitors, CIT v/s.
(2001)170 CTR 107 = 251 ITR 767(GUJ)

(h) <u>GENERAL</u>

(1) General principles - Liability does not depend on assessment being made – Liability to pay arises as soon as Finance Act prescribes rates for assessment year – Income Tax Act, 1961,
Shelly Products, CIT v/s.
(2003) 261 ITR 367 = 129 Taxman 271 =181 CTR 564 = 175 Taxation 434 (SC)

(2) Regular assessment initiated by issuing notice under section 143(2) – Summary assessment by intimation cannot be made thereafter.
Gujarat Electricity Board, CIT v/s.
(2003) 260 ITR 84 = 129 Taxman 65 = 260 ITR 84(SC)

(3) Assessing Officer included in his final order two items which he had not mentioned in draft order submitted to IAC – First was interest levied on assessee and second issuance of show cause notice for penalty - Whether it was open to Assessing Officer to make change in draft order in nature of levy of interest or issuance of a show cause notice for imposition of penalty after draft order was approved by LAC – Held, no.
Maharaja Exhibitors , CIT v/s.
(2002) 125 Taxman 278 (Guj)

(4) Additions – Excess shortage/wastage claimed by assessee – Commissioner(Appeals) deleting additions giving detailed reasons - Tribunal sustaining addition partly - Tribunal brushing aside reasons given by CIT (Appeals) without verifying them – Matter remanded to Tribunal for reconsideration.
Mercury Metals (P) Ltd. v/s. Asstt. CIT
(2002) 257 ITR 297 = 122 Taxman 737 = 175 CTR 520 = 169 Taxation 665 (Guj)

16. BAD DEBT

(1) Conditions precedent – Debts due to assessee cannot be said to have become bad in the relevant year where the debtors had not paid the amount due to some differences and the assessee was insisting on payment and, therefore, claim for deduction of bad debts was not allowable.
Dhall Enterprises & Engineers (P) Ltd., CIT v/s.
(2007) 207 CTR 729 = 198 Taxation 181= 162 Taxman 114 = 295 ITR 481 (Guj)

(2) Assessment year 1978-79 – In view of decision of Supreme Court in UCO Bank v/s. CIT (1999) 237 ITR 889/104 Taxman 547 and CBDT circular dated 6-10-1952 for assessment year 1978-79 assessee would not liable to be taxed in respect of interest on doubted advances credited to interest suspense account.
Mercantile Bank Ltd. v/s. CIT
(2006)153 Taxman 97= 202 CTR 457=283 ITR 84 = 193 Taxation 563 (SC)

(3) Absence of legal action vis-a-vis debtors declared as sick mills – Whether or not a debt is bad is a question to be determined objectively – Debt can be said to be bad if on a bona fide assessment, it appears that the debtor is unlikely to make payment of the debt – It cannot be inferred in such case that the debt is not bad merely because legal steps for recovery are not taken - There is no requirement that legal action should be taken before a decision is made that a debt is bad - However, to support a claim for deduction of a bad debt, there should be sufficient evidence to show that reasonable steps based on sound commercial considerations were taken to recover the debt – Further, the bad debt must also be actually written off – Crucial time at which the bad debt becomes

deductible is the time of writing off – Debts in question related to textile mills which had fallen sick and were unable to discharge their liabilities - These mills were taken over under the provisions of Gujarat Closed Textile Undertaking (Nationalisation) Act, 1986 – Assessee, an electricity company, had taken coercive measure for recovery by disconnecting the supply of electricity to these mills – Assets of the mills vested in the State Government free from all encumbrances and, therefore there were no assets from which assessee could have effected recovery hence further legal remedies were not attempted - Claim for bad debts allowable on the facts of the case.

Ahmedabad Electricity Co. Ltd., CIT v/s.
(2003)181 CTR 222=129 Taxman 190 = 262 ITR 97= 175 Taxation 704 (Guj)

17. BALANCING CHARGE

(1) Sale of undertaking by holding company to its wholly owned subsidiary - No reference in agreement of sale to value of building, machinery and plant – Evidence that sale price of building, machinery and plant was in excess of their written down value - Excess assessable under section 41(2) - Order of remand by AAC to ascertain value valid -

Shahibaug Entreprenuers (P) Ltd. , CIT
(2001)251 ITR 433 = 168 CTR 621 = 165 Taxation 300 = 122 Taxman 266(Guj)

(2) Sale of business as a going concern - For the purpose of invoking s. 41(2), the AO must have with him the actual cost, WDV and sale consideration for each asset which is sold – In the absence of the same, s. 41(2) cannot be applied - Where the entire business is sold as a going concern with all assets and liabilities, the provision cannot be invoked unless and until the aforesaid information is available with the assessing authority - Both CIT(A) and the Tribunal concurrently found after appreciating the evidence on record that the transaction in question was a slump sale i.e the entire business undertaking of the assessee firm was sold as a going concern and there was no itemized sale – Provisions of s. 41(2) not attracted.

Garden Silk Weaving Factory, CIT v/s.
(2005)199 CTR 13 = 279 ITR 136 (Guj)

18. BENAMI

A non-resident remitting certain amount to a person in India to buy certain property for him – The person in India buying property in his own name and in the names of his brothers – Petitioner filing suit for recovery of property – In the meantime, Benami Transactions (Prohibition) Act, 1988 promulgated – Court holding Act did not come in conflict with and the suit was maintainable – High Court holding against the appellant - Suit for possession decreed along with costs – Appeal of the respondent dismissed by High Court - Court holding property was held in a trust – Held, Benami Transactions (Prohibition) Ordinance or Act could not be taken in aid even otherwise in a suit against the assessee for recovery of the trust property.

Gangacharan (C) v/s. Narayanan (C)
(2002) 171 Taxation 192 = 123 Taxman 392(SC)

19. BEST JUDGMENT ASSESSMENT

Assessee filing a 'nil' return – Assessing Officer asking details of shareholdings and details of unsecured loans – In spite of notice under section 142(1), none appeared - Assessing Officer proceeding to make assessment under section 144 – Both CIT (Appeals) and Tribunal confirming Assessing Officer's order – Assessee pleading that before completing assessment, a further opportunity should have been given - Held, order of the Tribunal not in consonance with the judgment of the Apex Court in the case of CIT v/s. Smt. P.K Noorjahan (1999) 237 ITR 570 – Matter remanded to Tribunal for making fresh assessment.

Mitesh Rolling Mills (P) Ltd. v/s CIT
(2003) 173 Taxation 330(Guj)

20. BOI or AOP

Three individuals jointly received a sum from a donor under a declaration – Same invested and interest income returned in the status of BOI – Assessee assessable in the status of BOI and not AOP – Tribunal justified in setting aside the order of CIT under s. 263.

Shah, S.C & Ors., CIT v/s.
(2005) 193 CTR 226 = 185 Taxation 335= 274 ITR 217 (Guj)

21. **BUSINESS**

(1) Trader or commission agent - Out of ten parties five giving evidence that assessee was only commission agent – Other five outside the State not appearing to give evidence as could not be served with summons – No adverse inference can be drawn against assessee – Appellate Tribunal drawing– Inference against assessee – Not valid – Income tax Act, 1961, s. 131(1).
Anis Ahmad and Sons v/s. CIT (Appeals)
(2008)297 ITR 441=214 CTR 457 =167 Taxman 84 = 204 Taxation 37(SC)

(2) Profit Motive - Sales Tax Act -Publication of books, literature etc. by trust - Trust for spreading message of Saibaba of Shirdi among devotees – Books, pamphlets and other literature containing message of Saibaba under the aegis of "Sai publication" distributed by the trust to the devotees of Saibaba at cost price – The activity of the trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under s. 2(11) – The question of profit motive or no profit motive would be relevant only where person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. – Trust not a 'dealer' within the meaning of s. 2(11) of the Bombay ST Act , 1959 - Tax is leviable on the sales or purchases of taxable goods by a 'dealer' and not by every person.
Sai Publication Fund, CST v/s.
(2002) 177 CTR 1 = 122 Taxman 437 = 258 ITR 70 (SC)

22. BUSINESS EXPENDITURE

(a) **ACCRUAL OF LIABILITY**

(1) General Principles – Mercantile system of accounting - Assessee occupying premises of another firm – Provision for liability for use of premises – Agreement regarding quantum of liability not finalized – Liability was not contingent – Provision was deductible.
Amrish & Co. v/s. CIT
(2002) 257 ITR 180 = 173 CTR 27 = 121 Taxman 604 (Guj)

(2) Year of allowability – Disputed liability - Assessee following mercantile system of accounting - Liability can be said to be properly incurred when the dispute between the parties is amicably settled or finally adjudicated – Liability pending adjudication by way of appeal in the Supreme Court – Till the same is finally adjudicated, it would remain a contingent liability – Same not allowable as deduction - Same logic applies in relation to interest payable on the arrears of unpaid liability.
Alembic Chemical Works Ltd. v/s. Dy. CIT
(2003) 185 CTR 389 = 133 Taxman 833(Guj)

(3) Additional price payable towards purchase of milk - Assessee, an apex co-operative society of various milk producers' co-operative societies, issued circulars to the member societies from time to time notifying the adhoc/provisional price of milk and stating that the final price would be decided and intimated at the end of the year – Said circulars created an obligation to fix the final price – Purchase price revised upwards on the last day – Payment of additional/final price fixed on the last day of the accounting year is allowable as deduction s. 28 or alternatively under s. 37(1).
Mehsana District Co–operative Milk Producers Union Ltd., CIT v/s.
(2005)195 CTR 385 = 146 Taxman 355 = 189 Taxation 625 (Guj)

(4) Allowability - Disputed liability towards damages - Assessee did not supply part of contracted goods to APO as per the tender – APO intimated the loss incurred by it on account of cancellation of contract and called upon the assessee to make payment of specified loss – Dispute between the parties pending adjudication before the sole arbitrator – It is a contractual liability and has not been discharged during the year under consideration – Therefore, said liability was not allowable as deduction in the relevant year.
Ashwin Vanaspati Industrial (P) Ltd., CIT v/s.
(2005)196 CTR 117 = 189 Taxation 612(Guj)

(5) Year of allowability – Liability to return excess amount realized on sale of levy sugar – Assessee challenged the fixation of price of levy sugar and was permitted to sell levy sugar at a price in excess of price fixed under the Control Order – Later, it withdrew the petitions on 12th March, 1973 – Meanwhile the Levy Sugar Price Equalisation Fund Act, 1976 came into existence and under the provisions of the Equalisation Fund Act, the excess price recovered by sugar factories was required to be paid into the Equalisation Fund – Subsequently, on civil applications filed by the Union of India, the High Court vide its order dt. 2nd May, 1980 directed the assessee to credit the difference between the controlled price and the price recovered as well as interest on all excess realizations to levy Sugar Price Equalisation Fund – Assessee challenged the same but the Supreme Court rejected the principal contention of the assessee viz, liability to return the excess amount - Assessee claiming deduction thereof either in asst. yr. 1981-82 on the basis of the judgment of the High Court or alternatively in asst. yr. 1982-83 based on the order of the apex court – Claim not acceptable in either of the year – Liability to return the excess amount had arisen on 12th March, 1973, when the assessee withdrew the petitions and the interim order passed therein became non existent and inoperative, and not on the day the High Court passed the order nor on the day when the Supreme Court dismissed the assessee's challenging to the aforesaid order - Even otherwise, the assessee had become liable to return the amount by virtue of the provisions of s. 3(3) of Equalisation Fund Act in 1976 – Therefore, assessee was not entitled to claim deduction in the relevant assessment years despite having discharged the liability on the basis of the orders of the High Court and the Supreme Court.

Bileshwar Khand Udyog Sahakari Mandali Ltd. v/s. CIT
(2006)200 CTR 464(Guj)

(6) Year of allowability – Provision for interest payable to Sales Tax Department – Assessee was originally granted refund of sales tax but later demand was raised along with interest on the ground the refund was wrongly allowed – Interest was payable in instalments as per a settlement and accordingly assessee made provision therefore – Assessee is not disputing its liability by raising frivolous defence nor it is a case where the refund was obtained fraudulently – Tribunal justified in allowing deduction of provision in the relevant years.
Bileshwar Khand Udyog Sahakari Mandali Ltd. v/s. CIT (2006)200 CTR 464(Guj)

(7) Allowability – Disputed luxury tax liability – Tribunal held that despite the pendency of the litigation challenging the validity of the statute imposing the luxury tax, the amounts collected by the assessee from customers represented trading receipts of the assessee – Consequently the corresponding liability placed upon the assessee by the statute accrued on the date of the transaction, i.e when the customer was billed and the amount was recovered – Stay granted by the apex Court against operation of the statute was conditional inasmuch as the assessee was called upon to file an undertaking that in the event of the assessee succeeding before the apex Court the amount recovered by the assessee would be returned to the customers – Therefore, in any event, there was an accrued liability in so far as assessee was concerned – Tribunal justified in allowing deduction of statutory liability of luxury tax.
Express Hotel (P) Ltd., CIT v/s.
(2006)200 CTR 476(Guj)

(8) Payment of bonus – Assessee has been consistently paying bonus for each year after the end of the respective accounting year and claiming deduction thereof in the year of payment – In the relevant year assessee changed the system of accounting from cash basis to mercantile and accordingly claimed deduction of provision for bonus as well as payment of bonus relatable to the earlier year made in the year under consideration – This double deduction was a necessary concomitant in the year of system of accounting – Payment could not be said to be relatable to earlier year -

Tribunal was justified in allowing deduction of bonus actually paid during the accounting year.
Standard Radiators (P) Ltd. , CIT v/s.
(2006) 201 CTR 517 = 152 Taxman 210 =
193 Taxation 108 =286 ITR 207 (Guj)

(9) Assessment year 1981-82 – Assessee company was engaged in business of manufacturing and selling chemicals and pharmaceuticals – Assessee in course of business manufactured antibiotics on bulk basis – Government of India under Drug Price Control Order (DPCO) called upon assessee to pay a sum of Rs. 1,34,65,048 into Drug Price Equalisation Account (DPEA) which was difference between pooled price and retention price on quantity of bulk drug manufactured and sold by him – Assessee claimed deduction of total demand of Rs. 1,3465,048 from income – In meanwhile, assessee filed a writ application, against said demand which was quashed by High Court – Since High Court had quashed demand of Rs. 1,34,65,048 on account of which assessee was not required to make said deposit with Union of India, assessee could not be entitled to claim deduction on said amount – Held, yes –
Synbiotics Ltd. v/s. CIT
(2006)156 Taxman 344 = 206 CTR 17(Guj)

(b) **ADDITIONAL PRICE**

Co-operative society – Additional price of milk paid to member societies – Deductible – Income Tax Act, 1961, s. 37.
Mehsana Dist. Co-op. Milk Producers' Union Ltd. CIT v/s.
(2008) 307 ITR 83 = 205 Taxation 278 = 2 DTR 280=4 DTR 222 =
(2009) 176 Taxman 416 = 309 ITR 100(Guj)

(c) **ADVERTISEMENT EXPENDITURE**

(1) Disallowance under s. 37(3A) – Only the net amount of expenditure on advertisement and sales promotion i.e gross expenditure less amount recovered by assessee from its dealers could be considered for disallowance under s. 37(3A).
Vadilal Industries Ltd., CIT v/s.
(2008) 217 CTR 318 = 6 DTR 98(Guj)

(2) Supply of danglers, posters, steramers, tin plates to dealers to Exhibit assessee's products - Part of publicity expenditure - Disallowance of expenditure under section 37(3A) - Justified .
Innosearch Ltd. v/s. CIT
(2001) 251 ITR 384 = 114 TAXMAN 455 =
160 TAXATION 642(Guj)

(d) **AMORTISATION s. 35D**

(1) Amortisation of preliminary expenses – Bridge loans from specified institutions – Long term loans – included in computing capital for purpose of section 35D – Income Tax Act, 1961, s. 35D.
Core Healthcare Ltd., CIT (Deputy) v/s
(2009) 308 ITR 263 = 221 CTR 580(Guj)

(2) Debenture issue expenses – Debenture issue expenses having been held by the Tribunal to have been incurred for purposes of working capital in the course of modernization of the existing plant and machinery and there being no dispute on that count, there is no question of invoking the provisions of s. 35D.
Office of the official Liquidator, CIT v/s.
(2008) 218 CTR 165 = 205 Taxation 241 = 3 DTR 165 (Guj)

(e) **BONUS**

Production bonus – Finding that payment was for increased production and was part of regular wages – Payment deductible .
P.M Diesel P. Ltd. , CIT v/s.
(2006)284 ITR 146 = 193 Taxation 119 = 204 CTR 328 (Guj)

(f) **BANK GUARANTEE COMMISSION**

(1) Capital or revenue expenditure - Was revenue expenditure –
Mihir Textile Ltd. v/s. CIT
(2001) 170 CTR 606 = 252 ITR 686(GUJ)

(2) Guarantee commission given to Bank – Is revenue expenditure.
Mihir Textiles Ltd. , CIT v/s.
(2002) 256 ITR 528=172 CTR 344 = 166 Taxation 713 =
121 Taxman 60(Guj)

(g) **CAPITAL OR REVENUE**

(1) General principles – Scope of doctrine of enduring benefit – Advertisement expenses to create brand image – Revenue expenditure – Income Tax Act, 1961, s. 37.
Core Healthcare Ltd., CIT (Deputy) v/s
(2009) 308 ITR 263 = 221 CTR 580(Guj)

(2) Expenditure on construction of drainage for disposal of effluents - High Court having not examined the terms and conditions on which the Forest Department had permitted the assessee to construct drainage for disposal of effluents in deciding the question as to whether the expenditure incurred by the assessee is revenue or capital expenditure, impugned order is set aside and the matter is remitted to the High Court for fresh consideration in accordance with law.
Shreyans Industries Ltd. v/s. CIT
(2008) 219 CTR 320 = 175 Taxman 239 = 13 DTR 225(SC)

(3) Guarantee commission is allowable as revenue expenditure.
Elscope (P) Ltd., CIT V/s.
(2008) 215 CTR 16 = 206 Taxation 327 = 2 DTR 329, 342(Guj)

(4) Payment for acquiring leasehold right for extracting minerals – Proportionate lease rent paid by the mining lessee for acquiring leasehold right for extracting minerals from mineral bearing land is a capital expenditure.
Enterprising Enterprises v/s. Dy. CIT
(2007) 208 CTR 433 = 160 Taxman 188 = 293 ITR 437 (SC)

(5) Replacement of assets without increase in production capacity - Amounts to revenue expenditure – Absence of details – Old machine, replaced by new machine – Whether constitutes advantage of an enduring nature – Supreme Court – Matters remanded to Commissioner (Appeals) – Income Tax Act, 1961, s. 37.
Ramaraju Surgical Cotton Mills , CIT v/s.
(2007) 294 ITR 328 = 212 CTR 345 (SC)

(6) Share issue expenses - Expenditure on issue of new shares, fee paid to RoC for increasing the shares capital and prospectus report fee for new issue of shares is capital expenditure.
Vareli Textile Industries v/s. CIT
(2006)201 CTR 403=284 ITR 238=154 Taxman 33 = 193 Taxation 448(Guj)

(7) Expenditure in connection with amalgamation - Amalgamation and liquidation expenses of winding up company constitutes revenue expenditure.
Vareli Textile Industries v/s. CIT
(2006)201 CTR 403 =284 ITR 238 =154 Taxman 33 = 193 Taxation 448(Guj)

(8) Expenses for stamp duty - Company - Expenses by way of stamp duty and registration for issue of bonus shares – Company does not acquire any benefit or advantage of enduring nature – Expenses are revenue in nature and allowable.
General Insurance Corporation , CIT v/s.
(2006)286 ITR 232 =156 Taxman 96= 205 CTR 280(SC)

(9) Expenditure on renovation of theatre, stamp duty, interest payment, etc. Assessee firm carrying on business of exhibiting cinema films was operating as a lessee in the leased premises – It had merely incurred the said expenditure to facilitate its trading operations in a more efficient manner – Impugned expenditure would enable the assessee to generate more revenue by attracting greater flow of customers to the cinema hall without bringing into existence any new asset or advantage of enduring nature – Tribunal was justified in allowing the expenditure as revenue expenditure.
Laxmi Talkies, v/s. CIT
(2005)194 CTR 334 =275 ITR 125 = 186 Taxation 637 (Guj)

(10) Amalgamation of sister concern with assessee company - Legal and professional expenses - Revenue expenditure.
Dinesh Mills Ltd. V/s. CIT
(2004) 268 ITR 502 (Guj)

(11) Donation to certain funds, charitable institutions etc. – Assessee company claimed 100 per cent deduction on account of donation of Rs. 2.5 lakhs to Gujarat Cricket Club (GCC) on basis that expenditure was in nature of staff welfare activity – Assessing Officer held that benefit was of enduring nature and had resulted in acquisition of capital asset by assessee company – Tribunal held that contribution was not a capital nature but was a revenue expenditure - Whether expenditure could be considered as capital in nature only when any capital asset had been created by assessee by that expenditure –Assessee had no proprietary right on seats which had been promised by association to be allotted at time of event or game; therefore, capital nature of company had not been increased by contribution to GCC and, therefore, contribution could not be treated as capital expenditure.
Emtici Engg. Ltd., CIT v/s.
(2003) 128 Taxman 265 = 10 DTR 177(Guj)

(12) Since additional liability due to fluctuation in exchange rate was clearly referable to liability of capital nature, amount claimed by way of exchange loss, consequent to fluctuation in exchange rate, was not allowable as deduction.
S. G Chemicals & Pharmaceuticals Ltd., CIT v/s
(2003) 130 Taxman 284 (Guj)

(13) Payments to retiring partners – Stipulations of the retirement deed clearly show that the payments made to the outgoing partners were in lieu of their foregoing the rights, title and interest in the assets, the firm's name and all other rights in the firm – Therefore, the payment could not be treated as any expenditure incurred by the firm wholly and exclusively for the purposes of its business but was a capital payment by its very nature.
Shree Laxmi Textiles & Allied Corpn, CIT v/s.
(2003) 183 CTR 44 =128 Taxman 176 = 174 Taxation 563 (Guj)

(14) Expenditure in connection with obtaining loan -Expenses incurred by way of payment of scrutiny fee, payment for preparation of report and payment to solicitors and consultants for the purposes of obtaining loan from GIIC had nexus with acquiring loan and not with the acquisition of any asset – Therefore, these items of expenditure could not be treated as capital expenditure.
Patel Filters Ltd. v/s. CIT
(2003)183 CTR 608 =132 Taxman 116 =176 Taxation 567 =264 ITR 21 (Guj)

(15) Foreign tour expenses – Foreign tours undertaken by the managing director of the assessee company in connection with projects which were to be set up by other companies – Expenses are allowable as revenue expenditure.
Patel Filters Ltd. v/s. CIT
(2003) 183 CTR 608 =132 Taxman 116 =176 Taxation 567= 264 ITR 21(Guj)

(16) Expenditure incurred by company in connection with amalgamation proceedings - Is revenue expenditure.
Mihir Textiles Ltd. , CIT v/s.
(2002) 256 ITR 528=172 CTR 344 = 166 Taxation 713 = 121 Taxman 60(Guj)

(17) Agreement granting non-exclusive licence to manufacture electric motors – Royalty payable on the basis of a percentage of sale price of products manufactured – Is allowable business expenditure.
Jyoti Electric Motors Ltd., CIT v/s.
(2002) 255 ITR 345 = 173 CTR 20 = 167 Taxation 30 = 121 Taxman 519(Guj)

(18) Fees paid for technical report – For expansion of existing business – Is allowable expenditure.
Jyoti Electric Motors Ltd., CIT v/s.
(2002) 255 ITR 345 = 173 CTR 20 = 167 Taxation 30 =121 Taxman 519(Guj)

(19) Loss on account of fluctuation in exchange rate – Not allowable as revenue expenditure.
S.G Chemicals & Pharmaceuticals Ltd., CIT v/s.
(2002) 175 CTR 618 = 169 Taxation 679 = 258 ITR 109(Guj)

(20) Replacement of machineries – Whether in the given facts and circumstances of the case, replacement of parts of machinery would amount to revenue expenditure or capital expenditure is primarily a question of fact – Tribunal correctly applied the legal principles in holding that part of the total expenditure incurred on replacement of machineries was admissible as revenue expenditure.
Sarangpur Cotton Mfg. Co. Ltd. , CIT V/s.
(2002) 177 CTR 467 = 124 Taxman 30 = 171 Taxation 499 (Guj)

(21) Expenses incurred on issue of bonus shares – Is capital expenditure.
Bharat Vijay Mills Ltd. , CIT v/s.
(2002) 177 CTR 475 = 124 Taxman 60 = 171 Taxation 498(Guj)

(22) Expenditure due to exchange rate difference - Was capital expenditure.
Mihir Textile Ltd. v/s. CIT
(2001) 170 CTR 606 = 252 ITR 686(GUJ)

(23) Repairs to building - It is only where the advantage is in the capital field that the expenditure would be disallowable - If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched the expenditure would be on revenue account even though the advantage may endure for an indefinite future - As a result of the repairs, the godown which was earlier used as a creche for the children of the female workers employed in assessee's factory, is now used as administrative office - Thus, the business asset has retained its character and only its use has changed - There is no addition to or expansion of the profit making apparatus - Expenditure incurred on repairs was revenue expenditure held -
Indian Ginning & Pressing Co. Ltd. v/s. CIT
(2001)170 CTR 122(GUJ)

(24) Expending on borewell - Expenditure incurred towards cleaning of the existing tubewell and altering the pipes of the pump installed inside the well was revenue expenditure.
Indian Ginning & Pressing Co. Ltd. v/s. CIT
(2001)170 CTR 122(GUJ)

(25) Expenditure in connection with issue of bonus shares - Was capitalexpenditure -
Mihir Textile Ltd. v/s. CIT
(2001) 170 CTR 606 = 252 ITR 686(GUJ)

(26) Expenditure in connection with public issues of shares - Object of the assessee was to increase its share capital whether it did so to comply with the directive of the RBI or otherwise - Expenditure was capital expenditure.
Kodak India Ltd. , CIT v/s.
(2001) 171 CTR 187(SC)

(h) **CASH EXPENDITURE**

(1) Disallowance payments made in cash exceeding prescribed limit – Unaccounted business transactions – Business expediency and exceptional and unavoidable circumstances not established – No evidence to show that payment by crossed cheque or draft not practicable having regard to nature of transaction and necessity for expeditious settlement - The payment by crossed cheque or draft would have caused genuine difficulty to assessee having regard to nature of transaction and necessity for expeditious settlement not shown – Transactions not falling under rule 6DD(j) – Disallowance justified - Income tax Rules, 1962, r. 6DD(j) – Income Tax Act, 1961, s. 40A(3).
Hynoup Food and Oil Ind. P. Ltd., CIT v/s.
(2007) 290 ITR 702(Guj)

(2) Disallowance under s. 40A(3) - Payments through agent – Assessee had engaged a firm which used to look after the financial affairs of the assessee and used to collect and make payments on behalf of the assessee – Payment was made by the said firm on the instructions given by the assessee which was referred to as 'pay order' - Thus, the so called 'pay order' meant an instruction by the assessee to the firm for making payment and not the payment - By virtue of the 'pay order', no amount was paid or no expenditure had been incurred – All the final payments were made by the firm

as an agent of the assessee by account payee cheques – Transactions not hit by the provisions of s. 40A(3).
Mrinalini V. Sarabhai , CIT v/s.
(2003) 184 CTR 122 = 176 Taxation 553 = 132 Taxman 257(Guj)

(3) Exceptional or unavoidable circumstances - Assessee made certain payments in cash to supplier LT – CIT(A) and the Tribunal concurrently found that there was an agreement between the assessee and LT whereby the later was required to keep sufficient material in stock so as to supply the same to the assessee as and when required, and LT was entitled to insist on cash payment as and when need arose – Agreement also stipulates penalty for breach of obligation by either party – Only about one third payment of total purchases from the said party was made in cash – The order of the Tribunal deleting the disallowance under s. 40A(5) by holding that the payments made in cash were covered by exceptions under r. 6DD(j) is based on findings of fact recorded after appreciating the evidence on record and do not suffer from the vice of perversity.
P. Pravin & Co., CIT v/s.
(2005) 193 CTR 213 = 144 Taxman 210 = 274 ITR 534 = 186 Taxation 43 (Guj)

(4) Applicability of r. 6DD(j) vis-à-vis payments outside books – Where income from an undisclosed business is brought to tax, provisions of s. 40A(3) and all other relevant provisions come into play – Evidence of genuineness of the payment and the identity of the payee are the first and foremost requirements for the applicability of r. 6DD(j) – When these two factors are established, only then the question as to whether the payment in cash was made in exceptional or unavoidable circumstances can be examined – Reasoning of the Tribunal, that once the business was not reflected in the regular books, payment by crossed cheque or draft would not have been practicable considering the nature of the transaction was not valid – Tribunal was not therefore justified in deleting the addition.
Hynoup Food & Oil Ind. (P) Ltd., CIT v/s.
(2005) 199 CTR 350 = (2006) 150 Taxman 194=192 Taxation 800 = (2008) 11 DTR 241(Guj)

(i) COMMITMENT CHARGES

Interest on borrowed capital – Assessee establishing new project - Loan in foreign currency obtained from IDBI for project – In turn refinanced by COFACE – "Commitment charges" paid by assessee to COFACE – Are in the nature of 'interest' - Allowable as business expenditure.

Gujarat Alkalies & Chemicals Ltd., Dy. CIT v/s.
(2008) 299 ITR 85 =167 Taxman 203 =215 CTR 10 =
204 Taxation 51 = 3 DTR 58(SC)

(j) CONTRIBUTION

(1) Allowability–Contribution made as per provisions of section 69 of the Gujarat Rajya Sahakari Co-operative Societies Act is deductible in computation of total income.

Mehsana District Co-op. Milk Producers Union Ltd. , CIT v/s.
(2003) 130 Taxman 281 (Guj)

(2) Co-operative Society – Contribution made as per provision of State Co-operative Societies Act – Deductible in computing income.

Contribution made as per provision of s. 69 of Gujarat Rajya Sahakari Co-operative Societies Act – is deductible.

Mehsana District Co-op Milk Producers Union Ltd. v/s. CIT
(2002) 256 ITR 322 = 166 Taxation 339 = 121 Taxman 689 = 175 CTR 612 (Guj)

(3) Allowability – Contribution under s. 69 of the Gujarat Rajya Co-operative Societies Act, 1961 – Contribution to Gujarat Co-operative Federal Education Fund was allowable as business expenditure.

Mehsana District Co-op Milk Producers Union Ltd. v/s. CIT
(2002) 177 CTR 333 = 258 ITR 780(Guj)

(4) Contribution by employer to unrecognised provident fund scheme - Allowable on ground that expenditure was on account of commercial expediency –

Decom Marketing (P) Ltd. v/s. CIT
(2001)251 ITR 398 = 114 TAXMAN 678(GUJ)

(k) COST OF PRODUCTION OF FEATURE FILM

Applicability of r. 9A – Film in question having not been released for exhibition on a commercial basis for at least 180 days before the end of the previous year, r. 9A(3) will apply and cost of production of the film insofar as it does not exceed the amount realized by the film producer by exhibiting the film on a commercial basis is to be allowed as a deduction and the balance, if any, is to be carried forward to the next following previous year and allowed as a deduction in that year – Sec. 80 would not be applicable.

Joseph Valakuzhy, CIT v/s
(2008) 216 CTR 320 =170 Taxman 196 = 302 ITR 190=
206 Taxation 541 = 7 DTR 1(SC)

(l) **DEDUCTION ON ACTUAL PAYMENT**

(1) Disallowance of expenditure - Taxes and duties not actually paid – Sales Tax collected but not paid to Government – Amount converted into loan under State Government Scheme – Amount could not be disallowed - Income Tax Act, 1961, s. 43B – Circular No. 496, dated 25-9-1987.

Official Liquidator of Essab Computer P. Ltd., CIT v/s.
(2009) 308 ITR 234 = 208 Taxation 415 = (2008) 15 DTR 152(Guj)

(2) Effect of section 43B – Liability to pay royalty in accounting years relevant to assessment years 1981-82 and 1982-83 settled by order passed in January 1985 – Royalty deductible in assessment year 1985-86 –

Gujarat State Forest Development, CIT v/s.
(2007) 288 ITR 28 = 196 Taxation 259 = 163 Taxman 547 (Guj)

(3) Disputed amount of excise duty secured by bank guarantee – Not equivalent to actual payment to Revenue – Amount not deductible - CBDT Circular No. 372, dated December 8, 1983 – Income Tax Act, 1961, s. 43B.

Mugat Dyeing & Printing Mills v/s. Asstt. CIT
(2007) 290 ITR 282 = 207 CTR 606 = 198 Taxation 439 (Guj)

(4) Excise duty collected from customers and kept in a separate account – Not deductible – Assessable as trading receipt – Income Tax Act, 1961, ss. 28, 43B -
Ideal Sheet Metal Stampings & Pressing (P) Ltd., CIT v/s.
(2007)290 ITR 295 = 207 CTR 173= 197 Taxation 320 (Guj)

(5) Bottling of arrack,etc–Excise Commissioner's condition that arrack should be matured in wooden vats for at least 15 days – Permission for not complying with maturing – Additional amount paid per bottle for such permission – Amount paid claimed as deduction - Amount paid for not affixing label on bottles – Not in nature of penalty or excise duty – Allowable as deduction – Rule as to deduction in year in which amount paid – Not applicable – Income Tax Act, 1961, ss. 37, 43B –Tax, duty etc –Condition for allowance–Rule as to deduction in year in which amount paid -
Distillers Co. Ltd., CIT v/s.
(2007) 290 ITR 419 = 160 Taxman 252= 209 CTR 177 (SC)

(6) Payment of royalty pertaining to earlier years – Sec. 43B is fully applicable to the payment of royalty in asst. yr. 1985-86 though pertaining to asst. yrs. 1981-82 and 1982-83 which was finalised on 2nd January, 1985, and therefore assessee is entitled to deduction in asst. yr. 1985-86.
Development Corporation, CIT v/s.
(2007) 207 CTR 548 (Guj)

(7) Disallowance under s. 43B – Sales Tax and municipal tax –If unpaid sales tax liability and municipal tax pertaining to last quarter of the accounting period are paid within the time stipulated for filing return of income under s. 139(1), s. 43B cannot be invoked for disallowing the same.
Express Hotel (P) Ltd., CIT v/s.
(2006)200 CTR 476 = 281 ITR 160 = 192 Taxation 308 = 153 Taxman 156(Guj)

(8) Tax liability – Unpaid sales tax liability, if paid before the due date of filing the return under s. 139(1) cannot be disallowed under s. 43B.
Zaverchand Gaekwad (P) Ltd., CIT v/s.
(2006) 202 CTR 94 = 192 Taxation 298 (Guj)

(9) Manufacture of country spirit - Fees and additional fees payable under West Bengal Rules on import of spirit - Whether duty or cess or countervailing duty – Fee under Rules not price for grant of privilege – Matter remanded for fresh disposal.
Varas International P. Ltd., CIT v/s.
(2006)284 ITR 80 = 154 Taxman 331= 204 CTR 119 = 156 Taxation 455 (SC)

(10) Disallowance under s. 43B – Royalty – Royalty is not a "tax" or "duty" but a payment for the user of land – Words "cess" or "fee" and the phrase "by whatever name called" have been added by substituting cl.(a) of s.43B w.e.f 1st April,1989– Therefore, s.43B as applicable to assessment year under consideration cannot be invoked for disallowing the outstanding royalty–Moreover, the royalty liability had become due in the last quarter of the financial year and was payable and actually paid in the next accounting year before the due date of the return – Hence, disallowance rightly deleted.
Gujarat Industrial Products , CIT v/s.
(2005) 193 CTR 527 = 274 ITR 635 = 148 Taxman 264 (Guj)

(11) Interest on loan borrowed from public financial institution – Decision by Appellate Tribunal and High Court on wrong basis of fact that loans were from specified institutions – Supreme Court – Appeal – Matter remanded – Income Tax Act, 1961, s. 43B.
Bhuna Co-op. Sugar Mills Ltd. V/s. CIT
(2005)273 ITR 212=194 CTR 1 =143 Taxman 369=187 Taxation 182(SC)

(12) Whether where sales tax collected by assessee company satisfies State's Sales Tax Deferrment Scheme, the same is not caught by mischief of section 43B – Held, yes. Circulars & Clarifications – Circula;'No. 496 dated 25-9-1987.
Goodluck Silicate Industries (P) Ltd., CIT v/s.
(2004) 134 Taxman 715(Guj)

(13) Deduction only on actual payment – Excise duty – Customs duty - Actual amount paid to be allowed as deduction irrespective of amount included in valuing closing stock –
Berger Paints India Ltd. v/s. CIT
(2004)266 ITR 99=187 CTR 193=135 Taxman 586=180 Taxation 10(SC)

(14) Sales Tax –Sales Tax collected by the assessee in the last quarter of the previous year which was statutorily payable in the subsequent year could not be disallowed under s. 43B if it was paid on or before the due date for furnishing the return of income in respect of previous year in which the liability to pay such sum was incurred and the evidence of such payament was furnished by the assessee along with the return –
Sirhind Steel (P) Ltd. v/s. CIT
(2004) 187 CTR 159(Guj)

(15) Disallowance under s. 43B – Applicability of first proviso to s. 43B - First proviso is retrospective in operation - Tribunal right in deleting the disallowance.
Patel Filters Ltd. v/s. CIT
(2003)183 CTR 608 =132 Taxman 116 =176 Taxation 567=264 ITR 21(Guj)

(16) Disallowance under s.43B – Electricity duty recovered from consumers by electricity company –Is payable to the Government in respect of energy supplied to the consumers – Therefore, it cannot be said that s. 43B is not applicable to the electricity duty recovered by assessee on the ground that it did not belong to it, but was retained by it for a short time as an agent of the Government – However, the deletion of disallowance was justified under the first proviso to s. 43B if the duty was actually paid by the due date envisaged under the said proviso.
Ahmedabad Electricity Co. Ltd., CIT v/s.
(2003) 180 CTR 222 =129 Taxman 190 = 262 ITR 97 =
175xation 70(Guj)

(17) Disallowance under s. 43B – Sales Tax – Assessee's case covered by Sales Tax deferral Scheme vide Resolution No. INC/1087/143-1, dt. 21st March, 1988, passed by Gujarat Government which was made operative from 1st April, 1983, read with CBDT Circular No. 496 dt. 25th Sept. 1987 – Therefore, provisions of s. 43B could not be invoked in respect of said Sales Tax Liability.

Shree Talal Taluka Sahakari Khand Udyog Mandali Ltd. , CIT v/s.
(2002) 178 CTR 89 = 125 Taxman 248(Guj) &
Goodluck Silicate Industries (P) Ltd., CIT v/s.
(2002) 178 CTR 92 = 171 Taxation 693(Guj) &
Bhagwati Autocast Ltd., CIT v/s.
(2002) 178 CTR 98 = 124 Taxman 452 (Guj)

(18) Interest deficit – Advance Tax – Difference arising because of mistake in assuming Sales Tax not yet paid to state is not deductible – Proviso to section that if paid before filing return Sales Tax can be deducted – Held to be retrospective by Supreme Court - Assessee paying Sales Tax within time allowed - Interest on deficiency in Advance Tax – Not payable.

Amrit Banaspati Co. Ltd. , CIT v/s.
(2002) 255 ITR 117 = 175 CTR 202 = 124 Taxman 74(SC)

(19) Sales Tax – Sales Tax collected by the assessee in the last quarter of the previous year which was statutorily payable in the subsequent year could not be disallowed under s. 43B if it was paid on or before the due date for furnishing the return of income in respect of previous year in which the liability to pay such sum was incurred and the evidence of such payament was furnished by the assessee along with the return –

Electro Controls, CIT v/s.
(2002)178 CTR 70 =123 Taxman 824 =171 Taxation 260=
259 ITR 624(Guj)
Gujarat Industrial Products , CIT v/s.
(2005)193 CTR 527= 274 ITR 635 =148 Taxman 264(Guj)
Alembic Glass Industries Ltd., CIT v/s.
(2004) 197 CTR 514 = 279 ITR 331 =149 Taxman 15 (Guj)
Jyoti Electric Motors Ltd. , CIT v/s.
(2002) 173 CTR 537(Guj)
Gujarat Carbon (P) Ltd. , CIT v/s.
(2002) 124 Taxman 477 (Guj)

(m) **DEFERRED ANNUITY**

Allowability – Deferred annuity premium in respect of managing directors – Where the ownership of the policy is with the company, the company has the discretion to pay the amounts and, therefore the premium paid on such deferred annuities is not deductible.

Bharat Vijay Mills Ltd., CIT v/s.
(2002) 177 CTR 475 = 124 Taxman 60=171 Taxation 498(Guj)

(n) **ENTERTAINMENT EXPENDITURE**

(1) Entertainment expenditure – Expenses on presentation of articles to guests – Term 'hospitality' normally cannot be included in the ordinary meaning of the term 'entertainment' but falls within the enlarged meaning given t the words 'entertainment' by Expln. 2 to s. 37(2A)- Expenditure incurred on presentation of articles would neither fall within the meaning of the term 'entertainment' nor the term 'hospitality' - Thus, such expenditure cannot be termed to be entertainment expenditure - Sales expenditure, however, would fall within the meaning of the term 'entertainment expenditure' as it was incurred for extending hospitality to guests of the assessee company and therefore, same is hit by the provisions of s. 37(2A) r/w Expln. 2 thereto.

Gujarat Carbon Ltd., CIT v/s.
(2005)196 CTR 614=187 Taxation 278=277 ITR 349=148 Taxman 81 (Guj)

(2) Expenditure on providing ordinary meals to outstation customers – Deductible prior to 1-4-1976.

Gujarat State Fertilizer Co., CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651(Guj).

(o) EXCHANGE DIFFERENCE

Allowances - Special provision – Changes in rate of exchange of currency – Scope of provision – Decision of Madras High Court in Southern Asbestos Cement Ltd. has nothing to do with allowability in one year in different years – Income Tax Act, 1961, s. 43A(1).

Lucas T.V.S Ltd. , CIT v/s
(2008) 297 ITR 429 = 214 CTR 1 = 166 Taxman 164 =
204 Taxation 3 = 1 DTR 37(SC)

(p) FINANCE CHARGES

Paid by assessee to COFACE - Manufacturing activity not commencing in assessment year – Allowable as interest on borrowed capital and also as business expenditure - Income tax Act, 1961, ss. 36(1)(iii), 37.

Gujarat Alkalies & Chemicals Ltd., Dy. CIT v/s.
(2008) 299 ITR 85 =167 Taxman 203 =215 CTR 10 =
204 Taxation 51 = 3 DTR 58((SC)

(q) **FOREIGN TOURS EXPENSES**

Allowability - Foreign tour expenses of tax consultant - An employee of assessee company and the tax consultant of the company were invited to International Tax Planning Meeting abroad - Tribunal has found that assessee company has not proved the requisite nexus for establishing that the expenditure in question was wholly and exclusively incurred for the purpose of the business of the assessee - No particulars of work done abroad or on return were furnished - Deduction of expenses incurred on tax consultant not allowable.

Sarabhai Technological Development Syndicate(P) Ltd. v/s. CIT
(2001)171 CTR 357(GUJ)
Also see cases under Capital or revenue expenditure

(r) **GENERAL**

(1) Aid to neighbours - Aid to residents living in the vicinity of factory - In view of absence of finding in the order of the Tribunal or in the judgment of the High Court on the question of allowabilty of aid given to residents living in the vicinity of assessee's factory as a business expenditure, the impugned judgment is set aside and the matter is remitted to Tribunal for de novo examination of this point in accordance with law –

Madras Reflineries Ltd. , CIT v/s.
(2008) 220 CTR 733 =16 DTR 318 = 16 DTR 318=(2009) 177 Taxman 8 (SC)

(2) Section 37 – Expenditure incurred on third person who had no connection with assessee's business – High Court held expenditure being not incurred for the purpose of business not allowable – Special leave petition dismissed by the Supreme Court – Income-tax Act, 1961 – Section 37.

Bureau Veritas India Division v/s. DCIT
(2007)199 Taxation 166(SC)

(s) GRATUITY

(1) Assessee company making a payment of Rs. 1,89,396 towards approved gratuity fund on the basis of acturial valuation during the previous year ending 31st December, 1978 – AO disallowing claim of the assessee on the ground that the liability pertained to accounting year 1977 – Assessee also paying gratuity to retiring directors amounting to Rs. 3,95,491 - Assessee claiming since contribution made to gratuity fund on the basis of acturial valuation, it be allowed, and also since the payment made in terms of section 36(I)(v) out of irrevocable trust approved by CIT–On reference - Held : both the payment allowable.
Lok Prakashan Ltd., CIT v/s.
(2003) 174 Taxation 560(Guj)

(2) Tribunal held that assessee was eligible under section 40A(7)(b)(ii) for deduction of provision for gratuity representing annual incremental liability to gratuity according to actuarial valuation for years ended 31-3-1973, 31-3-1974 and 31-3-1975 in assessment year 1975-76 – High Court disallowed claim, holding that appeallant was not entitled to claim deduction because it had not made provision for said amount in accounting year relevant to respective assessment years and also said sum was not in respect of accounting year relevant to assessment year 1975-76 – there was no infirmity in High Court's order.
Peria Karamalal Tea & Produce Co. Ltd. v/s. CIT
(2002) 124 Taxman 489(SC)

(3) Amounts not deductible - Gratuity - Conditions laid down in section 40A(7) have to be fulfilled - Tribunal right in disallowing claim in respect of rovision for gratuity liability under sections 28 and 37 -
Innosearch Ltd. v/s. CIT
(2001) 251 ITR 384 = 114 Taxman 455 = 160 Taxation 642

(4) Provision for gratuity - Year of allowability - Provision made by assessee for payment of any gratuity is allowable provided the same has become payable during the previous year - No event as provided in s. 4 of the Payment of Gratuity Act had taken place during the relevant period of account - It cannot be stated that there was any closure of establishment till the point of time the workmen were effectively in service - Notice dt. 18th April, 1978, itself lays down that the services would stand terminated

effective from the close of the business on 19th May, 1978 - Said date fell beyond the relevant accounting period - Thus, the retrenchment took place only after the close of the accounting year - Deduction of provision for gratuity not allowable even under the mercantile system of accounting.
Sarabhai Technological Development Syndicate(P) Ltd. v/s. CIT (2001)171 CTR 357(GUJ)

(t) **GUEST HOUSE EXPENSES**

(1) Disallowance under s. 37(4) – Rent, repairs depreciation and maintenance of guest house – Clear and unambiguous intention of the legislature is to exclude the expenses towards rents, repairs, maintenance and depreciation of premises used for the purposes of guest house of the nature indicated in s. 37(4) from the deductible expenses referred to in ss. 30 and 32 – If the legislature intended to allow deduction in respect of all types of buildings/accommodations used for the purposes of business or profession, there was no need to amend the provisions of s. 37 so as to make a definite distinction with regard to buildings used as guest houses as defined in sub-s. (5) of s. 37 – Any other interpretation would negate the very purpose of sub-s. (4) of s. 37 – Therefore, expenses towards rent, repairs, maintenance and depreciation of the guest-house used in connection with the business were to be disallowed under s. 37(4).
Britannia Industries Ltd. V/s. CIT & Anr.Earlier cases overruled.
(2005) 198 CTR 313=148 Taxman 468= 278 ITR 546(SC)

(2) Disallowance – Expenditure on guest house – Finding that expenditure had not been incurred on maintenance of guest house – Expenditure had not be disallowed.
Gujarat State Fertilizer Co., CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651(Guj)

(3) Acquisition of capital assets for new units of existing business - For Bungalow used by employees - Words `guest house' in its ordinary sense mean any accommodation maintained for extending hospitality to a guest or an outside visitor - Employees of a business house cannot be considered guests of the business - Therefore, bungalow exclusively used by assessee for the purpose of providing accommodation to its employees during their

visit on official tour cannot be considered as guest house for the purpose of sub-s. (4) of s. 37 - Even an accommodation which is maintained by the assessee for the purpose of extending convenience and comfort to its employees on leave is outside the purview of sub-s.(4) - Fact that the bungalow was maintained for providing accommodation to the employees while on business tour implies that the expenditure incurred thereon was laid out wholly and exclusively for the business - Tribunal justified in allowing deduction.

Gujarat Industrial Development Corpn., CIT v/s.
(2001)170 CTR 19(GUJ)

(u) INSURANCE PREMIUM & LTC

Company - Disallowance of expenditure – Medical insurance premium of managing director and his leave travel concession – No evidence that managing director wanted to take out insurance policy or avail of leave travel concession - Value of benefits to be taken into account in computing disallowance.

Mihir Textiles Ltd., CIT v/s.
(2006) 287 ITR 232 = (2007) 197 Taxation 306=210 CTR 445 = (2008) 8 DTR 156(Guj)

(v) INTEREST

(1) Allowability of – Assessee claimed deduction of interest paid on amount borrowed for purpose of paying income tax - Such interest would not amount to business expenditure.

Packart (P) Ltd. v/s. CIT
(2003) 131 Taxman 239(Guj)

(2) Tribunal disallowed assessee's claim for deduction on account of interest –Tribunal was justified in disallowing assessee's claim in view of fact that assessee's claim on account of interest had been disallowed on similar facts in earlier assessment year.

Kalindi Investments (P) Ltd. v/s. CIT
(2002) 124 Taxman 475(Guj)

(w) INTEREST ON BORROWED CAPITAL

(1) Interest on funds borrowed for installation and commissioning of second manufacturing plant – Section 36(1)(iii) – Tribunal upholding disallowance of interest of Rs. 27,96,55,759 as being capital – High Court observes that section 36(1)(iii) makes no difference between money borrowed to acquire a capital asset or revenue asset -

Assessee's appeal allowed – (Business expenditure – Interest on funds borrowed – Section 36(1)(iii)).
Gujarat State Fertilizer & Chemicals Ltd. v/s. ACIT
(2009) 208 Taxation 444(Guj)

(2) Amortisation of preliminary expense – Short term loans, whether allowable – Income Tax Act 1961, ss. 35D, 260A - Expenditure incurred to create brand name with enduring benefit, whether allowable - Interest on borrowed capital – Allowance available even in relation to borrowing for capital purpose – Borrowing for purchase of machinery for purpose of business – Allowance of interest to be made even if machinery not used in the year of borrowing - Income Tax Act, 1961, ss. 32 , 36(1)(iii) (before amendment with effect from April 1, 2004), 37.
Core Health Care Ltd., Deputy CIT v/s. Deputy CIT v/s.
(2008) 298 ITR 194 = 167 Taxman 206 = 215 CTR 1=
204 Taxation 51 = 3 DTR 49 (SC)

(3) Assessee to prove borrowing was for purpose of business – Firm - Disallowance - Money borrowed from partner – Firm also to prove further that borrowing was after formation of partnership, and was in terms of deed of partnership and that interest did not exceed 18 per cent simple interest per annum – Interest in excess not allowable – Income tax Act, 1961 (as amended by Finance Act, 1992), ss. 36(1)(iii), 40(b)(iv).
Munjal Sales Corporation v/s. CIT
(2008)298 ITR 298 =215 CTR 105 = 168 Taxman 43 =
204 Taxation 198 = 3 DTR 217 (SC)

(4) Interest - Borrowing for purchase of capital assets – Not put to use in concerned financial year – Allowance of interest to be made – Income Tax Act, 1961, s. 36(1)(iii) (before amendment with effect from April 1, 2004
Arvind Polycot Ltd., Asstt. CIT v/s.
(2008) 299 ITR 12 = 215 CTR 15 = 167 Taxman 200= 3 DTR 63 (SC)

(5) Borrowing for purchase of capital assets-Not put to use in concerned financial year– Allowance of interest to be made income Tax Act, 1961, s. 36(1)(iii) (before amendment with effect from April 1, 2004).
United Phosphorous Ltd., Jt. CIT v/s.
(2008)299 ITR 9 =215 CTR 13 =167 Taxman 261=
204 Taxation 114 = 3 DTR 61(SC)

(6) Assessee to prove borrowing was for purpose of business – Disallowance – Money borrowed from partner – Firm also to prove further that borrowing was after formation of partnership, was in terms of deed of partnership and that interest did not exceed 18 per cent simple interest per annum – Interest in excess not allowable.
Munjal Sales Corporation v/s. CIT
(2008) 215 CTR 105 = 168 Taxman 43 = 298 ITR 298 = 204 Taxation 198 = 3 DTR 217 (SC)

(7) Deduction – Acquisition of preference shares carrying coupon rate of 4 per cent dividend – Tribunal allowing interest on borrowed fund at 4 per cent and not at 7.5 per cent – Proper – Income tax Act, 1961, s. 36(1)(iii).
Arvindbhai Narottambhai (HUF), CIT v/s.
(2008)306 ITR 33 = (2009)177 Taxman 68 (Guj)

(8) Assessment years 1986-87 to 1994-95 – Assessee company had obtained loans in foreign currency for modernization and expansion of its existing business - Since repayment of those loans was stipulated in instalments, company had booked forward contract for delivery of required foreign currency on stipulated dates – Contract was entered into for entire outstanding amount and delivery of foreign currency was obtained under contract for instalment due from time to time – Balance value of contract after deducting amount withdrawn towards repayment was rolled over for a further period up to date of next instalment – For that purpose, assessee company paid roll over premium to a bank – Assessee was entitled to deduction of roll over charges under section 36(1)(ii) .
Elecon Engg. Co. Ltd. v/s. Asstt. CIT
(2008) 173 Taxman 107 = 207 Taxation 488 = 220 CTR 577 = 12 DTR 179(Guj)

(9) Loan from sister concerns for acquisition of shares – Assessee company having prima facie acquired the shares of AEC Ltd. Through finances arranged mainly from T Group (sister companies) only to enable T Group to acquire and takeover the business of AEC Ltd. High Court erred in dismissing the appeals on the question of deductibility of interest paid by the assessee to T Group on the ground that no substantial question of law arose for determination –

Appeals are restored to the High Court to dispose of the same in accordance with law.
Ashini Lease Finance (P) Ltd., CIT v/s.
(2008) 217 CTR 17 = 7 DTR 68 = (2009) 309 ITR 320(SC)

(10) Assessee to prove borrowing was for purpose of business – Firm – Disallowance - Money borrowed from partner – Firm also to prove further that borrowing was after formation of partnership, was in terms of deed of partnership and that interest did not exceed 18 per cent simple interest per annum.
Munjal Sales Corporation v/s. CIT
(2008) 298 = 215 CTR 105 = 168 Taxman 43= 298 ITR 298 = = 204 Taxation 198 = 3 DTR 217(SC)

(11) Amount borrowed for new assets – Interest paid in respect of borrowings on capital assets not put to use in the concerned financial year is allowable deduction under s. 36(1)(iii).
Ishwar Bhuvan Hotels Ltd. , CIT v/s.
(2008) 215 CTR 14 = 3 DTR 62(SC)

(12) Purchase of land with buildings thereon - Assessee demolishing buildings and selling scrap materials – Income from sale of scrap material treated as business income – Delay in paying purchase consideration – Interest paid by assessee – Revenue expenditure – Income tax Act, 1961, s. 37(1).
Kerala Road Lines v/s. CIT
(2008) 299 ITR 343 = 215 CTR 401= 168 Taxman 308=4 DTR 305 (SC)

(13) Advance given towards purchase of tea estate – Assessee was entitled to deduction of interest payable on the amount outstanding towards purchase of tea estate notwithstanding the fact that assessee was engaged in liquor business.
Arun Family Trust v/s. CIT
(2007) 207 CTR 168= 196 Taxation 191 = 163 Taxman 285 = 165 Taxman 15 (Guj)

(14) Acquisition of capital assets for new units of existing business - For applicability of s. 36(1)(iii) the only requirement is that the interest must be in respect of capital borrowed for the purposes of business - Sec. 36(1)(iii) nowhere stipulates that such borrowing has to be only on revenue account - There is also no requirement that the capital asset for the acquisition of which the borrowings

were made should have been put to use - Expln. 8 to s. 43(1) nowhere provides that the interest pertaining to the period prior to the asset being first put to use has necessarily to be capitalised and will not be allowed as deduction under s. 36(1)(iii) - Assessee had capitalised the interest but has given up its claim for depreciation on larger amount of actual cost of machines purchased out of borrowings - Therefore, deduction was allowable in respect of interest on borrowing though pertaining to the period prior to commencement of production.

Core Healthcare Ltd., Dy. CIT v/s.
(2001) 169 CTR 416 = (2008) 14 DTR 332(GUJ)

(x) LIABILITY OF PREDECESSOR

Allowability - Assessee company took over the running business of a firm and undertook to pay the outstanding remuneration payable to its income tax practitioners - As the going concern was purchased with assets and liabilities, the liability constituted an integral part of purchase consideration - It cannot be accepted that the outstanding remuneration was paid by assessee company solely to maintain cordial relationship with the practioners who continued to represent the assessee company in its income tax cases - Payment was made to fulfl the express terms of the agreement of purchase of the going concern of the firm - Such payment cannot therefore, he held to be expenditure incurred wholly and exclusively for the purpose of the business of the assessee company and cannot be allowed as deduction**.**

Garden Silk Mills (P) Ltd., CIT v/s.
(2001) 170 CTR 450 = 252 ITR 804(GUJ)

(y) LITIGATION EXPENSES

(1) 4Allowability of - Whether legal and professional expenses were allowable as revenue expenditure - Held, yes.

Dinesh Mills Ltd. Ltd. V/s. CIT
(2003) 130 Taxman 260 = 177 Taxation 295 (Guj)

(2) Legal expenses in connection with amalgamation of company – Since the amalgamation is resorted to for smooth and efficient conduct of the business of the company whether it is transferee company or transferor company, such legal expenses are laid out wholly and exclusively for the purpose of the business – It cannot be held otherwise merely because the assessee company in the instant case was transferor company – Moreover, the liability to pay such

legal expenses arises in respect of the period when the transferor company still continue to exist.

Akme Electronics & Control (P) Ltd., CIT v/s.

(2004)187 CTR 606=180 Taxation 214=267 ITR 396= 137 Taxman 263 (Guj)

(3) Litigation expenses for recovering advance towards capital asset – Tribunal

held that once there was a breach of the agreement it could not be said that the expenditure so incurred had direct connection with the acquisition of the capital asset i.e premises - This expenditure had connection with the recovery of the amount and, therefore it was allowable as a revenue expenditure - No error in the view taken by the Tribunal.

Gujarat Steel Tubes Ltd., CIT v/s.

(2002)177 CTR 191=123 Taxman 994= 258 ITR 235=171Taxation 274(Guj)

(4) In connection with investigation by Commission of inquiry - If the expenditure is such that it is incurred in connection with some activity or transaction which is directly or substantially connected with the running of the business of the assessee and if it pertains to business itself it should be considered as business expenditure - State Government appointed a commission of enquiry to investigate the irregularities or illegalities allegedly committed by the assessee company, its officers and one of its directors - Assessee engaged an advocate to represent the assessee and to render necessary assistance to the commission so that it could come to the right conclusion - Commission was required to be properly assisted by placing relevant facts in its proper perspective - Assessee wanted to protect its business goodwill and wanted to ascertain the conduct of its officers and the director - Thus, the expenditure incurred by the assessee for engaging an advocate is an expenditure allowable under the provisions of s. 37(1).

Gujarat Agro Oil Enterprises, CIT v/s

(2001) 170 CTR 458 = 118 TAXMAN 150 = 256 ITR 230 = 166 Taxation 138 = 125 Taxman 912 (GUJ)

(z) <u>MOTOR CAR EXPENSES</u>

(1) s. 37(3A),(3B) - Repairs and insurance of motor car – Repairs and insurance of motor car cannot be considered for disallowance under s. 37(3A) - Vehicle tax and driver's salary – Vehicle tax and driver's salary are in the nature of expenditure incurred on running and maintenance of motor cars as contemplated under cl. (ii) of s. 37(3B) and deductible under s. 37(1) and, therefore, said expenses are to be disallowed under s. 37(3A).

Indian Petrochemicals Ltd. CIT v/s.
(2007) 207 CTR 551 = 197 Taxation 317 (Guj)

(2) Expenditure on maintenance of vehicles – Part of motor car expenses not disallowable as personal and non business use of car – Income Tax Act, 1961, s. 37.

Dinesh Mills Ltd. v/s. CIT
(2004) 268 ITR 502(Guj)

(3) Tribunal was right in law in holding that a sum of Rs. 20,000 out of motor car expenses was not disallowable as personal and non business use of motor car in hands of assessee .

Dinesh Mills Ltd. Ltd. V/s. CIT
(2003) 130 Taxman 260 = 177 Taxation 295(Guj)

(za) **<u>PAYMENT TO RETIRING PARTNER</u>**

Allowability of - Assessee firm claimed as business expenditure compensation paid to retiring partners quantified in context of orders which were pending at date of their retirement in lieu of their foregoing right interest and title in assets and liabilities, firm's name and other rights in firm – That was disallowed by Assessing Officer being expenditure of capital nature but was allowed in appeals – Said payment could not be allowed as expenditure incurred by firm wholly and exclusively for purpose of business but was a capital payment.

Shree Laxmi Textiles & Allied Corpn., CIT v/s.
(2003)128 Taxman 176 = 174 Taxation 563 =183 CTR 44((Guj)

(zb) **ROYALTY**

(1) Royalty for use of technical know –how - CIT(A) found that the payment of royalty was required to be made for a period of five years – Therefore, royalty is payable for certain period of time as long as the assessee can use the technical know-how and is allowable as revenue expenditure.
Zaverchand Gaekwad (P) Ltd., CIT v/s.
(2006) 202 CTR 94 = 192 Taxation 298 (Guj)

(2) Payment by way of royalty – Revenue Expenditure.
Mihir Textiles Ltd., CIT v/s.
(2002) 256 ITR 528 = 172 CTR 344 = 166 Taxation 713 =
121 Taxman 60(Guj).

(3) Deductible as revenue expenditure.
Jyoti Electric Motors Ltd., CIT v/s.
(2002) 173 CTR 538(Guj)

(4) Assessee entering into a collaboration agreement for obtaining technical
know how as well as technical assistance for manufacture of carbon black – Pursuant to the agreement assessee paying Rs. 22.25 lakhs for obtaining technical know how which was capitalized - Over and above assessee making payment to the company for royalty based on sales – Royalty disallowed by the AO but allowed by ITAT – Held, relevant agreement not produced - Order of the ITAT correct – Question answered in favour of the assessee.
Gujarat Carbon Ltd., CIT v/s.
(2002) 167 Taxation 469 = 254 ITR 294 = 124 Taxman 477((Guj)

(zc) REPAIRS

(1) "Current repairs" – Test – Not the same as and is different from test for revenue expenditure – Textile mill – Replacement of worn out ring frames - Not "current repairs" – Income tax Act, 1961, s. 31(i).
Saravana Spinning Mills P. Ltd., CIT v/s.
(2007) 293 ITR 201= 163 Taxman 201= 211 CTR 281=
9 RC 422(SC)

(2) Disallowance – Scope of section 37(3A) – Disallowance only of expenditure not covered by sections 30 to 36 – Expenditure on repairs and insurance of motor car – Not to be taken into account in computing disallowance under section 37(3A) – Income Tax Act, 1961, s. 37(3A)- May be incorrect in view of Britania Industries Ltd. v/s. CIT (2006) 198 CTR 313(SC).
Broach Textile Mills Ltd., CIT v/s.
(2006) 280 ITR 335= 200 CTR 142= 192 Taxation 562 = 154 Taxman 113 (Guj)

(3)Allowable as –Expenditure incurred by assessee on repairs to godown and office building and claimed as revenue expenditure - Facts on record showed that godown being used as crèche for children of female workers was repaired and put to use as administrative office– There was no addition to or expansion of profit making apparatus of assessee and income earning capital, i.e fixed capital remained same –Expenditure on repairs was allowable as revenue expenditure - Expenditure incurred on cleaning of existing tubewell and altering pipes of pumps installed inside well was to be allowed as revenue expenditure –.
Indian Ginning & Pressing Co. Ltd. v/s. CIT
(2002) 125 Taxman 546(Guj)

(zd) RURAL DEVELOPMENT PROGRAMME

Conditions for allowance – Institution must hold valid certificate of approval and institution should furnish certificate of approval of programme by prescribed authority – No further condition – Assessee entitled to allowance if such conditions are satisfied - No obligation to see proper utilization of funds by institution - Subsequent withdrawal of approval - No effect.
Chotatingrai Tea, CIT v/s.
(2002) 258 ITR 529(SC)

(ze) SALES PROMOTION

(1) Disallowance u/s. 37(3A)of the IT Act – Advertisement, publicity & sales promotion – Whether commission reimbursed to the distributor paid to sales representative is covered under section 37(3A) – Held, no – Commission paid to the sales representative is for services rendered & not sales promotion expenses – Reference answered in favour of assessee & against the revenue – A.Y 1980-81 – Income Tax Act, 1961 – s. 37(3A).
Lakhan Pal National Ltd., CIT v/s.
(2007)196 Taxation 201(Guj)

(2) Disallowance – Amounts spent on sales promotion – Difference between sales promotion and sales commission – Incentives paid to sales representatives cannot be disallowed.
Lakhan Pal National Ltd., CIT v/s.
(2007)292 ITR 167 = 196 Taxation 201(Guj)

(3) Commission paid on sales to Agents dealers – Whether falls under 'sales promotion expenses' & hit by section 37(3A) – Held, no – Revenue's appeal dismissed – A.Y 1984-85 & 1985-86 – Income Tax Act, 1961, s. 37(3A).
Arunodata Mills Ltd., CIT v/s
(2007)196 Taxation 203(Guj)

(4) Expenditure on sales promotion – Discount in sale price – Not expenditure on sales promotion - Amount of discount cannot be disallowed.
P.M Diesel P. Ltd. , CIT v/s.
(2006)284 ITR 146 = 193 Taxation 119 = 204 CTR 328 (Guj)

(zf) **TECHNICAL KNOW HOW FEE**

Applicability of s. 35AB vis-à-vis s. 37(1) – Assessee having claimed deduction of royalty paid under an agreement for transfer of technical know how, issue involved interpretation of s. 35AB – Matter is remitted for fresh consideration, after construing the agreement between the parties as to whether the expenditure is capital or revenue in nature and thereafter decide the question of applicability of s. 35AB.
Swaraj Engines Ltd., CIT v/s.
(2008) 216 CTR 365 = 171 Taxman 495= 7 DTR 65(SC)

(zg) **TAX PAYMENT BY SUCCESSOR**

Disallowance under s. 40(a)(ii) – Income Tax liability of predecessor firm paid by successor – Not deductible in view of clear provision of s. 40(a)(ii) – Said section does not make any distinction between the income tax paid by assessee on its own income and the income tax paid by the assessee on the income of its predecessor – Even otherwise, assessee was one of the partners of the erstwhile firm and having taken over the liabilities was bound to pay the income tax dues of the firm under the provisions of s. 189.
Himson Textile Engineering Industries (P) Ltd. V/s. CIT
(2004) 187 CTR 88 = 180 Taxation 93= 267 ITR 612 = 137 Taxman 432 (Guj)

(zh) **TRAVELING EXPENSES**

(1) Rule 6 D - Limit prescribed in r. 6D should be applied to each tour individually and not to all tours made by an employee during the relevant year consolidated together.
Express Hotel (P) Ltd., CIT v/s.
(2006) CTR 476 =281 ITR 160 = 192 Taxation 308 = 153 Taxman 156(Guj)

(2) Travel expenses of employees – Expenditure on each trip to be taken into account – Income Tax Act, 1961 – Income Tax Rules, 1962, R. 6D.
Sayaji Iron and Engineering P. Ltd., CIT v/s.
(2006) 281 ITR 438= 192 Taxation 588(Guj)

23. BUSINESS INCOME

(a) BENEFIT UNDER S. 28(iv)

(1) Reduction in liability by way of commutation – Assessee acquiring four divisions as going concerns along with all assets and liabilities, which included the amount payable to four investment companies in five equal annual instalments, reduction in liability on commutation of liabilities at a discounted rate of 12 per cent did not constitute income in the hands of assessee nor could be charged to tax as benefit or perquisite under s. 28(iv), more so when in the case of one of the recipient investments companies, its claim for deduction of the said amount was disallowed by the Court.
Elscope (P) Ltd., CIT V/s.
(2008) 215 CTR 16 = 206 Taxation 327(Guj)

(2) Chargeability - Reduction in liability by way of commutation - Assessee acquiring four divisions as going concerns along with all assets and liabilities, which included the amount payable to four investment companies in five equal annual instalments, reduction in liability on commutation of liabilities at a discounted rate of 12 per cent did not constitute income in the hands of assessee nor could be charged to tax as benefit or perquisite under s. 28(iv) more so when in the case of one of the recipient investments companies, its claim for deduction of the said amount was disallowed by the Court.
Elscope (P) Ltd., CIT V/s.
(2008) 215 CTR 16 = 206 Taxation 327 = 2 DTR 329, 342 (Guj)

(b) BUSINESS INCOME OR CAPITAL GAINS

Vis-à-vis business income – Profit from sale of shares – Tribunal found that there was a long gap between the date of acquisition of shares and their sale and the shares having been shown as investment in wealth tax returns right from the asst. yr. 1957-58 profits from sale of shares were chargeable as capital gains and not business income – Tribunal was correct in holding that CIT was not justified in his revisional jurisdiction under s. 263 to hold that income was assessable as business income.

Rewashanker A. Kothari, CIT v/s.
(2006)201 CTR 510 = 283 ITR 338 = 193 Taxation 581 = 155 Taxman 214 (Guj)

(c) BUSINESS INCOME OR INCOME FROM HOUSE PROPERTY

(1) Chargeable as - Assessment year 1992-93 to 1999-2000 – Assessee carrying on business of hire purchase, took a land on lease constructed a multi storeyed building thereon and let out same to a bank and others – It received hiring charges and maintenance charges from lessees and claimed same as business income for assessment year 1997-98 – Assessing Officer, however, held same as income from house property – Commissioner (Appeals) confirmed assessment order and directed to reopen cases for assessment years 1992-93, 1995-96, 1996-97 and 1999-2000 by issuance of notice under section 148 – On appeal, Tribunal held hiring charges received by assessee as business income – Against notices issued under section 148 for reopening assessments, assessee filed writ petition before High Court – By impugned order High Court held that for all assessment years income should be treated as business income - It was not open to High Court to direct by an omnibus order that all earlier years were connected years and that income be treated only as business income when it was not a case of block assessment – Even otherwise it was not open to High Court to entertain writ petitions and parties should have been relegated to move High Court by filing appeal under section 260A .

Divya Investment (P) Ltd., Dy. CIT v/s
(2008) 171 Taxman 92 = 4 DTR 188(SC)

(2) Income from business or profession – Factory building raised before it could be put up for business use was leased out as per High Court orders in view of disputes between the directors – Lease rent assessed under the head "House Property" – Tribunal held it as assessable under the head "Business or Property" – High Court confirmed Tribunal's order, Income Tax Act, 1961, s. 14.

Hagochi Chemicals Pvt. Ltd., CIT v/s.
(2001) 196 Taxation 171(Guj)

(3) Sub-lessee developing property as business center and providing services – Amount received assessable as business income –

Saptarshi Services Ltd. , CIT (Asst.) v/s.
(2004) 265 ITR 379= 181 Taxation 204 (Guj)

(4) Income from house property - Assessment treating income derived by assessee company from letting out office premises along with certain facilities and services to various persons as business income, was held by Commissioner under section 263 as erroneous and prejudicial to interest of revenue and was set aside with direction to Assessing Officer to assess said income as property income – Prime object of assessee under said agreement was to let out portion of said property to various occupants by giving them additional right of using furniture and fixtures and other common facilities for which rent was being paid month by month in addition to security free advance covering entire cost of said immovable property – It would be wrong to say that assessee was exploiting property for its commercial business activities and such business activities were primary motto and letting out property was secondary one – From agreement between two parties, it was clear that primary object was to let out portion of said property with additional right of using furniture and fixtures and other common facilities for which rent was being charged from month to month and therefore, income derived from said property was income from property which should be assessed as such.

Shambhu Investment (P) Ltd., CIT v/s.
(2003) 129 Taxman 70 = 263 ITR 143 = 184 CTR 91 (SC)

(5) Property used for business – Tribunal found that the property in question was brought into partnership as capital contribution by one of the partners for its exploitation as a business asset – From the very inception of the firm, the income from the said property has been assessed under the head 'business' and that the assessee firm had been granted registration/renewal under s. 185 despite the fact that in the earlier years the only source of income of the assessee was exploitation of the said property – There is nothing to dislodge the aforesaid findings of the Tribunal - Therefore, income from the property has to be treated as business income and not as income from house property.

Gaekwad and Co., CIT v/s.

(2006) 202 CTR 166= 284 ITR 382 (Guj)

(d) <u>BUSINESS INCOME OR OTHER SOURCES</u>

Vis-à-vis income from other sources – Rental income - Assessee company took a building on lease and rented out the same after amending its objects clause to enable it to carry on said activity – Year wise comparison of the figures of rent received by the assessee and the rent paid clearly established that the assessee had undertaen the said activity as a business venture – Rental income was, therefore, taxable as business income and not as income from other sources.

Amora Chemicals (P) Ltd., CIT v/s.

(2002)178 CTR 64=125 Taxman 255 = 171 Taxation 505=258 ITR 519(Guj)

(e) <u>EXEMPTION</u>

(1) Accumulation of income – Application for accumulation filed during pendency of appeal before Tribunal – When the matter is pending before the Tribunal by way of an appeal, the assessment proceeding can be said to be pending – It cannot be contended that the assessment proceeding come to an end when the assessment order is framed – Hence, Tribunal was well within its jurisdiction to entertain the new ground by which the assessee trust claimed the benefit under s. 11(2) and adjudicate upon it – Tribunal having found that the assessee trust had complied with all the requirements

stipulated in s. 11(2), it was justified in holding that the assessee is entitled to benefits of s. 11(2).
Mayur Foundation, CIT v/s.
(2005)194 CTR 197 = 274 ITR 562 =
187 Taxation 95 (Guj)

(2) Delay in filing application under s. 11(2) – When decision on the question whether delay should be condoned or not entails drastic civil consequences on assessment of the trust, the principles of natural justice are required to be read into the provisions of s. 119(2)(b) – All CITs have been instructed to dispose of the applications for condoning the delay in filing applications under s. 11(2) in terms of Circular No. 273, dt. 3rd June, 1980 – CIT was not justified in dismissing the petitioner's application for condonation of delay in filing application under s. 11(2) without giving any opportunity of hearing and without considering the relevant criteria laid down by the CBDT for this purpose - Impugned order of the CIT quashed and set aside and he is directed to decide the matter afresh after giving opportunity of personal hearing to the petitioner's representative.
Gujarat Institute of Desert Ecology v/s. CIT
(2003) 180 CTR 351 =260 ITR 595 = 174 Taxation 221=
131 Taxman 274

(3) Bar of s. 13(1)(c) – Dividend received by assessee trust on the shares which were donated to assessee and which were received by assessee by way of bonus would not attract provisions of s. 13(2)(h) – Such dividend would be exempt from tax – However, dividend received on shares which were purchased by assessee would be subject to provisions of s. 13(2)(h) and would subject to tax.
Ambalal Sarabhai Charity Trust
(2002) 172 CTR 161 = 121 Taxman 463(SC)

(4) Contribution towards corpus – Contribution received towards specific purpose of construction of Wadi – Would not from part of the income of the trust.
Sthanakvasi Vardhman Vanik Jain Sangh, CIT v/s.
(2002) 178 CTR 95 = 171 Taxation 685(Guj)

(5) Assessee claiming exemption – AO holding since Trust having deposited certain amounts with certain companies in contravention of rules not entitled to the benefit of donation or exemption – Order of the AO confirmed by CIT – Assessee pleading that amounts having already withdrawn from the companies and invested as per rules and there being a technical default exemption be granted – Held, CIT be directed to pass fresh orders considering the view point of the assessee keeping in mind the decision of Division Bench of this Court in the case of N.N Desai Trust v/s. CIT 246 ITR 452.
Orpat Charitable Trust v/s. CIT
(2002) 169 Taxation 49 (Guj)

(6) Charitable Trust - Purpose not confined to religious or charitable use - Property could be used for social cultural and allied purpose at sole discretion of trustee - Trust not entitled to exemption.
Gangabhai Charities v/s. CWT
(2001) 250 ITR 666(SC)

(7) Dividend - Dividend on shares received as donation and on bonus shares
exempt - Dividend on shares purchased by trust covered by section 13(2)(h).
Ambalal Sarabhai Charity Trust, CIT v/s.
(2001)252 ITR 610(GUJ)

(f) **GENERAL**

(1) Purchase of units with mainly borrowed funds – After receiving dividend units sold at a loss – Question whether transaction is business or an adventure in the nature of trade – One of the considerations – Whether similar operations carried on by assessee – Supreme Court – Matter remanded to Appellate Tribunal for fresh consideration – Income Tax Act, 1961, s. 28.
Anil Jain v/s. CIT
(2007) 294 ITR 435 = 164 Taxman 319 = 212 CTR 347(SC)

(2) Business Income or Income from House Property - Rental income from property held as stock-in-trade – Rental income derived by assessee from the property which was treated as stock-in-trade is assessable as business income and cannot be assessed under the head "Income from house property".
Neha Builders (P) Ltd. , CIT v/s.
(2007) 207 CTR 231= 196 Taxation 242 =
164 Taxman 342 (Guj)

(3) Where in addition to letting buildings or parts thereof, assessee was also rendering numerous services to tenants, income received by assessee towards rent from property leased by it, would be treated as 'Income from house property' whereas income received towards different services rendered to tenants would be treated as 'Profits and gains of business or profession' and, accordingly allowable expenditure would be deducted from respective heads of said income.
Sarabhai (P) Ltd. , CIT v/s.
(2003) 129 Taxman 43 = 182 CTR 447=263 ITR 197 =176 Taxation 84 = (2008) 10 DTR 194(Guj)

(4) Rental income and service charges – Assessee co-operative society providing various facilities to its members and occupiers of the property such as maintenance of lifts, etectricity, sanitation, internal telephone , security arrangement, etc. – All these aspects taken collectively indicate that the activity of the society is business activity, though may not be aimed at making profit - Token rent of Re. 1 charged from the allottee members was not changed with a view to exploit the property - After the shops or godowns were allotted to the members, they alone had the right to derive income from such property by assigning it to others – Therefore, income derived by assessee by charging such nominal rent would not fall under the head income from house property but under the residuary head "income from other sources" - Income derived by assessee from the occupants and/or members for rendering incidental services would fall under the head "business income" as these services are provided by the assessee to fulfil its object of providing godowns, shops and other amenities for the trade of the members – Apart from this, assessee being an AOP, cl. (iii) of s. 28 would also get attracted - Letting out the premises to banks, post office and canteens was with a view to facilitate and provide amenity to the traders and fell within the business activity of the

assessee and, therefore income derived by way of rent from banks, post office and canteens would fall under the head "business income" - Similarly the auditorium is mainly used by the assessee for fulfillment of its object though occasionally used by outsiders also and, therefore income derived therefrom would fall under the head "business income" - There is no nexus between the objects of the assessee society and the activity of constructing and letting out restaurant and the hotel fall and thus the income from letting of revolving restaurant and the hotel would fall under the head "income from house property" and not "business income".
Surat Textile Market Co-op. Shops & Warehouse Society Ltd., CIT v/s.
(2003)183 CTR 556 = 132 Taxman 146 = 176 Taxation 575= 264 ITR 289(Guj)

(5) Cash Compensatory Support **-** Is revenue receipt exigible to tax.
Gujarat Steel Tubes Ltd., CIT v/s.
(2002) 177 CTR 191 = 123 Taxman 994 = 258 ITR 235= 171 Taxation 274(Guj)

(6) Benefit or perquisite under s. 28(iv) – Sales Tax Refund – Monetary benefit or perquisite cannot be taxed by invoking the provisions of s. 28(iv) –
Saurashtra Packaging (P) Ltd., CIT v/s.
(2002) 178 CTR 83 (Guj)

(7) S. 170, 176 (3A) – Discontinuance of business – Succession to business – Sec. 176 (3A) can be applied only when there is discontinuance of business - Business of erstwhile firm was taken over by an ex-partner (assessee) as a going concern - Assessee received sales tax refund subsequently - Business continued after the take over – Provisions of s. 176(3A) could not be invoked for including the amount of sales tax refund in the taxable income of the assessee.
Saurashtra Packaging (P) Ltd., CIT v/s.
(2002) 178 CTR 83 (Guj)

(8) Cash assistance – In view of clause (iiib) of section 28 inserted by the Finance Act, 1990 with retrospective effect from 1-4-1967, amount of export cash assistance is a revenue receipt and liable to be taxed.
Deversons (P) Ltd., CIT v/s.
(2002) 124 Taxman 472(Guj)

(9) S. 28(iv) – Value of any benefit or perquisite, arising from business or exercise of profession – Cost price of milk powder and soya flour received by assessee from UNICEF free of charge was not deductible in computation of total income.
Kaira Dist Co-op. Milk Producer Union Ltd., CIT v/s.
(2002) 124 Taxman 473(Guj)

(10) Business - Firm - Partner - Amount received on retirement from firm - Not a benefit or perquisite arising from business - Receipt of amount is not from "sale" within the meaning of section 41(2) - Amount not assessable under section 28(iv) or 41(2) -.
Bharatkumar R. Panchal, CIT v/s.
(2001) 252 ITR 454(GUJ)

(g) <u>PROFITS U/s. 41(1)</u>

Remission or cessation of liability – Mere withdrawal of Court cases challenging liability to municipal tax and submitting the disputes to arbitration would not amount to cessation of liability so as to attract s. 41(1).
Office of the official Liquidator, CIT v/s.
(2008) 218 CTR 165 = 205 Taxation 241 = 3 DTR 165(Guj)

(h) <u>SALE OF SCRAP</u>

Assessee demolishing buildings and selling scrap materials – Income from sale of scrap material treated as business income.
Kerala Road Lines v/s. CIT
(2008) 299 ITR 343 = 215 CTR 401=168 Taxman 308 =
4 DTR 305 (SC)

24. CAPITAL GAINS

(a) COST OF ACQUISITION

(1) Cost with reference to certain modes of acquisition –When subsidiary company disposes of asset, cost of acquisition in hands of subsidiary company cannot be any other cost but cost in hands of previous owner – Assessee company was a wholly owned subsidiary of KPPL – KPPL had acquired all equity shares of a company 'A' at Rs. 1,11,00,000 and, therefore, 'A' became wholly owned subsidiary of KPPL at Rs. 55,36,680 and as a result 'A' became wholly owned subsidiary of assessee - Subsequently, 'A' went into voluntary liquidation and distributed assets valued at Rs. 93,24,000 in favour of assessee – Assessing Officer invoked section 46(2) and taxed surplus after deducting amount paid by assessee for acquisition of shares i.e Rs. 55,36,680 and rejected assessee's plea that for purpose of computing capital gains chargeable to tax, cost to previous owner, i.e KPPL in terms of section 49(1)(iii)(e) should be considered – Merely because cost of shares to assessee was less than their cost to KPPL, that by itself could not be criterion for giving a go by to legislative intent and scheme of Act - Therefore, capital gains under section 46(2) had to be computed by taking cost of acquisition of shares in hands of previous owner, i.e KPPL.

Brahmi Investments (P) Ltd., CIT v/s.
(2006) 153 Taxman 471 = 204 CTR 319 = 286 ITR 66 (Guj)

(2) Agricultural Land – Transfer of land converted from agricultural to non-agricultural - Circular stating that cost of acquisition would be value on date of such conversion - Circular in force in assessment year 1971-72 – Cost of acquisition to be calculated as per circular for assessment year 1971-72 – Income Tax Act, 1961, s.48.

Vyas B.B , CIT v/s.
(2003)261 R 73 =128 Taxman 166 =174 Taxation 556 =
183 CTR 108 (Guj)
[but see contrary, view in 159 ITR 141(Guj)]

(3) Portion of property belonging to assessee acquired - Statutory compensation for injury to unacquired portion – It is part of full value of consideration for portion acquired.

Mahalakshmi (P) (Smt) v/s. CIT
(2002) 255 ITR 647 = 176 CTR 103(SC)

(b) CHARGEABILITY

(1) Acquisition of assessee's banking undertaking by Government – Compensation received by assessee on nationalization of its banking undertaking which included intangible assets like goodwill, tenancy rights, manpower and banking licence, not being allocable item wise, it is not possible to computer capital gains and therefore, it is not taxable under s. 45.
PNB Finance Ltd. v/s. CIT
(2008)220 CTR 110 = 307 ITR 75= 175 Taxman 242 =11 RC 607 = 15 DTR 47=(2009) 208 Taxation 370(SC)

(2) Chargeability – Consideration received in lieu of surrender of tenancy rights – Tenancy rights is a capital asset and surrender thereof would attract s. 45 only – Such consideration cannot be treated as a casual and non-recurring receipt under s. 10(3) so as to bring it to tax under s. 56.
Mahendra R. Divecha, CIT v/s.
(2005)199 CTR 721(Guj)

(c) **COMPUTATION OF CAPITAL ASSET**

(1) State sold the immovable property by public auction to realise its dues and paid over the balance to the assessee after deducting its due towards 'kist' and interest - Immovable property and the price realised therefor belonged to the assessee - Therefore, capital gain has to be computed on the full price realised in auction.
Attili N. Rao, CIT v/s.
(2001) 171 CTR 188 = 252 ITR 880 = 119 Taxman 1030(SC)

(2) Assessee purchasing certain agricultural land and throwing the same in the hotch-potch of the HUF – Later, HUF partitioned and the assessee paying Rs. 23,000 to equalize his share in the land on partition – Assessee pleading that the payment of Rs. 23,000 in the cost of land as paid by assessee – Held, a sum of Rs. 23,000 paid to the HUF on partition for equalizing his interest in the land to be taken, as cost.
Narendra N. Chauhan, CIT v/s.
(2003)173 Taxation 522 =261 ITR 185 =181 CTR 412 = 131 Taxman 42(Guj)

(d)**CONTRIBUTION OF CAPITAL (SHARES) BY PARTNER TO FIRM**

(1) Assessment year 1983-84 – In absence of ascertained cost of acquisition, charge under head 'capital gains' cannot be fastened to full value of consideration – Where assets had been acquired by a mode specified in section 49(1)(iii)(a) but neither its cost nor date of acquisition was ascertainable, income tax authorities were not right in working out capital gains.

Manoharsinhji P. Jadeja, CIT
(2005) 148 Taxman 110 = 199 CTR 223 (Guj)

(2) Revenue admits in no uncertain terms that the capital assets were transferred within the meaning of s.2(47) from the assessee to the partnership firm by way of capital contribution -Hence, it is not possible for the Revenue to contend that the firm was not genuine – Transfer being without consideration, no tax can be levied on capital gains.

Subodhchandra S. Patel, CIT v/s.
(2003) 184 CTR 393(Guj)

(e) DEDUCTION U/S. 48 - PRIORITY

Priority vis-à-vis exemption under s. 54E – While computing long term capital gains, deduction under s. 48(2) is required to be allowed before exemption under s. 54E.

Sercon (P) Ltd. & Ors. V/s. Asstt. CIT
(2008) 218 CTR 479 = 174 Taxman 245 = 207 Taxation 610 (Guj)

(f) DISTRIBUTION OF ASSETS BY COMPANIES IN LIQUIDATION

Assessment year 1988-89 – Where a holding company by virtue of being a shareholder, had received assets on voluntary liquidation of its subsidiary company, value of assets received by holding company on date of distribution was liable to be taxed under section 46(2) and section 47(v) would not apply to such transaction.

Brahmi Investments (P) Ltd., CIT v/s.
(2006) 153 Taxman 471= 204 CTR 319=286 ITR 66 (Guj)

(g) EXEMPTION - S. 54

(1) Section 54 – Capital gains on sale of residential house – Investment from salE consideration another residential house – Held, exemption to HUF not allowable - Assessment year 1981-82.

Naresh Ratilal Shah, CIT v/s.

(2006)192 Taxation 574(Guj)

(h) <u>S. 47(iv)</u>

(1) Distribution of assets by company in liquidation – Distribution of assets which are not capital assets under s. 2(14) – Sec. 46(2) is an independent charging section and provides for a distinct method of calculation of capital gains – It does not make any reference to capital assets either in connection with the imposition of capital gains tax or its computation – Parliament appears to have deliberately chosen to use the word 'assets' in s. 46(1) and (2), ostensible intention being to bring assets of all kinds within the scope of the charge - If the words 'capital assets' and 'assets' as used in ss. 45(1) and 46, respectively did not overlap there was no need to provide for a non obstante clause in s. 46(1) with reference to s. 45 - What is not a capital asset may yet be an asset for the purposes of s. 46(2) - Therefore, assessee shareholder is liable to pay tax on the market value of the assets, whether capital or any other asset (agricultural land in the present case) received from the company in liquidation as on the date of distribution as provided under s. 46(2).

Bagavathy Ammal, N. V/s. CIT & Anr.
(2003)179 CTR 458 =259 ITR 678 =173 Taxation 98 =
127 Taxman 422 (SC)

(2) Loss under "Short term Capital Gain" - Applicability of s. 47(iv) – Loss incurred under head "short term capital gains" incurred on sale of shares to a company which was a wholly owned subsidiary of another company which was a wholly owned subsidiary of assessee company - Could not be disallowed by invoking s. 47(iv) - There is no justification for transplanting the wider definition of holding company under s. 4(1) (c) of the Companies Act into the provisions of s. 47 of IT Act - Words "any transfer of a capital asset by a company to its subsidiary company" in s. 47(iv) contemplate only the immediate subsidiary company of the holding company - Clauses (iv) and (v) of s. 47 lay down two specific conditions for applicability of said clauses which are quite different from the criteria laid down in s. 4(1) of the Companies Act - Therefore, Tribunal was not justified in treating the transferee company as a subsidiary of assessee company for the purpose of s.47(iv) and disallowing the claim of loss.

Kalindi Investment (P) Ltd. v.s, CIT
(2001) 171 CTR 99(GUJ)

(3) Transactions not regarded as transfer under s. 47(ii) - Sale of share of partitioned property - Ancestral property had been divided equally among the HUFs of four brothers though not by metes and bounds under a memorandum - Assessee one of the four HUFs, had been showing its share of income from the said property in its return after the said partition - Assessee - HUF sold its share to HUF of J - Said property was not owned by a BOI or any AOP as on date of sale - Four different HUFs were having their distinct share when share of assessee was sold - Capital Gains were not exempt under s. 47(ii).
Dilip Chinubhai Shah v/s. CIT
(2001) 171 CTR 294(Guj)

(i) **LONG TERM OR SHORT TERM**

(1) Member of Co-operative Housing Society allotted a flat – Date of acquisition of flat is the date of allotment of share in society - Share allotted in November 1980 – Possession of flat in September 1983 - Sale of flat in April, 1984 – Gains were long term capital gains– Income Tax Act, 1961, ss. 2(29B), 112.
Jindas Panchand Gandhi , CIT v/s.
(2005) 279 ITR 552 (Guj)

(2) Assessee acquiring shares in co-operative Housing Society and allotted flat in 1979 – Possession of flat obtained in October, 1981 and sale in December, 1982 – Shares in Co-operative Housing Society held for more than thirty six months - Gains on sale of flat are long-term capital gains.
Anilaben Upendra Shah, CIT v/s.
(2003) 262 ITR 657 = 176 Taxation 334 184 CTR 129(Guj)

(j) **Loss**

(1) Capital loss – Commutation charges or discount towards share call moneys – The amount that the assessee was to receive was towards share capital – Share capital appears on the liabilities side of the balance sheet and at no point of time the assessee was in possession of or entitled to any asset - In the absence of any asset, there is no question of transfer of capital asset and the basic condition for invoking s. 45 is not fulfilled – Thus, the claim of the assessee that the amount forgone by it represented capital loss is not tenable.
Kailash Investmens (P) Ltd. v/s. CIT v/s.
(2006)200 CTR 21= 281 ITR 92 = 192 Taxation 583 (Guj)

(2) Loss on cancellation of order for supply of machinery – Contract between the assessee and the supplier of machinery was not a capital asset in the hands of the assessee and there was no transfer whatsoever within the meaning of s. 2(47) when the assessee cancelled the contract and therefore, the resultant loss incurred by assessee was not allowable as short-term capital loss.

Patel Brass Works v/s. CIT

(2006) 205 CTR 139= 286 ITR 598(Guj)

(k) RESIDENTIAL HOUSE

(1) Sale of house used for residential purposes and purchase or construction of another house for residential purposes– Scope of section 54(1)– Meaning of "residence" - Residence means permanent residence– Sale of house used for residential purposes and purchase of another house immediately thereafter for temporary residence and construction of permanent residence within two years –Sale of temporary residence within three years–Assessee can claim exemption u/s.54(1) in respect of construction of permanent residence.

Harsutrai J. Raval v/s. CIT

(2002)255 ITR 315 = 174 CTR 540=169 Taxation 77 =122 Taxman 165(Guj)

(l) TRANSFER

(1) Assessment year 1989-90 – Assessee entered into an agreement to sell certain land to 'K' for Rs. 25 lakh – Subsequently, said land was divided into plots and 24 sub-divided plots were transferred by assessee to nominees of 'K' for consideration of Rs. 15.2 lkh in relevant assessment year – Assessing Officer worked out capital gain on entire consideration of Rs. 25 lakh, rejecting assessee's contention that since he had not given possession of entire area of land and continued to be in possession of land not transferred, section 2(47) was not applicable – Order of Assessing Officer was upheld by Commissioner (Appeals), but Tribunal allowed assessee's appeal – Since no revenue or municipal records had been produced which could have indicated as to whether entire land or a part thereof stood conveyed and delivered to 'K' at relevant time and on facts, it was not clear as to how many plots stood conveyed and how many plots remained with assessee – Therefore matter was to be remitted to Tribunal for fresh consideration in accordance with law after considering relevant documents.

Ajay Kumar Shah Jagati v/s. CIT

(2008)168 Taxman 53 =215 CTR 396 =205 Taxation 445=4 DTR 214(SC)

(2) Assessment year 1974-75 and 1975-76 - Assessee executed lease deed in accounting year relevant to assessment year 1974-75 but presented document therefore before sub-registrar and got registration completed in accounting year relevant to assessment year 1975-76 - For purpose of capital gains under section 45 transfer is effected when lease is executed rather than when it is registered - Held, yes -
Interpretation of statutes - Reference to other statutes.
Hormasji Mancharji Vaid , CIT v/s.
(2001) 118 TAXMAN 276(GUJ)(FB)

(3) Compulsory acquisition of land – Physical possession of the land was given to the municipal corporation on 8th Feb., 1967 - However, notification under s. 4 of the land Acquisition Act was issued subsequently on 9th April, 1967 – Therefore, there was no effective transfer during the accounting year relevant to the assessment year under consideration – Hence, capital gain was not liable to tax in the relevant asst. yr. 1967-68.
Kohinoor Flour Mills Pvt. Ltd., CIT v/s.
(2005) 197 CTR 167 = Taxation 293 (Guj)

(4) "Transfer", meaning of - Immovable property of value exceeding Rs. 100 –Transfer when "effected" - Date of execution of transfer deed - Registration of transfer deed-Transfer effective from date of execution -
Mormasji Mancharj Vaid, CIT v/s.
(2001) 250 ITR 542 = 168 CTR 565 = 164 Taxation 277(Guj)

(5) Chargeability – Consideration for surrender of tenancy rights – Prior to the amendment of s. 55(2) in 1995, if the cost of acquisition of capital asset could not be determined the transfer of such capital asset would not attract capital gains tax – In the instant case, Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained - Said receipt not being chargeable under s. 45 because of inapplicability of computation provision cannot be treated as a casual and non-recurring receipt under s. 10(3) and be subjected to tax under s. 56.
Cadell Weaving Mill Co. (P) Ltd. & Anr., Union of India & Anr. V/s.
(2005) 193 CTR 578 = 273 ITR 1 = 142 Taxman 713(SC)

(m) VALUATION OFFICER – REFERENCE TO

(1) Reference to Valuation Officer –A valuation officer appointed under Wealth Tax Act can neither be called upon nor he would have jurisdiction to give a report either to Assessing Officer under Income Tax Act except when a reference is made under and in terms of section 55A, or to a competent authority except under section 269L – In income tax returns assessee disclosed certain amounts which she had invested in construction of a house – These were not accepted by Assessing Officer, who referred question of construction cost of house to Valuation Officer - Assessing Officer reopened assessment and made addition of excess amount as undisclosed income – Assessing Officer could not refer matter to Valuation Officer for estimating cost of construction – Reassessment was bad.
Amiya Bala Paul (Smt) v/s. CIT
(2003)130 Taxman 511 = 182 CTR 489 = 262 ITR 407=
176 Taxation 221 (SC)

25. CASH CREDITS

(1) Assessment year 2003-04 – Assessing Officer made addition under section 68 on theground that assessee had deposited cash in bank on two different dates without having cash balance in hand and he had also failed to furnish details regarding source of said cash credits – On appeal Commissioner (Appealsd upheld addition – On second appeal Tribunal deleted addition holding that there was no evidence to disbelieve the fact that sufficient cash was available in cash book on two relevant dates for making deposits and that there was no reason for disbelieving books of account maintained by assessee – Whether findings recorded by Tribunal being findings of fact, its order was to be upheld – Held, yes.
Shailesh Rasiklal Mehta , CIT v/s.
(2009) 176 Taxman 270(Guj)

(2) Assessment year 1987-88 – In course of assessment proceedings Assessing Officer compared copy of account of assessee company as appearing in books of Gujarat Mineral Development Corporation (GMDC) with books of account of assessee and noticed that certain drafts allegedly sent to GMDC by assessee had not been accounted for in its books but entries in respect thereof appeared in account of assessee in books of GMDC - Assessee replied that it had not sent said drafts to GMDC – Assessing Officer was not satisfied with reply of assessee and made addition of that amount – On appeal addition was upheld on ground that onus laid upon assessee to explain

source of said drafts – Burden was on department to show that amount of demand drafts found to be credited in assessee's account in books of account of GMDC belonged to assessee by bringing proper evidence on record and assessee could not be expected to explain source of income or call responsible officers of GMDC or bank to discharge burden that laid upon department – Whether when Assessing Officer had failed to discharge his burden to prove that amount in question was income of assessee Tribunal was right in upholding addition – Held, no

Krishna Textiles v/s. CIT

(2008) 174 Taxman 372 = 207 Taxation 559 = 220 CTR 568 = 11 DTR 217(Guj)

(3) Assessment year 1985-86 – A search and seizure operation was carried out at residence of 'R' wherein a key of bank locker along with two envelopes containing six promissory notes were found – 'R' in his statement stated that said key of bank locker and both envelopes containing promissory notes were handed over to him by assessee – Out of six promissory notes one promissory note was executed by 'K' in his capacity as partner of firm – 'K' in his statement stated that he had signed said promissory note in favour of assessee on behalf of his firm after obtaining said amount – However, later on 'K' retracted from his statement alleging that same was recorded under pressure – He along with two other partners of firm also made voluntary disclosure disclosing certain income which also included amount covered by said promissory note – Assessing Officer however treated amount of said promissory note as income of assessee from undisclosed sources rejecting assessee's contentions that he had no concern with said promissory note nor had he lent any moneys to 'K' – It was found that statement of witness 'R' on which heavy reliance was placed by Assessing Officer while making addition was neither referred to in assessment order nor a copy thereof was given to assessee nor assessee was given an opportunity of cross examining said 'R' – Whether on facts addition was justified – Held, no.

Laxmanbhai S. Patel by his heirs and legal Representatives of Late v/s. CIT

(2008) 174 Taxman 206 = 207 Taxation 474 = 222 CTR 138 = 12 DTR 108 (Guj)

(4) Liabilities/deposits taken over by company on incorporation – Assessee company having been incorporated on 14th Feb 1985 cash credits appearing in the books of account of its predecessor entity as on 16th Jan. 1985 whose business was taken over by the assessee company as a going concern could not be assessed as cash credits in the hands of assessee company.
Amod Petrochem (P) Ltd., Dy CIT v/s
(2008)217 CTR 401 = 207 Taxation 50 = 307 ITR 265=9 DTR 169 (Guj)

(5) Share application money – If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company.
Lovely Exports (P) Ltd., CIT
(2008) 216 CTR 195 = 6 DTR 308(SC)

(6) Amounts shown as withdrawn from bank and credited to accounts - Amounts found not to have been received by assessee at all but utilized to purchase drafts in favour of two persons - On basis of evidence Tribunal giving benefit of doubt in respect of two amounts and holding against it on two others – Discretion not to be interfered with.
D.M Engineering v/s. CIT
(2007) 289 ITR 517(Guj)

(7) Gift from NRI – AO, CIT(A) and Tribunal after consideration of material on record, having found that the explanation offered by the assessee was unacceptable and held that NRI gifts were not real, no substantial question of law arose, and High Court, was not justified in disturbing said findings of fact and deleting addition under s. 68.
Mohanakala P. & Ors. , CIT v/s.
(2007) 210 CTR 20 =291 ITR 278= 161 Taxman 169 = 201 Taxation 349 (SC)

(8) Assessing officer obtained information from the witness that he deposited the money after taking from the partner of the firm – The cash credits were held as non-genuine – Further held action against partner could be taken – Reference decided in favour of revenue & against the assessee – Income Tax Act,

1961 , s 68 & 147.
Gujarat Fertilizers v/s. CIT
(2007)196 Taxation 187= 210 CTR 594 (Guj)

(9) Genuineness of transactions – Information from witness that he had no money with him – Finding that witness was brought to save assessee – No interference –
Gujarat Fertilizers v/s. CIT
(2007) 293 ITR 70 =196 Taxation 187 =210 CTR 594(Guj)

(10) Genuineness of gift – Addition made by the AO by disbelieving the explanation of the assessee that the credit entry in the capital account represented gift from R – Not justified - R appeared before the AO and confirmed the fact of having made the gift by way of bank draft – He produced evidence in support of the source from which the funds for making the gift were available with him – Revenue has not disputed any of these facts – Primary onus which rested with the assessee thus stood discharged – Assessee can be asked to prove the source of credit in books, but cannot be asked to prove the source of the source – Tribunal has sustained the addition without addressing itself to the requirement of s. 68 – Finding of the Tribunal that the motive for making the gift is not established has no relevance for disbelieving the gift – Also, the Tribunal totally failed to consider the fact that the donor has filed gift tax return and assessment has been framed on the donor – Nothing has been brought on record to show that the explanation of the assessee is not satisfactory - Impugned order of the Tribunal cannot be sustained.
Murlidhar Lahorimal v/s. CIT
(2006)200 CTR 109=280 ITR 512 = 153 Taxation 451 = 193 xation 131 (Guj)

(11) Withdrawals from bank – Amounts credited in the books were stated to have been received from bank against two bearer cheques drawn by the assessee firm – Tribunal found that drafts of larger amounts were obtained by the assessee from that very bank on the same days on which these cheques were encashed and the difference of the amounts was paid by ET Ltd., a group concern - Also, there were notings “DD on Bombay” on the reverse side of the cheques – However, at the same time, Tribunal also found rubber stamp bearing

endorsement "pay cash" as well as token numbers on these cheques issued by the assessee – Analysis of the bank account did not lead to a firm conclusion either way – In view of overall facts and circumstances, Tribunal rightly accepted the explanation tendered by the assessee and deleted the additions – However, in respect of two other cheques, Tribunal found that drafts of identical amounts were obtained by the assessee from that very bank on the same days on which these cheques were encashed – Also, there were notings "DD on Bombay" on the reverse side of the cheques - Further, the draft application forms mentioned the same cheque numbers respectively and bore the rubber stamp "transfer" – In view of aforesaid facts the Tribunal concluded that the proceeds of these cheques were not received by the assessee in cash but were diverted at the bank counter itself for purchase of drafts – There is no infirmity in the order of the Tribunal insofar as appreciation of evidence and recording of facts are concerned – Additions have been made in relation to unproved entries of credit in the cash book – No interference is called for.

D.M Engineering v/s. CIT
(2005) 199 CTR 545 (Guj)

(12) Fixed deposit receipts by co-operative bank – There was no obligation on the AO to treat the fixed deposits as income of the assessee merely because he did not find the assessee's explanation satisfactory - Admittedly , AO has not discharged the onus of proving that the apparent was not real – on the other hand, assessee has furnished the details which would discharge the onus that lay on it – Grievance of the AO that complete details and addresses of the depositors were not furnished has been found to the incorrect – As regards the defects in maintenance of records of the bank, CIT(A) as well as the Tribunal have accepted the explanation tendered by the assessee – Further, under provisions of s. 80P entire income from banking activities is exempt in the hands of the assessee and there can exist no reason for the assesseee bank to indulge in any activity which would yield undisclosed income – Hence, deletion of the additions was justified.

Pragati Co-operative Bank Ltd., CIT v/s.
(2005)197 CTR 505 = 278 ITR 170 = 149 Taxman 149 (Guj)

(13) Burden of proof – Tribunal upheld the addition on the footing that since the assessee did not offer any explanation for cash credit entries, the amounts in question had to be treated as income under s. 68 – Not justified - Approach of the Tribunal not in consonance with the law laid down by the apex Court – Matter remanded to the Tribunal taking a fresh decision in accordance with law after applying the test laid down by the apex Court.
Mitesh Rolling Mills (P) Ltd., v/s. CIT
(2002) 177 CTR 142 = 124 Taxman 620 = 258 ITR 278(Guj)

(14) Casual and non-recurring receipt - Consideration received in lieu of surrender of tenancy rights – Tenancy rights is a capital asset and surrender thereof would attract s. 45 only – Such consideration cannot be treated as a casual and non-recurring receipt under s. 10(3) so as to bring it to tax under s. 56.
Mahendra R. Divecha, CIT v/s.
(2005)199 CTR 721(Guj)

26. CHARGEABILITY OF INCOME

(1) Income earned in continental shelf of India vis-à-vis applicability of notification dt. 31st March, 1983 – Notification dt. 31st March, 1983 extending the provisions of IT Act, 1961 to Continental Shelf and Exclusive Economic Zone of India did not apply to asst. yr. 1983-84 and was applicable only from asst. yr. 1984-85.
Oil & Natural Gas Corpn Ltd. v/s.
Atwood Oceanic International, S.A
(2008) 217 CTR 305 =170 Taxman 203 = 8 DTR 257(SC)

(2) Chargeability - Sale of remainderman's interest in trust - T executed a trust deed whereby the properties received by him on partition of HUF were settled upon a trust for the benefit of his sister S - T retained life interest in the properties along with right of residence for his parents till their death - In the event of death of S, the immovable property was to go to her surviving son or sons (assessees) - Interest of assessee was contingent when the trust deed was executed and same vested in assessee only when S died - There was no previous owner and no conceivable cost of acquisition - Even by applying the provisions of s. 49(1) the backward chain would snap at settlor and it is not possible to conceive a cost in the hands of the settlor - Thus, the computation provision fails

and the capital gains cannot be charged to tax.
Chintan N. Parikh & Anr. v/s, CIT
(2001) 171 CTR 386(GUJ)

27 CHARITABLE TRUST

(a)**ASSESSMENT**

(1) Interest paid to beneficiaries - In the absence of any term in the deed of trust or agreement between the trust and beneficiaries to treat the amount credited to account of beneficiary and not withdrawn by him as a loan, interest payment on such amount was rightly disallowed as deduction and the same was rightly treated as income of the trust.
Arun Family Trust v/s. CIT
(2007) 207 ITR 168= 196 Taxation 191 = 163 Taxman 285 = 165 Taxman 15 (Guj)

(2) Valid of trust – Trust deed executed on stamp paper purchased in the name of a third party and bearing a date prior to the date of purchase of stamp paper cannot be accepted as a genuine document and, therefore, the Tribunal was justified in holding that no valid trust had come into existence on the basis of the alleged deed and the income had to be assessed to tax at rates as applicable to AOP.
Hemesh Family Trust V/s. CIT
(2007) 207 CTR 99 = 197 Taxation 292 = 165 Taxman 233 = 295 ITR 514(Guj)

(3) Application of income – Waiver of loan to weaker sections of the society – Assessee, a public charitable trust, had advanced loans in earlier years to persons belonging to weaker sections of the society as part of its charitable objects – Same written off as the chances of recovery were found to be remote and adjusted against the income of the year under consideration - Tribunal rightly held that the income was applied in the year under consideration – Assessee entitled to benefit of s. 11 in respect of amount written off.
Sacred Heart Church, CIT v/s.
(2005) 198 CTR 189 = 278 ITR 180 = 149 Taxman 367(Guj)

(4) Bar of s. 13(2)(a) – Assessee bourse advanced a sum to B allegedly for procurement of appropriate premises for the assessee on lease -There was no written agreement or proper documentation– Amount was lent to B for substantial periods without interest and adequate security -Said B, along with several others, was founder of the assessee association and thus answers the description "founder of the institution" used in s.13(3)(a) r/w s.13(3)(c)–Consequently, assessee would lose the benefit under s. 11 by falling within the mischief of s.13(3)(a) r/w s.13(1)(c)(ii) –Director of IT vs. Bharat Diamond Bourse (2003) 179 CTR (SC) 225 : (2003)259 ITR 280 (SC) followed.

Bharat Diamond Bourse, Director of I T
(2004) 192 CTR 506(SC)

(5) Income utilised for benefit of "founder" – Charitable institution a company limited by guarantee – Person subscribing to memorandum of association - Is a "founder of the institution" – Money lent to such person without adequate security or interest - Benefit of exemption lost.

Bharat Diamond Bourse, Director of I.T v/s.
(2003)259 ITR 280 =179 CTR 225= 126 Taxman 365 =173 Taxation 1(SC)

(6) Shares donated to assessee trust and shares received as bonus on such shares – Dividends from all shares – Exempt – Dividends from shares purchased by trust – Subject to provisions of section 13(2)(h) - Shares in company donated to trust subject to payment of specified sum to company – Payment of such sum not a voluntary diversion of funds – Section 13(3) not applicable - Assessee trust entitled to exemption under section 11 – Assessee entitled to deduction of expenditure on objects of trust.

Ambalal Sarabhai Charity Trust
(2002) 255 ITR 586 = 174 CTR 313 = 124 Taxman 771 (Guj)

(7) Assessment of trust – Rectification of trust deed – Resolution passed by the trustees altering the object clauses which provided for maintenance and support to the members of settlor's family relatives and payment of remuneration to the trustees – Fraud was played by rectification of the trust deed by altering the very object of the trust - Trust deed must be read as it originally stood and trust is to be assessed accordingly.

Shervani Charitable Trust & Ors. V/s. CIT
(2002) 172 CTR 673 = 120 Taxman 496 = 171 Taxation 553(SC)

(8) Bar of s. 13(2)(h) – Provisions of s. 13(2)(h) were not attracted when shares of the concerns in which persons specified in s. 13(3) have substantial interest were donated to the assessee trust - Exemption under s. 11 could not be denied.
Shreyas Nidhi, Swati Nidhi, Venu Nidhi & Swasthya Nidhi , CIT v/s.
(2002) 177 CTR 341 = 171 Taxation 298 = 123 Taxman 840 =
258 ITR 712(Guj)

(b) **CHARITABLE PURPOSE**

(1) Registration – Commissioner to examine whether object of assessee falls within definition of "charitable purpose" under section 2(15) – Object of general utility is charitable purpose – "Person" in section 2(31) – Includes institution – Assessee developing and maintaining ports in Gujarat – Object of general public utility – Whether part of income of assessee is exempt or not – Irrelevant – Assessee entitled to registration under section 12A – Income Tax Act, 1961, ss. 2(15), (31), 12A, 12AA.
Gujarat Maritime Board , CIT v/s.
(2007)289 ITR 139 = 208 CTR 439 = 199 Taxation 494 (Guj)

(2) Wakf - Lands of six villages given for upkeep of Roza in 1670 AD – Enquiry in 1956 under Public Trusts Act and order directing trust to be registered as a Public Trust Act – Decision in rem – Tribunal on consideration of material on record also finding that properties belonged to trust - Trust entitled to exemption under section 11 – Income spent on maintenance of Sajjadanashin to extent of Rs. 30,000 per annum also entitled to exemption.
Hazarat Pir Shah – E – Alam Roza Estate Trust, CIT v/s.
(2002) 256 ITR 193 = 175 CTR 66 = 122 Taxman 755 =
169Taxation 88(Guj)

(3) Exclusion of income from exemption–Burden of proof on revenue –
Surat City Gymkhana v/s. Deputy Commissioner of Income Tax
(2002) 254 ITR 733 (Guj)

(4) Diamond bourse – Registered as company limited by guarantee – Primarly objects to establish facilities to promote diamond export, effective liaison between industry in India and abroad, promote trade in exports and imports of diamonds and development India as a modern diamond market – Dominant purpose advancement of objects of general public utility – Diamond bourse a charitable institution.

Bharat Diamond Bourse, Director of I.T v/s.
(2003) 259 ITR 280 = 179 CTr 225 = 126 Taxman 365 =
171 Taxation 1(SC)

(5) Assessing Officer alleged that assessee trust was created to promote Jainism which is a religion and disallowed assessee's claim of exemption under section 11 by invoking provisions of section 13(1)(b) – Since from covenants of trust deed, it was spelt out that objects of trust were not only to propagate Jainism or help and assist maintenance of temple, Sadhus, Sadhvis, Shraviks and Shravaks, but other goals were also set out in trust deed, it could be said that trust was a charitable religious trust and section 13(1)(b) would not be applicable.

Chandra Charitable Trust, CIT v/s.
(2006)156 Taxman 19 = 206 CTR 418 (Guj)

(c) <u>REGISTRATION</u>

(1) Charitable institution – Object of general public utility – Is "charitable purpose" – Assessee developing and maintaining minor ports in State of Gujarat – Object of public utility – Assessee entitled to registration – Income tax Act, 1961, ss. 2(15), (31), 10(20), 12A – Gujarat Maritime Board Act, 1981, ss. 73, 74, 75.

Gujarat Maritime Board , CIT v/s.
(2007) 295 ITR 561 =(2008) 214 CTR 81=166 Taxman 58 =
203 Taxation 263 = 1 DTR 1(SC)

(2) Exemption under s. 11 - Registration under s. 12A – Registration under s.12A is a condition precedent for availing of benefit under s. 11 and 12 and, therefore assessee is not entitled to claim exemption under ss. 11(1)(a) and 12 in view of the fact that it has not been granted registration under s. 12A.

U.P Forest Corporation v/s. Dy. CIT
(2007) 213 CTR 473 = 165 Taxman 533 (SC)

(3) Certification of trust u/s. 80G for purposes of deduction of donations – Scope of enquiry – That trust had made deposits in institutions not approved for investment – Not valid reason for rejecting application for renewal of certification.
Orpat Charitable Trust v/s. CIT
(2002) 256 ITR 690 = 173 CTR 534 = 167 Taxation 22 = 121 Taxman 451(Guj)

(4) S. 12A – Assessee claiming exemption under section 11 – A.O holding that since assessee not registered under section 12A of the I.T Act, 1961, not entitled to exemption – Held, in spite of the fact that assessee not registered under section 12A, AO not precluded from looking into details relating to exemption.
Surat Tennis Club, ACIT v/s.
(2002) 166 Taxation 65 (Guj)

28. CIRCULARS

(a) BINDING

(1) Commissioner – Scope of power to issue circulars – Not to create liability where there is none under the statute – Circular of Commissioner of Trade Tax dated December 13, 2000.
Jhunjhunwala v/s. State of U.P
(2007) 8 RC 52(SC)

(2) Beneficial circulars – To be applied with retrospective effect – Oppressive circular – To be applied prospectively from date of issue of show cause notice and not from earlier date.
Suchitra Components Ltd. v/s.
Commissioner of Central Excise.
(2007) 8 RC 204(SC)

(3) Binding on Department.
Pradip J. Mehta v/s. CIT
(2008) 300 ITR 231 = 216 CTR 12 = 169 Taxman 454 = 206 Taxation 169 (SC)

(4) Reassessment - Assessing Officer passing assessment order treating field latex and centrifuged latex as the same commodity and granting reliefs – High Court – Judgment holding that they were different commercial commodities – Reassessment - Not permissible so long as Circular of Board of Revenue was there treating them as same

commercial commodity - Circular binding on Assessment Officer – Kerala General Sales Tax Act, 1963, s. 3(1A).
Kurian Abraham Pvt. Ltd., State of Kerala v/s.
(2008)303 ITR 284 (SC)

(5) SC decision against what is written in the circular – Since circular binding on revenue authorities matter referred to a larger bench for decision whether circular will prevail or SC decision.
Ratan Melting & Wire Industries ,
Commissioner of Central Excise v/s.
(2006)190 Taxation 1 = (2008) 220 CTR 98 = 14 DTR 324(SC)

(6) Scope of – Circular giving administrative directions allocating work between officers of department – Cannot oust jurisdiction conferred by ACT – Central Excise Act, 1944, ss. 11A, 37B.
Pahwa Chemicals P. Ltd. v/s. Commissioner of Central Excise.
(2005)274 ITR 87 (SC)

(7) Though not binding on assessee can be relied on for providing reasonable
construction – Circular No. 779 dated September 14, 1999.
Sedco Forex International Drill Inc. v. CIT
(2005)279 ITR 310 = 199 CTR 320 = 149 Taxman 352 (SC)

(8) Binding nature – Extent thereof – When a circular issued under s. 151A of the Customs Act remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid or that it is contrary to the terms of the statute - Although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise a contention contrary to a binding circular – A show cause notice and demand contrary to existing circulars of the Central Board of Excise and Customs are ab initio bad - Further , it is not open to the Revenue to advance an argument or file an appeal against the circular.
Indian Oil Corporation Ltd. & Anr.,
Commr. of Customs Etc. Etc. v/s.
(2004)187 CTR 297 =136 Taxman 491=180 Taxation 637 =
267 ITR 272 (SC)

(9) Power to issue circulars – As long as circular emanates from CBDT and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to source of power under section 119 irrespective of its nomenclature - Circular No. 789 dated 13-4-2000 falls well within parameters of powers exercisable by CBDT under section 119.
Azadi Bachao Andolan, Union of India
(2003) 132Taxman 373 =263 ITR 706 =184 CTR 450 =
177 Taxation 775 (SC)

(10) Power to extend time for filing returns – Sec. 119(1) specifically empowers the CBDT to issue such orders, instructions and directions to other IT authoritites as it may deem fit for the proper administration of the Act – By issuing Circular No. 113 , dt. 20th June, 1973 the CBDT granted general extension for furnishing the returns of income and net wealth for asst. yr. 1973-74 till 15th Aug. 1973 – Same was not beyond the power of the CBDT – Though s. 139 was inserted in s. 119(2)(a) w.e.f 1st April, 1990, it cannot be said that prior to that date, there was any restriction on the exercise of powers by the CBDT as sub-s. (2) of s. 119 starts with the words 'without prejudice to the generality of the foregoing power' – Even otherwise, the said circular was benevolent one.
Hargovind Damji v/s. CIT
(2002) 177 CTR 20 = 123 Taxman 949(Guj)

(11) Central Board of Direct Taxes – Circulars - Nature of - Executive authority - Circulars - Beneficial to assessee - Binding nature - Settlement Commission - Can waive or reduce interest in according with circular of CBDT Circular No. 400/234/95-IT(B), dated May 23, 1996.
Anjum M.H Ghaswala, CIT v/s.
(2001) 252 ITR 1 = 171 CTR 1 = 119 TAXMAN 352(SC)

(12) Press Release do not amount to circulars.
Anjum M.H Ghaswala, CIT v/s.
(2001) 252 ITR 1, 171 CTR 1, 119 TAXMAN 352(SC)

29. CLUBBING OF INCOME UNDER S. 60

(1) Gift of share in partnership firm to trust – Assessee having gifted one-half of his partnership share in a firm by a deed of assignment to a trust created by him which includes the right of share in the profits and obligation to share losses arising from the business of said firm as also to share in the assets of said firm on dissolution thereof, it cannot be said that there is no transfer of assets from which the income by way of share in the profits arises to the transferee and therefore, provisions of s. 60 are not attracted.
Jayantilal D. Patel, CIT v/s.
(2007)212 CTR 271 = 162 Taxman 385(Guj)

(2) Income of trust – Trust admittedly not created by the Manging Trustee i.e the assessee – Income of the trust not taxable in the hands of assessee under s. 60.
Sharad Narandas Patel, CIT v/s.
(2002) 176 CTR 41 = 169 Taxation 682 = 123 Taxman 646(Guj)

30. COMMISSIONER - WAIVER

(1) Waiver – Commissioner – Discretionary power – Conditions for waiver – Refusal of waiver for failure to make arrangements for payment of interest and penalty – No interest levied – Payment of penalty not condition for waiver – Assessee satisfying all prerequisite conditions - Reason for rejecting waiver application not germane – Order quashed and waiver of penalty in entirety – Wealth Tax Act, 1957, s. 18B.
Kiritkumar K. Shroff v/s. CWT
(2005) 278 ITR 79 = 148 Taxman 540= 199 CTR 19(Guj)

(2) Interest Chargeable - S. 234A, read with sections 234B, 234C, of the Income Tax Act, 1961.– Waiver of interest levied under sections 234A, 234B and 234C is to be considered when delay on part of assessee is due to unavoidable circumstances or on account of circumstances beyond her control – Assessee filed a petition before Chief Commissioner for waiver of interest stating, inter alia, that delay in filing returns was on account of fact that there was delay in arranging for funds and that she had filed returns voluntarily and she had paid a lot of taxes over years and no taxes were due and only a part demand relating to interest was due – Chief Commissioner waived interest under section 234A to extent of 50 per cent and declined to grant such waiver in respect of interest

levied under sections 234B and 234C holding that relevant clause (e) of para 2 of Circular dated 23-5-1996 which confers power of waiver on Commissioner is only applicable to waiver of interest under section 234A and not waiver of interest under section 234B or section 234C - If circumstances of instant case had been considered to be unavoidable circumstances for purpose of waiver of interest under section 234A, same would have to be considered as unavoidable circumstances for purpose of reduction/waiver of interest under sections 234B and 234C as well as - Circular dated 23-5-1996 is also applicable to waiver of interest levied under sections 234B and 234C – Assessee was unable to file returns within time or to pay taxes within time due to unavoidable circumstances – It was a fit case for granting waiver under section 234A, 234B and 234C to extent of 75 per cent .

Bhanuben Panchal and Chandrikaben Panchal V/s. Chief CIT
(2004)136 Taxman 237 =188 CTR 449 =269 ITR 27 =
182 Taxation 696 (Guj)

(3) Waiver or reduction under s. 273A – Voluntary filing of return - Subsequent events suggesting that return of assessee for asst. yr. 1986-87 was filed voluntarily and the case of the assessee was governed by amnesty scheme - Similar facts were there in the asst. yr. 1987-88 and deletions made by CIT(A) were also upheld by the Tribunal - Matter remanded to CIT for fresh consideration of waiver application under s. 273A for asst. yr. 1987-88 in respect of penalty & interest.

Shantaben R. Choksi (Decd) through LRs V/s. CIT
(2004) 190 CTR 491(Guj)

31. COMPANIES

(a) ADDITIONAL TAX UNDER S. 104

Leviability – Reference in quantum proceedings having been answered in favour of assessee, and thus there being no. distributable income, there can be no levy of additional tax under s. 104.

Elscope (P) Ltd., CIT V/s.
(2008) 215 CTR 29(Guj)

(b) DEEMED DIVIDEND

(1) Loan or advance to shareholder – Closely held companies of assessee – Assessee withdrawing sums from his capital account and making investment – Sums debited in assessee's capital account with respective firms – Paid on behalf of assessee – Transactions satisfy test of section 2(22)(e)- Income Tax Act, 1961.

Mukundray K. Shah, CIT v/s.
(2007) 288 ITR 433 = 209 CTR 97 = 160 Taxman 276= 200 Taxation 272 (SC)

(2) Company advancing large amounts to low paid employee - Employee
advancing loans to assessee, Managing Director - Advance to employee for benefit of assessee - Loans to assessee given by employee can be treated as dividend - Payment, meaning of -

Alagusundaram Chettiar (L) v/s. CIT
(2001) 252 ITR 893(SC)

(c) MAP

Special provisions – Jurisdiction of Assessing Officer – Limited to matters specified in Explanation to section 115J – No power to rework net profit arrived at by company by consistently charging depreciation at the rates specified in Income tax Rules – Income tax Act, 1961, s. 115J – Companies Act, 1956, Sch. VI, Parts II and III, Sch. XIV.

Malayala Manorama Co. Ltd. V/s. CIT
(2008) 300 ITR 251 = 216 CTR 102 = 169 Taxman 471 = 206 Taxation 157 = 6 DTR 1(SC)

(d) PUBLIC ARE SUBSTANTIALLY INTERESTED

(1) Conditions precedent in s. 2(18)(b)(B)(c) – Two parts of sub cl. (c) of s. 2(18)(b)(B) are separate and independent of each other – More than 50 per cent of the shares of the assessee company having been unconditionally allotted to two companies and these companies being companies "to which this clause applies", assessee company stands covered by the definition of "company in which public are substantially interested in s. 2(18).

Emtici Engineering Ltd., CIT v/s.
(2008) 218 CTR 154 = 174 Taxman 525(Guj)

(2) Private Company (CC) - Director's liability under s. 179 -**Co**ndition precedent – Only when it is established that recovery cannot be made from the company, revenue can initiate action against the director responsible for conducting affairs of the company during the relevant accounting period – Affidavit-in-reply is silent as to the total value of the immovable properties as well as other assets of the company attached under the order of attachment – Thus, it is not possible to accept that the Revenue was not able to recover the outstanding taxes from the company despite best efforts – Impugned order made under s. 179 is quashed and set aside.

Gujarat Fertilizers v/s. CIT

(2007) 293 ITR 70 =196 Taxation 187 =210 CTR 594(Guj)

(e) **UNDISTRIBUTED PROFITS**

(1) Additional Tax - Investment company - Sale of house properties and rubber plantation - Profits from sale brought to profit and loss account - Directors treating profits as commercial profits - Invoking provision for imposing additional tax for failure to distribute specified percentage of profits - Proper -

Plantations P. Ltd. (M.R.M) v/s. CIT

(2001) 250 ITR 521 = 169 CTR 432 = 118 TAXMAN 892 (SC)

(2) Nominal delay in declaration of dividend – Dividend was declared by the assessee company three days beyond the period of 12 months from the end of relevant previous year – Additional tax leviable.

Alkapuri Investments (P) Ltd. v/s. CIT

(2002) 177 CTR 550 = 124 Taxman 36 = 171 Taxation 495(Guj)

(3) Past losses – Losses incurred by the assessee company in earlier years is a very important factor which is required to be taken into consideration before deciding whether the provisions of s. 104 are to be invoked or not – Statute does not put any limit on the number of "earlier years" - Total loss of Rs. 1,78,887 which was the aggregate of losses carried forward in the past seven years was set off in the relevant year - Having regard to the fact that the assessee company had incurred losses even in the preceding year and had made a small profit in the year prior thereto, it was justified in adopting a conservative approach in declaring small dividend – Merely because the assessee had made excess provisions for taxes, it cannot be said that the assessee had not

taken into consideration past losses – Provisions of s. 104 not attracted.
Creative Investment (P) Ltd. v/s. CIT
(2004) 188 CTR 6 = 268 ITR 485 =181 Taxation 465 (Guj)

(4) Additional tax under s. 104 – Smallness of profits – CM Ltd. in which the assessee company is a shareholder, not only declared the dividends within the relevant previous year ending on 30th Sept., 1976 but also prepared the dividend vouchers for the dividend payable to the assessee company within the previous year - Thus, the contention that the dividend income derived by it from CM Ltd. did not form part of commercial income of the assessee for the said previous year is not sustainable – Assessee distributed dividends after the statutory period was over - It did not show that it could not declare the dividend within the statutory period on account of smallness of profits or accumulated losses or other similar causes - Additional tax under s. 104 rightly levied.
Ranoli Investment (P) Ltd. v/s. CIT
(2003)179 CTR 156 = 132 Taxman 895(Guj)

(5) Capital gains on compulsory acquisition of agricultural land – Even assuming that compulsory acquisition of land is a transfer within the meaning of s. 45, s. 47(viii) specifically exempts any transfer of agricultural land effected before 1st March, 1970 – Thus, the compensation which became payable to the assessee a result of acquisition of its agricultural land in 1962 was not income and not chargeable under s. 45 and was not to be included while computing the total income of the assessee as defined in s.2(45) – Hence, the entire amount of capital gains did not form part of distributable income as defined in s. 109(1) – Further jurisdiction under s. 104 is not to be invoked where the payment of dividend or larger dividend would be unreasonable having regard to past losses or the smallness of the profits – There was nothing unreasonable in the decision of the assessee company not to distribute dividends from the compensation amount having regard to the accumulated losses together with the loss of its only asset i.e land -ITO could not therefore exercise jurisdiction under s. 104.
Delhi Farming & Construction (P) Ltd. V/s. CIT
(2003)180 CTR 12 = 260 ITR 561 =128 Taxman 374 =
174 Taxation 421 (SC)

(f)s. 115JA

(1) Total income less than 30 per cent of book profits – Deemed income Scope of provision – Book profits – Assessing Officer to accept authenticity of accounts maintained in accordance with Parts II and III of Sch. VI to Companies Act, 1956 – Computation – Adjustments – Provision made in accounts to be added back – Permissible only if made for meeting a liability – Provision for bad and doubtful debts – Not for meeting liability – Provisions for bad and doubtful debts cannot be added back – Income Tax Act, 1961, s. 115JA(2)(c).
HCL Comnet Systems and Services, CIT v/s.
(2008) 305 ITR 409 = 219 CTR 222 =174 Taxman 118 =
13 DTR 105(SC)

(2) Book profit under s. 115J – Adjustment for depreciation - Assessee is entitled to change the method of depreciation from straight line method to WDV method and claim extra depreciation for current year as also arrears of past years for purpose of computing book profit under s. 115J.
Rubamin (P) Ltd., CIT v/s.
(2008) 218 CTR 162 = 10 DTR 278(Guj)

(3) Book profit under s. 115J - Adjustment of TDS – TDS on dividend income debited to dividend account and not debited to P & L a/c. in accordance with provisions of Parts II and III of Sch. VI of the Companies Act cannot be added to compute book profits under s. 115J.
Amichand Investment (P) Ltd. V/s. Dy. CIT
(2008)216 CTR 230 = 304 ITR 97 = 206 Taxation 320 =
6 DTR 249(Guj)

(4) Book profits assessment - Nature of - Determination of tax only after end of relevant year - Advance tax – Interest - Not leviable -
Kwality Biscuits Ltd., CIT v/s.
(2006)284 ITR 434 = 155 Taxman 658= 205 CTR 122 =
195 Taxation 229 (SC)

(5) Computation – Liability towards excise duty – Finding that demand notice had been received – Liability disputed and assessee required to furnish bank guarantee – Liability towards excise duty an ascertained liability – Deductible.
I.G Gandhi Silk Mills Ltd., CIT v/s.
(2005)274 ITR 274 = 145 Taxman 276 = 187 Taxation 288 (Guj)

(6) Company – (H) Zero Tax Companies - Book Profits – s. 115J.
Net profits in profit and loss account prepared in accordance with part II and III of Schedule VI to Companies Act – Accounts scrutinized and certified by statutory auditors - Assessing Officer has no power to scrutinize except as provide in explanation.
Apollo Tyres Ltd. v/s. CIT
(2002)255 ITR 273=174 CTR 521 = 122 Taxman 562 =169 Taxation 522(SC)

(7) Book profit - Liability – Scheme - Charge to tax on basis of book profit – Depreciation – Loss – Investment allowance – Carry forward - To be done as would be done in the case of normal assessment - Circular No. 495 dated September 22, 1987 –
Karnataka Small Scale Industries Development Corpn. Ltd. v/s. CIT
(2002) 258 ITR 770(SC)

32 CONSTITUTION OF INDIA

(a) VIRES

(1) Art. 265 - Excise Duty
Can be imposed only by statute – Constitution of India, art. 265.
Distillers Co. Ltd., CIT v/s.
(2007) 290 ITR 419 = 160 Taxman 252= 209 CTR 177 (SC)

(2) Legislative entries – Schematic interpretation – Doctrine of pith and substance – Taxation entries – Nomenclature of tax not conclusive – Nature of levy determines competence.
All India Federation of Tax Consultants V/s. Union of India
(2007) 293 ITR 406 = 163 Taxman 196 = = 211 CTR 449 (Guj)

(3) Constitution of India – Vires - Capital Gains – Agricultural land situate within municipal limits – Capital gains arising from sale - Taxable.
Mahajan (M.L), CIT v/s.
(2002) 255 ITR 272 = 124 Taxman 76 = 175 CTR 298(SC)

(b) VIRES OF LICENSE FEE

State Government – Liquor Policy – Retail sale of liquor – Basic difference between excise duty and licence fee – Licence fee is paid under contract – Validity cannot be challenged on basis of fundamental rights – Constitution of India, art. 14.
Lalit Jaggi, State of M.P v/s.
(2008) 11 RC 448(SC)

(c) VIRES OF RULE

(1) Income Tax Rules
Rules cannot override provisions of Act.
Crown Products , CIT v/s
(2008) 304 ITR 106 = = 7 DTR 385 =(2009) 177 Taxman 266 (SC)

(2) Vires - Salary – Perquisite – Rule 3 – Validity - Constitutional validity of r. 3 as amended by Income Tax (Twenty second Amendment) Rules, 2001 – Rule 3 as amended by Income Tax (Twenty second Amendment), 2001, is neither inconsistent with s. 17(2)(ii) r/w Expln. 1 inserted retrospectively w.e.f 1st April, 2002, nor ultra vires Art. 14 of the Constitution.
BHEL Workers Union & Anr. V/s. Union of India & Anr.
(2008) 217 CTR 19 = 7 DTR 122 (SC)

(d)VIRES - GENERAL

(1) Vires - Liquor trade – No fundamental right to trade in liquor - But law regulating trade cannot be arbitrary or discriminatory - Constitution of India, arts. 14, 19(1)(g) - Imposition – Can be only by statute - Cannot be by way of bye-laws or rules.
Gupta Modern Breweries v/s. State of Jammu and Kashmir.
(2007) 8 RC 688(SC)

(2) Constitution of India – Vires – Loans or deposits – s. 269 - Provision requiring receipt by account payee cheque or Bank draft – Valid – Within legislative competence of Parliament – Not discriminatory – Provisions for punishment for failure to do so – Not expropriatory - Parliament - Legislative Powers - Legislative entry - "Taxes on income other than agricultural income " – Scope of – Of wide

amplitude – Extends to all ancillary and subsidiary matters – Constitution of India, Art 246, Sch. VII, List I Entry 82 - Colourable legislation – Not unless legislature has no power but camouflages in way as to appear within its competence.

Asstt. Director of Inspection (Investigation) v/s.
Kum. A.B Shanthi
&
Chamundi Granites Pvt. Ltd. v/s. Dy.
Commissioner of Income Tax & Anr.
(2002) 255 ITR 258 – 174 CTR 513 = 122 Taxman 574(SC)

(3) Deposits - Mode of taking/accepting - Whether if any legislation intended to achieve collection of income tax and to make it easier and systematic, is enacted such legislation would certainly be within competence of legislature – Held, yes – Whether section 269SS or 271D, or earlier section 271DD, can be held to be unconstitutional on ground that it is draconian or expropriatory in nature – Held, no – Whether section 269SS is in any way violative of article 14 of the Constitution – Held, no.

Shanthi (Kum. A.B), Asstt. Director or Inspection v/s
(2002) 122 Taxman 574(SC)

(4) Cess – Legislative Competence - Royalty vis-à-vis tax – Royalty is not tax - Royalty is paid to the owner of land who may be a private person and may not necessarily be State – A private person owning the land is entitled to charge royalty but not tax – Cess on coal bearing land is levied on land – Merely because the quantum of coal produced and dispatched from the land is the factor taken into consideration for determining the value of land, it does not become a tax on coal or minerals - Being a tax on land it is fully covered by Entry 49 List II – Assuming it to be a tax on mineral rights, it would be covered by Entry 50 in List II – Central legislation has not placed any limitation on the power of the states to legislate in the field of taxation on mineral rights – Thus, West Bengal Taxation Laws (Amendment) Act, 1992, is intra vires the Constitution – Similarly, levy of cess on tea estates is levy on land forming part of tea estates which is a well defined classification – Simply determinable on the basis of quantum of tea produced or dispatched, it does not become a cess on tea or a tax on production of tea or a tax on income of land – Impugned cess is covered by Entry 49 in List II – Field of taxation of brick earth cannot be said to have been covered by Central legislation by reference to Entry 54 of List I – Cess on brick

earth whether treated as one on land or as one on mineral rights would be covered by Entries 49 or 50 in List II – Cess on minor minerals can be justified as fee for rendering such services as would improve the infrastructure and general development of the area and would be covered by Entry 66 in List II – As a tax the impugned levy of cess is clearly covered by Entry 5 r/w Entries 49, 50 and 66 of List II – Impugned cess by no stretch of imagination can be called a tax on tax.

Anil Kumar Singh v/s. Collector, Sonbhadra District & Ors.
Bengal Brickfield Owners' Association & Anr.V/s. State of West Bengal & Ors.
Terai Indian Planters' Association & Anr. v/s.
State of West Bengal & Ors.
V/s. State of West Bengal & Ors. &
Kesoram Industrial Ltd. & Ors. V/s.
State of West Bengal & Ors.
(2004) 187 CTR 219 = 266 ITR 721 (SC)

(5) Constitution of India – (B) Vires of provision - Validity of Tax - Partial cement decontrol – Non levy cement – Amount per tonne of non-levy cement produced by manufacturer made payable to cement regulation account – Compulsory levy amounting to "Tax" – No provision in statute for levy – Not valid – Cement control order, 1967, rule 9A – Essential Commodities Act, 1955.

Shree Digvijay Cement Co. Ltd. V/s. Union of India
(2003) 259 ITR 705 = 174 Taxation 744 (SC)

(6) Doctrine of unjust enrichment -Unjust Enrichment Doctrine does not apply to state – Right to refund not an absolute or unconditional right – Burden passed on to consumer - Loss not suffered by manufacturer - Manufacturer cannot claim refund from State – Constitution of India, Art. 265.

Shree Digvijay Cement Co. Ltd. V/s. Union of India
(2003) 259 ITR 705 = 174 Taxation 744 (SC)

(7) Appellant through an advertisement invited applications from partnership firms of Chartered Accountants for purpose of empanelment for audit of Government/public sector companies – Aforesaid advertisement stipulated that excepting certain States, only partnership firms of Chartered Accountants were eligible for enrolment on panel and proprietary firms of Chartered Accountants were made in eligible either to apply or to be empanelled for being assigned audit work of Government companies – Application of respondent, a sole proprietor of Chartered Accountants firm in Gujarat, was rejected on ground that it was not a partnership firm – Whether whenever appellant appoints an auditor for audit of Government corporations and public sector undertakings under Companies Act, 1956, he exercises statutory powers under the Companies Act and such an exercise of power manifestly is a statutory function and not a matter of policy – Merely because some of Chartered Accountants have formed a partnership firm, it cannot be assumed that they become more efficient for carrying out audit work than an individual Chartered Accountant who forms proprietary concern –A Chartered Accountant cannot be discriminated against merely because he has elected to invest his professional expertise in a proprietary concern, rather than to express it in form of a partnership firm –It would be fallacious to attribute a greater capacity to partnership firms than to proprietary concerns simply on account of nomenclature or numbers involved - Therefore, classification between proprietary and partnership firms is arbitrary and unfair, and, accordingly falls on anvil of article 14 – Held, yes Whether further, if proprietary concerns of Chartered Accountants are really inefficient, there appears to be no reason why they have been made eligible to audit Government and public sector companies in some States and if there is paucity of partnership firms of Chartered Accountants in such States, services of partnership firms who are said to be efficient and based in other States could be taken, then on this ground also impugned notification/advertisement does not stand test of article 14 .

Kamlesh Vadilal Mehta , Controller and Auditor General v/s
(2003) 126 Taxman 619(SC)

(8) Constitutional validity of amendment made by IT (Second Amendment) Act, 1998 – Exemption confined to societies marketing agricultural produce grown by their members – Clear effect of the amendment is that s. 80P(2)(a)(iii) must be read as if the substituted phrase "grown by" from the date the section was introduced - In making the impugned amendment the legislature does not "statutorily overrule" the decision in Kerala Co-operative Marketing Federation Ltd & Ors. V/s. CIT (1998) 147 CTR(SC) 28 : 1998 (5) SCC 48 as contended by the appellant – There was hardly any retrospectivity but a continuation of status quo ante as the law declared in Assam Co-operative Apex Marketing Society v/s. Addl. CIT (1993) 113 CTR (SC) 58 : 1994(Supp) 2 SCC 96 held the field till 1998 when it was reversed - Further, the amendment did not authorize the Revenue authorities to reopen time barred assessment – Amendment is therefore constitutionally valid.
National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. V/s. Union of India & Ors.
(2003) 180 CTR 1=260 ITR 548=128 Taxman 361=
174 Taxation 409 (SC)

(9) Section 1 of the National Tax Tribunal Ordinance, 2003 – Constitutional validity - Petitioners filed instant petitions challenging constitutional validity of Ordinance in question on grounds, inter alia that unusual and exceptional circumstances did not exist for issuance of Ordinance in question, when Parliament was likely to meet soon – Union of India were to be restrained till next date of hearing from issuing any notification under section 3.
Income Tax Appellate Tribunal Bar Assn. v/s. Union of India.
(2004)136 Taxman 484(Guj)

(10) Legislative Powers – Service Tax - Parliament – Competent to levy service tax – Constitution of India, Sch VII, list I, Entry 97 -Incidental encroachment, Tax on Luxury – Service Tax – No overlapping in law - Tax - Measure of Taxation – Cannot affect validity of tax.
Tamil Nadu Kalyana Mandapam Assn. V/s. Union of India.
(2004) 267 ITR 9 = 188 CTR 297 = 136 Taxman 596 =
181 Taxation 15 (SC)

(11) Parliament – Service Tax – Imposed on service – Is only tax on services falling under entry 97 of list I (union list) – is not tax on goods and passengers under entry 56 of list II (state list) – Constitution of India, Art. 14, 246, Sch. VII, List I, Entry 97, List II, entry 56.

Power to remove infirmities in earlier legislation and make retrospective amendment – Service Tax – Original law specifically prescribing liability only on providers of services – Provision making customers receiving services liable in the case of services by goods transport operations and clearing and forwarding agents – Declared by Supreme Court to be invalid – Parliament - Retrospectively amending existing provisions by imposing liability on receivers of services – Valid - Does not amount to overruling decision of Supreme Court - Finance Act, 1994, ss. 65(5), 66(1A), proviso - Finance Act, 2000, ss. 116, 117. Finance Act, 2003, s. 158 – Service Tax Rules, 1994, R 2 (1)(d)(xii), (xvii).

Service Tax – Imposed on provider of service - Singling out only customers of goods transport operators and clearing and forwarding agents for imposing liability to pay the tax – Not discriminatory - Constitution of India, Art. 14. Statute – Constitutionality – Constitution of India, Art. 14.

Gujarat Ambuja Cements Ltd. v/s. Union of India
(2005) 274 ITR 194=194 CTR 428=144 Taxman 512=
188 Taxation 360(SC)

(12) Constitution of India - Retrospectivity - Legislative Powers Retrospective legislation – Normally not to create offence retrospectively – Liability to pay tax created retrospectively - Cannot entail punishment of payment of interest with retrospective effect.

Star India P. Ltd. v/s. Commissioner of Central Excise
(2006) 280 ITR 321 = 150 Taxman 128 (SC)

(!3) Rule 3 – Re perquisites in connection of accommodation to employees not ultra vires art. 14.

Arun Kumar v/s. Union of India
(2006) 155 Taxman 659 = 286 ITR 89= 205 CTR 193 (SC)

(14) Constitution of India – (C) Act of State - Doctrine of Act of State – Act of state cannot be questioned by any court including Surpeme Court - Effect of art. 363 of Constitution of India.
Pratapsinhji Ramsinhji, CED v/s.
(2002) 255 ITR 365 = 174 CTR 591 = 169 Taxation 54 =
(2003) 127 Taxman 66(Guj)

33. DEDUCTION

(a) GENERAL

(1) Deductions - Industrial undertaking - Special deduction – Newly established undertaking – Newly established undertakings or hotels in backward areas – Deductions are independent – New undertaking can claim both deductions.
Mandideep Eng. & Pkg. Ind. (P) Ltd., Jt. CIT v/s.
(2007) 292 ITR 1 = 210 CTR 614 = 163 Taxman 337 = 201 Taxation 388 (SC)

(2) Deductions – Scientific Research – s. 35 - Scope of section 35 – Not necessary that capital asset should be used for scientific research in previous year - Expenditure on construction of building for scientific research – Building not used in previous year - Not relevant – Expenditure deductible under section 35 – Exemption provision - Liberal construction.
Gujarat Aluminium Extrusions Pvt. Ltd., CIT v/s.
(2003) 263 ITR 453 = 176 Taxation 542 = 133 Taxman 542 = 184 CTR 297(Guj)

(b) s. 80HH

(1) Special deductions under sections 80HH and 80-I – Income from sale of empty containers in which raw materials were purchased – Entitled to special deductions under sections 80HH and 80-I –Income Tax Act, 1961, ss.80HH, 80-I.
Core Healthcare Ltd., CIT (Deputy) v/s
(2009) 308 ITR 263 = 221 CTR 580(Guj)

(2) Special deduction – Criteria – Item produced, process undertaken and resultant output – Hospital Investment in plant and machinery – Absence of details – Supreme Court - Matter remanded – Income Tax Act, 1961, ss. 32A, 80HH.
Down Town Hospital Ltd. v/s. CIT
(2009) 308 ITR 188(SC)

(3) Computation – Initial depreciation – To be deducted before making any deduction under s. 80HH.
Cadila Chemicals (P) Ltd., CIT v/s.
(2003)179 CTR 37 = 259 ITR 692 (Guj)

(4) Profits and gains from hotels or industrial undertakings, etc. in backward areas –Words 'derived from' in section 80HH must be understood as something which has direct or immediate nexus with an industrial undertaking - Derivation of interest or profits on deposit with Electricity Board could not be said to be flowing directly from industrial undertaking and, therefore deduction for same could not be allowed.
Pandain Chemicals Ltd. v/s. CIT
(2003) 129 Taxman 539 = 262 ITR 278 = 183 CTR 99=
(2004) 179 Taxation 2 (SC)

(5) Exporters – When Tribunal recorded a firm finding of fact that assessee was exporting 'cut and polished' granite blocks (although not finally cut and precisely polished) and as assessee processed rough mineral by cutting and processing which added value to marketable commodity, it was entitled to deduction under section 80HHC – Circular No. 729 dated 1-11-1995 could be applied by Tribunal for benefit of assessee.
God Granites , CIT v/s.
(2003) 129 Taxman 547 = 183 CTR 20 = 262 ITR 567 (SC)

(6) Profits and gains derived from industrial undertaking - Interest paid to partners - Deduction under s. 80HH is allowable at the rate of 20 per cent of profits and gains of the assessee determined in accordance with and subject to the provisions of the Act - The term "gross total income" meant, the total income computed in accordance with the provisions of the Act, before making any deduction under Chapter VI-A - Amount of interest paid by the assessee firm to its partners was not allowable under s. 40(b) as a deductible expenditure from the gross total income and consequently that amount was to be treated as a part of total income of the assessee - Therefore, the amount paid by way of interest to the partners has to be treated as part of the "profits and gains to business or profession" for the purpose of computing relief under s. 80HH.
Kedraj Agricultural Industries , CIT v/s.
(2001)171 CTR 23(GUJ)

(7) Computation – Weighted deduction under s. 35B – Assessee cannot be allowed deduction under s. 80HH before allowing weighted deduction under s. 35B.
Swastik Industries , CIT v/s.
(2002) 178 CTR 234 = 125 Taxman 175(Guj)

(c) <u>s. 80HHA - s. 80 HHC</u>

(1) Computation - Adjustment of deduction under s.80-I -In the absence of any provision which restricts relief s. 80-I to the extent the relief is granted under s. 80HHA, Tribunal has not committed any error in granting deductions both under ss.80HHA and 80-I simultaneously without reducing the relief available under s.80-I by the amount of deduction granted under s. 80HHA.
Blue Bell Polymers (P) Ltd., Dy. CIT v/s.
(2008) 217 CTR 324 = 207 Taxation 55 = 9 DTR 49(Guj)

(2) Manufacture or production – Manufacture of bidies - Where the raw material is subjected to a process or processes of such a nature that it cannot be termed to be the same as the end product, and the article produced is regarded by the trade as a new and distinct article having an identity of its own and an independent market, the activity amounts to manufacture or production – Tendu leaves and tobacco which are used as inputs do not retain independent identity after bidies are rolled - Commercially, the final product is known as a distinct commodity and has a separate market – It is immaterial that the assessee gets the work done through contract workers – Therefore, assessee was entitled to reliefs under ss. 80HH and 80-I – Further, while ascertaining the monetary limit down for the purpose of determining whether a unit is a small scale industrial undertaking eligible for relief under s. 80-I, only the actual cost of plant and machinery relatable to the industrial undertaking has to be adopted and not all the assets of the business as a whole.
Prabhudas Kishordas Tobacco, CIT v/s.
(2006) 201 CTR 312 = 193 Taxation 442= 282 ITR 568 (Guj)

(3) Special deduction under section 80HHC – Computation of "profits of business" – Effect of sub section (2) of section 80HHC – Receipt of profits attributable to sale proceeds within six months from end of previous year or such further period as allowed to be taken into account – Sale proceeds directly relatable to export - Exchange rate difference pertaining to exports made earlier – No finding regarding period to which it related - Matter remanded – Income Tax Act, 1961, s. 80HHC.
Amba Impex, CIT v/s.
(2006) 282 ITR 144 = 201 CTR 409 =(2007) 164 Taxman 344(Guj)

(4) Special deduction – Commission or brokerage earned by person engaged in export – Change of law - Prospective amendment curtailing scope of deduction – Effect – Commission or brokerage part of profits of business for earlier years - Entitled to deduction - s. 80HHC (before amendment with effect from 1-4-1992 by Finance (No. 2) Act, 1991) – Circular No. 621 dated December 19, 1991 –
Prabhakar (P.R) v/s. CIT
(2006) 284 ITR 548 = 154 Taxman 503= 204 CTR 27 = 195 Taxation 228 (SC)

(5) Special deduction – Scope of – Export of both self manufactured goods and trading goods – Profits and losses in both to be taken into account - If after adjustment there is positive profit deduction available -
Mohanachandran Nair, CIT v/s.
(2006) 285 ITR 226 = 205 CTR 123=156 Taxman 149 = (2007) 196 Taxation 529(SC)

(6) Special deduction under section 80HHC for assessment year 1986-87 – Computation of special deduction – Total export sales to be taken into account - Loss in some units not to be taken into account.
Rolcon Engineering C. Ltd. , CIT v/s.
(2006)286 ITR 450(Guj)

(7) Assessee not an Indian company – Only an assessee being an Indian company or a person resident in India can claim deduction under s. 80HHC - Assessee not being an 'Indian company" is not entitled to deduction under s. 80HHC in respect of income earned on sales in India.
Gaskets & Radiators Distributors, CIT v/s.
(2006) 206 CTR 209(Guj)

(8) Interest on deposit, export incentive, and octroi refund do not form part of the total profits to work out total turnover and qualifying profit for the purpose of deduction under s. 80HHC .
Gaskets & Radiators Distributors, CIT v/s.
(2006) 206 CTR 209(Guj)

(9) Allowability – Agricultural primary commodities – HPS groundnuts are notin the form as actually grown – Unshelled groundnuts are processed before it attains the form of HPD groundnuts – Neither the agriculturists nor the traders regard it as a primary commodity - Irrespective of the fact whether or not HPS groundnuts retain their characteristics as groundnut, it is regarded as a commercially different product – Thus, HPS groundnuts cease to be 'agricultural primary commodity" even if they continue to remain agricultural commodity and assessee is entitled to deduction under s. 80HHC on export of HPS groundnuts.
Gujarat State Export Corpn. Ltd., CIT v/s.
(2005) 199 CTR 217 =(2006) 280 ITR 62 =
150 Taxman 560(Guj)

(10) Allowability – Incremental turnover – To claim additional deduction under cl. (b) of sub-s. (1) of s. 80HHC, assessee is required to establish that it has exported the same items or commodities which were exported during the preceding previous year and the commodity wise export turnover of such items exceeds the export turnover of the same commodities in the preceding year - Word "total" cannot be read before the term "export turnover" in cl. (b) – Phrase "such goods or merchandise" in cl. (b) refers to identification of the goods which were exported in the immediately preceding previous year – It denotes not only qualifying goods

but also the same goods which formed part of export turnover in the immediately preceding previous year – Therefore, export turnover of two commodities being more than the export turnover of said commodities in the immediately preceding previous year, additional deduction was allowable on the incremental turnover even though there was decline in the overall export turnover during relevant year as compared to the immediately preceding previous year.
Raymon Glues & Chemicals , CIT v/s.
(2005) 195 CTR 518 = 277 ITR 529 = 189 Taxation 401 (Guj)

(11) Exporters – Assessment Year 1994-95 – Assessee an exporter, claimed deduction under section 80HHC – However, it declared negative profit out of export of trading goods – Assessing Officer allowed assessee's claim – High Court also allowed assessee's claim without arriving at finding that whether assessee had shown any positive profit or not in its export business – Whether matter should be remitted to High Court for consideration of matter afresh – Held, yes.
Induflex Products (P) Ltd., ITO v/s.
(2005) 149 Taxman 687 =199 CTR 712= (2006) 280 ITR 1 = 192 Taxation 2 (SC)

(12) Section 80HHA of the Income Tax Act, 1961 – Deductions Profits and gains from newly established small scale industrial undertakings – Assessment year 1986-87 – Whether an assessee engaged in ship breaking business can be said to be engaged in a manufacturing activity – Held, no – No ewcweaws by Supreme Court in (2008) 219 CTR 639 = 175 Taxman 77(SC)
Madhav Industrial Corpn., CIT v/s.
(2004)136 Taxman 416=188 CTR 575=182 Taxation 110 (Guj)

(13) Condition that reserve equal to special deduction should be created - Amount transferred to reserve less than deduction allowed – Commissioner in revision issuing notice for reducing allowance – Appellate Tribunal - Finding that assessee had failed to create extra reserve in spite of opportunity – High Court – Dismissing appeal on the ground of question of fact – Appeal to Supreme Court - Assessee given opportunity to credit further amount to reserve account and on compliance held entitled to full deduction .

Karimjee P. Ltd. v/s. Deputy CIT
(2004) 271 ITR 564 = (2005) 193 CTR 55=
143 Taxman 226=186 Taxation 630(SC)

(14) Employment of 10 or more workers - Payment on the basis of job work - Tribunal found that the workers were working at the factory premises - Assessee was conbtrolling not only the work done by those persons but also the manner of doing the work - It could not be said that these persons were not employees simply because they were paid on piece rate basis or job work basis - Tribunal applied the correct test to render the aforesaid finding that the assessee had employed 10 or more persons in the manufacturing process - Assessee entitled to deductions.S.80 HH,80-I
Narania & Co. (V.B) , CIT v/s.
(2001)171 CTR 416 = 252 ITR 884(Guj)

(d) <u>s. 80 HHC</u>

(1) Assessment year 1991-92 – Whether profit should be reduced by amount of carried forward depreciation and investment allowance before allowing deduction under section 80HHC – Held, yes
Mahalaxmi Fabric Mills Ltd. v/s. Asstt. CIT
(2009) 176 Taxman 153 = 309 ITR 63= 129 Taxation 72 =(2008) 9 DTR 70 (Guj)

(2) Profits derived from export–No export made - Duty drawback and cash compensatory support - Words "business profits" in the formula given in s. 80HHC(3) include cash compensatory allowance and duty drawback and, therefore, deduction under s. 80HHC is allowable in respect of duty drawback and cash compensatory support received by the assessee during the relevant accounting year even though no export was made by the assessee during the relevant year.
Desraj B. v/s. CIT
(2008)216 CTR 348=301 ITR 439 = 171 Taxman 481=7 DTR 54(SC)

(3) Filing of audit report - Report not filed along with return – Deduction under s. 80HHC cannot be dented simply because the report of the accountant in the prescribed form is not attached with the return, but it is produced before the AO during the course of assessment proceedings – Assessee having made the claim for deduction for the first time during the course of assessment proceedings by filing audit report, Tribunal was justified in directing the AO to consider the claim of the assessee under s. 80HHC on merits.
VXL India Ltd., ITO v/s.
(2008) 219 CTR 242 = 207 Taxation 553 = 12 DTR 203(Guj)

(4) Assessment year 1990-91 - Formula for deduction simplistic – Basis – Proportion of business profits irrespective of actual profits by export - Income tax Act, 1961, s. 80HHC(3)(b) - CBDT Circular No. 564, dated July 5, 1990.
Mysodet P. Ltd. v/s. CIT
(2008) 305 ITR 276 = 174 Taxman 221=12 DTR 265=
(2009) Taxation 39(SC)

(5) Computation of business profits - Business profits whether will include receipts by way of brokerage, commission, interest, service charges etc. – Law amended with effect from April 1, 1992 to the effect that business profits will not include such receipts – Prospective and not retrospective – Income-tax Act, 1961, s. 80HHC – CBDT Circular no. 621 dated December 19, 1991.
K.K Doshi and Co. v/s. CIT
(2008) 297 ITR 38 = 215 CTR 114 = 171 Taxman 12(SC)

(6) Special deduction – Supporting manufacturer – Selling goods to Export House or Trading House in respect of which Export House or Trading House issues certificate – Scope of deduction – Premium paid by Export House or Trading House to supporting manufacturer on f.o.b value – Integral part of turnover of supporting manufacturer – Includible in profits of business and eligible for deduction – Restriction that receipt should be in shape of convertible foreign exchange applies to direct exporter and not supporting manufacturer selling to Export House or Trading House –
Baby Marine Export, CIT v/s.
(2007) 290 ITR 323= 160 Taxman 160 = 209 CTR 183 =
199 Taxation 274 (SC)

(7) Special exemption – Object – To provide incentive for promotion of exports – "Total turnover" – Formula adopted in statute for determination – Exclusion from total turnover of brokerage, commission, interest, rent etc. – Excise duty and sales tax also of same nature – Are to be deducted.
Lakshmi Machine Works, CIT v/s.
(2007) 290 ITR 667 = 160 Taxman 404 = 210 CTR 1 = 200 Taxation 254 (SC)

(8) Special deduction – Determination of profits – Section 80AB specifying that profits are those as computed in accordance with other provisions of Act can be applied – Unabsorbed business losses of earlier years to be set off – Income Tax Act, 1961, ss. 72, 80AB, 80HHC.
Shirke Construction Equipment Ltd., CIT v/s.
(2007)291 ITR 380 = 210 CTR 159 =161 Taxman 212 = 201 Taxation 398 (SC)

(9) Allowability - Export out of India – Deduction under s. 80HHC is allowable only in case of export of goods or merchandise out of India, and not from any other country.
Dhall Enterprises & Engineers (P) Ltd., CIT v/s.
(2007) 207 CTR 729 = 198 Taxation 181 = 162 Taxman 114 = 295 ITR 481 (Guj)

(10) Special exemption – "Total turnover" – Exclusion from total turnover of brokerage, commission, interest, rent etc. – Excise duty and sales tax also of same nature – Are to be excluded – Income Tax Act, 1961, s. 80HHC(3)(b).
Chatapharma (India) (P) Ltd,, CIT v/s.
(2007)292 ITR 641 = 211 CTR 83 = 162 Taxman 455 = 201 Taxation 375 (SC)

(11) Special deduction from profits – Scope of deduction –

Deduction is only of positive profit earned – Exports of both self manufactured goods and trading goods to be taken into account-No profit earned by assessee – Assessee not entitled to benefit of deduction – Meaning of "profit" – Income tax Act, 1961, ss. 80AB, 80HHC(3)(c)(i), (ii).

Moosa (A.M) v/s. CIT

(2007) 294 ITR 1 = 163 Taxman 741 = 212 CTR 89(SC)

(12) Computation - Loss from export business – For computation of deduction under s. 80HHC(3)(c), losses suffered by the assessee in the export of trading goods are to be set off/adjusted against profits from export of manufactured goods and vice versa and the assessee would not be entitled to deduction if after such adjustments/set off the net figure is a loss.

Ravindranathan Nair K., CIT v/s.

(2007)213 CTR 227 = 165 Taxman 282= 295 ITR 228(SC)

(13) Computation of total turnover - Processing charges – Processing charges derived by the assessee exporter by processing cashewnuts for other exporters being independent income, 90 per cent thereof had to be reduced from the gross total income but the same being and important component of business profits, had to be included in the total turnover in the formula given in s. 80HHC(3).

Ravindranathan Nair K., CIT v/s.

(2007) 213 CTR 227 = 165 Taxman 282= 295 ITR 228 (SC)

(14) Special deduction – Computation of special deduction – Meaning of "turnover" - Income earned by processing goods belonging to third persons – Is part only of gross total income and not export turnover for purposes of deduction – Income tax Act, 1961, s. 80HHC(3) (as it stood in the assessment year 1993-94) - Special deduction – Deduction only if positive profits earned – Export of both self manufactured and trading goods to be taken into account – No profit earned by assessee - Assessee not entitled to any deduction.

Max India Ltd., CIT v/s.

(2007) 295 ITR 282 = 213 CTR 266 = 9 RC 710

(2008) 166 Taxman 188 = 204 Taxation 1(SC)

(15) Special deduction – Computation of special deduction – interest and sales tax set off assessed as business profits – Amounts includible for computation of special deduction – Income Tax Act, 1961, s. 80HHC
Alfa Laval (India) Ltd. , CIT v/s.
(2007)295 ITR 451 = (2008) 170 Taxman 615(SC)

(16) Special deduction – Assessee engaged in business of export of trading goods - Deriving income from export of trading goods and also from export incentives, commission, interest, etc. – Computation of deduction – Ten per cent of expenses for earning incentives, commission, interest, etc. – Deductible – Income Tax Act, 1961, s. 80HHC.
Hero Exports V/s. CIT
(2007) 295 ITR 454 = 213 CTR 291 =165 Taxman 445 (SC)

(17) Total turnover – Whether Sales tax & excise duty form part of the turnover – Held No. (Deduction under section 80HHC – Total Turnover – Sales Tax & Excise Duty).
Catapharma (India) Pvt. Ltd., CIT v/s.
(2007)201 xation 375(SC)

(18) Income from manufacture and export of tea - Stage of granting deduction under s. 80HHC - Deduction under s. 80HHC is to be allowed after apportionment of income from cultivation and manufacture of tea under r. 8(1) i.e from 40 per cent profits on sales taxable as business income.
Willamson Financial Services , CIT v/s.
(2007) 213 CTR 612 = 165 Taxman 638 =(2008) 297 ITR 17= 204 Taxation 89 (SC)

(19) Assessee exporting goods manufactured by itself and also trading goods of supporting manufacturers – Profit in export of goods manufactured by assessee –Loss in export of trading goods – Net loss from export of goods – Assessee not entitled to deduction – Also disclaimer in favour of supporting manufacturer - Only for passing on the deduction of export house - Export house cannot disclaim where it has incurred loss –
IPCA Laboratory Ltd. v/s. Dy. CIT
(2004)266 ITR 521 = 135 Taxman 594 = 187 CTR 513= 181 Taxation 2 (SC)

(20) Exporters – Assessee was an exporter of granite - Its claim was that granite was cut and polished before export and, therefore, it was entitled to deduction under section 80HHC in respect of profits from export business - High Court rejected assessee's claim – On perusal of Circulars of years 1994 and 1995, it was seen that benefit of section 80HHC was available to cut and polished granite only with effect from 1-4-1991 by virtue of insertion of item (x) in Twelfth Schedule to Act – In view of aforesaid, benefit of section 80HHC could not be granted to assessee for assessment year in question.

Gem Granites v/s. CIT
(2004) 141 Taxman 528 = 192 CTR 481 = 271 ITR 322 =
(2005) 185 Taxation 5(SC)

(21) Counter sales in convertible foreign exchange involving customs clearance – Profits qualify for special deduction.

Silver and Arts Palace, CIT v/s.
(2003) 259 ITR 684 = 180 CTR 309=129 Taxman 56 =
174 Taxation 742(SC)

(22) Deductions - Exporters – Assessment year 1984-85 – Revenue contended that in view of provisions of section 80AB, Tribunal was in error in allowing deduction under section 80HHC against income from capital gains while assessee had no profit from export business - Section 80AB does not override provisions of section 80HHC - Since section 80HHC requires deduction to be made from total income of assessee and capital gains form part of income to be included for purpose of ascertaining total income, Tribunal had rightly allowed deduction under section 80HHC.

Arvind Mills Ltd. , CIT v/s.
(2003) 131 Taxman 556(Guj)

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

(1) Ship Breaking - Manufacture or production - Business of ship breaking – Ship breaking activity gave rise to the production of a distinct and different article hence eligible for deduction under ss. 80HH and 80-I.

Vijay Ship Breaking Corpn. & Ors. V/s. CIT
(2008) 219 CTR 639 = 175 Taxman 77=(2009)208 Taxation 675 = 14 DTR 74 (SC)

(2) Manufacture or production - Conversion of jumbo rolls of photographic films into small flats and rolls in desired sizes – Amounts to manufacture or production eligible for deduction under ss. 80HH and 80-I.
India Cine Agencies v/s. CIT
(2008)220 CTR 223 = 175 Taxman 361=15 DTR 121
(2009)308 ITR 98 (SC)

(3) Computation for - Special deduction under section 80-I – Computation of special deduction – Profits and gains not to be reduced by special deduction admissible under section 80HH – Income tax Act, 1961, ss. 80HH, 80-I.
Venus Electricals, CIT v/s.
(2008)304 ITR 347 = 205 Taxation 282(Guj)

(4) Industrial undertaking - Special deduction – Miscellaneous income from sale of empty containers, whether qualifies for deduction – Income tax Act, 1961, ss. 80HH, 80-I, 260A.- Held, no.
Core Health Care Ltd., Deputy CIT v/s. Deputy CIT v/s.
(2008) 298 ITR 194 =167 Taxman 206 =204 Taxation 107=
3 DTR 49 (SC)

(5) Profits from all units to be taken. - Special deductions – Allowance to be made only after computing "gross total income" – Assessee having two industrial units, one in oil and the other in chemicals – Assessee making profits in chemical unit and incurring loss in oil unit - Computation of "gross total income" – Gross total income should include both profit in chemical unit and loss in oil unit – If result is nil, assessee not entitled to special deductions – Income tax Act, 1961, Ch. VI-A, ss. 80A, 80B, 80B(5), 80HH, 80-I.
Synco Industries Ltd. V/s. Assessing Officer(Income Tax)
(2008)299 ITR 444 = 215 CTR 385 = 168 Taxman 224=
4 DTR 203 (SC)

(6) Industrial undertaking – Special deduction under section 80-I – Computation of special deduction – Profits and gains not to be reduced by special deduction admissible under section 80HH.
Venus Electricals, CIT v/s.
(2008)304 ITR 347 = 205 Taxation 282(Guj)

(7) Deduction - Industrial Undertaking - Special deduction under section 80-I – Condition precedent – Employment of specified number of employees – Workers engaged on contract labour basis – Finding that assessee controlled the work and the manner of doing it – Workers were employees for purposes of section 80-I – Income Tax Act, 1961, s. 80-I.
Prithviraj Bhoorchand, CIT v/s.
(2006) 280 ITR 94 = 200 CTR 82 = 152 Taxman 372 = 192 Taxation 301 (Guj)

(8) Deductions- What amounts to Manufacture -Unwinding, cutting and slitting of jumbo rolls of tissue papers into smaller size – Jumbo rolls of tissue papers are cut into various shapes and sizes so that they can be conveniently used as table napkins, facial tissues, toilet rolls etc – However, the characteristics and end use of the tissue paper in the jumbo rolls and the characteristics and end use of the toilet rolls, table napkins and facial tissues remain the same – No new product emerges on winding, cutting/slitting and packing - Thus, there is no manufacture on first principles – Slitting and cutting of toilet tissue paper or aluminium foil has not been treated as a manufacture by the legislature and therefore, s. 2(f) also not applicable – Merely because tissue paper in the jumbo roll of size exceeding 36 cms. Falls in one entry and the toilet roll of a width not exceeding 36 cms. Falls in a different entry, it cannot be presumed that the process of slitting and cutting and slitting of jumbo rolls of aluminium foils amount to manufacturing – Also, value addition without any change in the name, character or end use cannot constitute criteria to decide what is “manufacture”.
S.R Tissues (P) & Anr., CCE v/s.
(2005) 197 CTR 437(Guj)

(9) Computation – Sale of goods to another division (undertaking) of same group – Allocation of indirect expenses – In cases where an industrial undertaking transfers goods to any other business carried on by the assessee, the consideration has to be at the market value, and if it is not so, the AO can substitute the figure of consideration for the purpose of computing deduction – Therefore, it is not

possible to accept the contention that merely because the entire production of the eligible division was sold to the main division of the assessee, there could be no occasion for disturbing the figure of consideration – Hence, AO was justified in allocating the indirect expenses of the assessee company to the eligible division to arrive at the profits and gains of the said division for the purpose of computing deduction under ss. 80HH and 80-I.

Profits of the business – Scope of explanation (baa) to s. 80HHC – Once the sums or receipts of the nature specified in sub – cl. (1) of cl. (baa) of the explanation to s. 80HHC are included while computing profits and gains of business then all such sums or receipts are to be reduced to the extent of 90 per cent from the profits of the business and not simply one of them.

Alembic Chemical Works Ltd. v/s. Dy. CIT
(2003)185 CTR 389 = 133 Taxman 833(Guj)

(10) Manufacture or Production - Business of ship breaking – There is nothing whatsoever in the process of ship breaking activity which can be termed as manufacture or production of any article or thing – Dismantled material already exists as a component of old ship - Neither the process of extracting steel plates from nor the process of cutting extracted steel plates for convenient disposal is an activity of manufacture or production of such material - Merely because ship breaking is considered as an industry, it would not be an industry engaged in manufacture or production of any article or thing – Ship breaking activities do not result in bringing into existence any new article or thing - Assessee engaged in the business of ship breaking was not entitled to deduction under ss. 80HH and 80-I. – The decision is pending in appeal before the Supreme Court - Further by Taxation Laws (amendment) ordinance 2003 retrospectively from 1-4-1991 addition of "business of ship breaking " in explanation 1 in section 10(15), is made after item (i) .

Vijay Ship Breaking Corpn. , CIT v/s.
(2003) 182 CTR 134 =261 ITR 113=129 Taxman 120=
175 Taxation 233(Guj) – now reversed by Supreme Court in (2008) 219 CTR 639(SC) = 175 Taxman 77(SC)

(f) s. 80-I

(1) Assessment under s. 158BC – In the light of provisions of s. 158BB as amended by the Finance Act, 2002 retrospectively w.e.f 1st July, 1995, no fault can be found with the impugned order of the Tribunal holding that the assessee is entitled to claim deduction under s. 80-I or s. 80-IA in block assessment.
Suman Paper & Boards Ltd., CIT v/s.
(2009) 221 CTR 781(Guj)

(2) Whether in view of law laid down in CIT v/s. Prithviraj Bhoorechand (2006) 280 ITR 94/152 Taxman 372(Guj) where more than twenty persons were working under control of assessee in his industrial undertaking Tribunal was right in directing department to allow deduction under provisions of section 80-I – Held, yes.
Prithviraj Bhoorchand, Asst. CIT v/s.
(2009)176 Taxman 156(Guj)

(3) Allowability - Transfer of old machinery or plant to new business – Assessee having installed two new assembly lines for manufacture of new types of dry cell batteries and started no new business, cl. (ii) of sub-s. (2) of s. 80-I was not applicable, and further value of new machinery installed by Rs. 1.04 crores as against existing machinery worth Rs. 5 lacs used for common facilities, deduction under s. 80-I was allowable to assessee.
Lakhanpal National Ltd., CIT v/s
(2008) 215 CTR 503 = 205 Taxation 232 172 Taxman 301 = 304 ITR 365 = 4 DTR 129(Guj)

(4) Computation – Deduction under s. 80HH - In the absence of any clarificatory words in s. 80-I, like those found in the bracketed portion in s. 80J, the deduction admissible under s. 80HH is not required to be reduced from the profits and gains of business while computing the profits for the purpose of deduction under s. 80-I.
Amod Stamping, CIT v/s.
(2005) 194 CTR 158= 185 Taxation 339=274 ITR 176(Guj)

(5) Profits and gains derived from industrial undertaking – Excess recovery over expenditure on advertisement from consignee distributors – Consignee distributors primarily liable to incur advertisement expenditure – However, under an agreement, the assessee undertakes work of issuing advertisements and towards expenditure incurred by the assessee, recoveries are effected from the consignee distributors - Excess recoveries over expenditure on this account – Finding of Tribunal that recoveries are directly related to net sales of the product by the consignee distributors - Excess receipts therefore qualify for computing deduction under s. 80-I.

K. Kacharadas Patel Specific Family Trust v/s. CIT

&

K. Kacharadas Patel Specific Family Trust, CIT v/s.

(2005) 195 CTR 577 = 189 Taxation 608 (Guj)

(6) Also see s. 80HH

(g) s. 80-IA

(1) Hotel –Special deduction section 80-IA(4)(iii) - Scope of provisions – Hotel in a place of piligrimage – Hotel granted certification by prescribed authorities – Income tax authorities has no jurisdiction to decide on basis of his own criteria that assessee not entitled to special deduction under section 80-IA – Income Tax Act, 1961, s. 80-IA(4)(iii) – Income Tax Rules, 1962, r. 18BBC.

Gujarat JHM Hotels Ltd. v/s.

Director General of Income Tax (Exemption).

(2008)305 ITR 386 = 207 Taxation 567 = 222 CTR 132 = (2009) 18 DTR 93 (Guj)

(h) s. 80J

(1) Profits and gains derived from industrial undertaking – Cash compensatory support (CCS) – Cash compensatory support is “attributable to”, but not “derived from” the industrial undertaking and, therefore, it could not be included in profits and gains of the business for the purposes of deduction under s. 80J.

Profits and gains derived from industrial undertaking – Duty drawbacks intended to reduce the cost of production–Same being integral part of pricing of goods, is part of the cost of

production of the industrial undertaking, hence derived from industrial undertaking and eligible for deduction under s. 80J.
India Gelatine & Chemicals Ltd., CIT v/s.
(2005) 194 CTR 492=145 Taxman 303 =275 ITR 284 =
188 Taxation 50 (Guj)

(2) Profits and gains from new industrial undertakings etc. – In view of decision in case of CIT v/s. Alcock Ashdown & Co. Ltd. (1997) 224 ITR 353/90 Taxman 521 (SC), work in progress is includible in computation of capital employed for granting relief under section 80J.
Mehsana District Co-op. Milk Producers Union Ltd. , CIT v/s.
(2003) 130 Taxman 281 (Guj)

(3) Profits and gains from new industrial undertakings etc. – Cost of plant and machinery under erection as also cost of building under construction are to be included in capital base for purpose of deduction under section 80J.
S. G Chemicals & Pharmaceuticals Ltd., CIT v/s
(2003) 130 Taxman 284(2002)175 CTR 618=169 Taxation 679=
258 ITR 109 (Guj)

Also see under heading "New Industrial Undertaking".

(i) <u>s. 80L</u>

(1) Interest on securities, dividends, etc. – Assessee's claim for deduction under section 80L on interest income from compulsory deposit was rejected – Assessee had earned certain dividend income also – For earning that, it had made borrowings and paid interest on that - In relation to dividend income, there was deficit as worked out under section 56 read with section 57 – According to revenue, interest income on compulsory deposit had to be set off against such deficit in relation to dividend account and if net figure was negative, assessee could not claim any deduction under section 80L in view of provisions of section 80AB - Since no expenditure had been incurred for earning interest from compulsory deposits, there was no question of reducing figure of interest income – Such exercise as suggested by revenue was unwarranted and Tribunal was right in allowing assessee's

claim under section 80L in respect of interest income earned on compulsory deposit .
Apoorva Shantilal Shah, CIT v/s.
(2003) 128 Taxman 525 = (2002) 255 ITR 390=174 CTR 612= 169 Taxation 51(Guj)

(2) Discretionary Trust – Status of individual – Special deduction under section 80L for individuals – Available – Trust - Interest paid to beneficiaries - Deductible.
Harjivandas Juthabhai Zaveri & Anr., Dy. CIT v/s.
(2002) 258 ITR 785 (Guj)

(j) s. 80-O

Foreign Project – Exemption in regard to profits - Provision that profits comprised in execution of foreign project will not qualify under any other provision – Valid and constitutional - Exemption clearly referable to s. 80-O not denied - Income Tax Act, 1961, ss. 80-O, 80HHB(5) – Constitutional of India, Arts. 14, 19(1).
Continental Construction Ltd. v/s. Union of India
(2003) 264 ITR 470 = (2004) 186 CTR 88=178 Taxation 395(SC)

(k) s. 80P

CO-OPERATIVE SOCIETY

(1) Deduction under s. 80P(2)(a)(i) – Business of banking Interest received from members of society – Matter regarding exemption under s. 80P(2(a)(i) for interest received from members of the society remanded for reconsideration.
Ponni Sugars & Chemicals Ltd. & Ors., CIT v/s.
(2008) 219 CTR 105 = 174 Taxman 87 = 306 ITR 392 = 13 DTR 1= (2009) 208 Taxation 59(SC)

(2) Profits and gains of banking business – Co-operative bank carrying on banking business – Statutorily required to place part of its funds in approved securities – Income from such securities – Deductible under section 80P(2).
Nawanshahar Central Co-operative Bank Ltd., CIT v/s.
(2007) 289 ITR 6 = 208 CTR 438 = 160 Taxman 48 (SC)

(3) Sale of articles intended for agriculture - Gross or net income - In the case of indivisible business, in the first instance all common expenditure incurred wholly and exclusively for the purposes of the business including the expenditure in relation to the specified activities are to be deducted under s. 37(1) – Activities being one and indivisible apportionment is not permissible even on notional basis - While interpreting s. 80P a liberal construction should be made so as to achieve the object of the provision Jamnagar Jilla Sahakari Khorid

Vechan Sangh Ltd., CIT v/s.

(2006) 201 CTR 243 = 283 ITR 116 = 153 Taxman 363(Guj)

(4) Business of banking – Interest on investments made out of voluntary reserves – The direction of the Supreme Court in Mehsana District Central Co-operative Bank's case can only mean ascertainment of utilization of net income of earlier years, which forms part of the funds which are invested and given the nomenclature of voluntary reserves – It is not possible to restrict the scope of business of banking to the definition of banking under s. 5(b) of the Banking (Regulations) Act – Clause (a) of s. 6(1) specifies numerous activities in which a banking company may engage – Term "investment" used in s. 5(b) has to be read in a sense broad enough to denote placing of property in business so that it will be safe and yield a profit - In case of a society carrying on business of banking, it is permissible to make specified investments as provided in s. 71 of Gujarat Co-operative Societies Act including in any of the modes specified in s. 20 of the Indian Trusts Act without any upper limit once the statutory requirement of reserve fund as stipulated in s. 67(2) is satisfied – All investments, surplus otherwise are essential and conducive to the promotion or advancement of the business of banking - Therefore, interest earned on investments made by the assessee society in the course of business of banking is attributable to business of banking and deduction under s. 80P(2)(a)(i) is allowable on such income.

Baroda Peoples Co-operative Bank Ltd., CIT v/s.

(2005) 198 CTR 1 =149 Taxman 509 = 280 ITR 282(Guj)

(5) Constitutional validity of amendment made by IT (Second Amendment) Act, 1998 – Exemption confined to societies marketing

agricultural produce grown by their members – Clear effect of the amendment is that s. 80P(2)(a)(iii) must be read as if the substituted phrase "grown by" from the date the section was introduced - In making the impugned amendment the legislature does not "statutorily overrule" the decision in Kerala Co-operative Marketing Federation Ltd & Ors. V/s. CIT (1998) 147 CTR(SC) 28 : 1998 (5) SCC 48 as contended by the appellant – There was hardly any retrospectivity but a continuation of status quo ante as the law declared in Assam Co-operative Apex Marketing Society v/s. Addl. CIT (1993) 113 CTR (SC) 58 : 1994(Supp) 2 SCC 96 held the field till 1998 when it was reversed - Further, the amendment did not authorize the Revenue authorities to reopen time barred assessment – Amendment is therefore constitutionally valid.

National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. V/s.Union of India & Ors.

(2003) 181 CTR 1 = 260 ITR 548 =128 Taxman 361 =174 Taxation 409(SC)

(6) Special Deduction - Co-operative Society engaged in banking business - Interest earned from funds utilized for statutory reserves - Income from hiring safe deposit vaults - Deductible - Interest from utilization of voluntary reserves - Deductible if funds utilized in course of ordinary banking business - Income Tax Act, 1961, s. 80P(2)(a)(i) - Gujarat Co-operative Societies Act, 1961, s. 67(2) - Banking Regulation Act, 1949, s. 6(1)(a).

Mehsana District Co-op. Bank Ltd. v/s. ITO

(2001) 251 ITR 522(SC)

(7) Special Deduction - Banking Business - Total reserves - Interest on investments from-Not deductible –Income Tax Act, 1961, s. 80P(2)(a)(i).

Mehsana District Co-op. Bank Ltd. v/s. ITO

(2001) 251 ITR 520(GUJ) Now over ruled by 251 ITR 522(SC)

(8) Scope of - Co-operative society engaged in banking business - Interest arising from investment made out of reserve fund to enable it to carry on banking business - Is income from banking business - Deduction not restricted to income derived from working or circulating capital -

Karnataka State Co-operative Apex Bank, CIT, v/s.

(2001) 251 ITR 194(SC)

(9) Banking business – Interest on securities – Subsidies from government – Dividend – Are business income – Deduction available

– Supreme Court - Earlier decisions on these points - Do not require reconsideration.
Ramanthapuram Dist. Co-op. Central Bank Ltd., CIT v/s.
(2002) 255 ITR 423 = 175 CTR 297 = 123 Taxman 222(SC)

(10) Deduction under s. 80P(2)(a)(i) – Providing credit facility to members – Hire sale of vehicles – Assessee a co-operative Society, purchasing auto rickshaws and reselling them to its members on hire purchase terms – This activity cannot be said to provide "credit facilities" to its members – Provisions of s. 80P(2)(a)(i) not applicable.
Madras Auto Rickshaw Drivers v/s. CIT
(2002) 173 CTR 77(SC)

(l) <u>s. 80-U</u>

(1) Deduction – Only by revised return - Return – Deduction claimed after return filed - No power in assessing authority to entertain claim made otherwise than by way of revised return -
Goetze (India) Ltd. v/s. CIT
(2006)284 ITR 323 = 204 CTR 182= 157 Taxman 1= 195 Taxation 228 (SC)

(2) Blind or physically handicapped persons – Fact that person has substantial income by itself cannot be a criterion for determining whether disease or disability with which he is suffering has resulted in reducing his capacity to gainful employment – Assessee suffered from deafness to extent that he could not hear from a distance of two-three feet even with help of hearing aid – Assessee would be entitled to relief under section 80U.
Narendra R. Oza, CIT v/s.
(2002) 257 ITR 466 = 175 CTR 621 = 169 Taxation 656
(2003) 130 Taxman 287(Guj)

(m) <u>s. 80VV</u>

(1) Expenses in connection with income tax proceedings - Applicability of s. 80VVA, the expenditure incurred in connection with the legal proceedings in respect of the tax liability under the Act is to be allowed from the balance of 30 per cent of the income of the assessee company.
Ahmedabad New Cotton Mills Co. Ltd., CIT v/s.
(2001) 171 CTR 495(GUJ)

(2) Mercantile system of accounting - Expenditure incurred in respect of certain proceedings before Income Tax Authorities - Expenditure

incurred not actually paid during the relevant year - Assessee entitled to deduction under section 80VV even though no payment was made in the relevant year if he follows mercantile system –
DAYAL B. Mistry , CIT v/s.
(2001)252 ITR 571 = 165 TAXATION 753(GUJ)

34. DEPRECIATION

(a) ADDITIONAL DEPRECIATION

(1) Computers – Meaning of office premises in section 32 – Computers used for data processing – Entitled to additional depreciation – Income Tax Act, 1961, s. 32(1)(iia).
Statronics & Enterprises (P) Ltd., CIT v/s.
(2007)288 ITR 455 = 207 CTR 96= 196 Taxation 198 = 165 Taxman 153 = (2008) 3 DTR 343 (Guj)

(2) Air conditioners and fans in a clinic – Entitled to additional depreciation.
Nathubhai H. Patel, CIT v/s.
(2006)201 CTR 102 = 154 Taxman 117 = 193 Taxation 114 = 285 ITR 67 (Guj)

(b) ACTUAL COST

(1) Pre-commencement expenses - Assessee - company filed an affidavit asserting that all expenditure except some items were incurred for setting up of the plant - CIT(A) misdirected himself in relying upon a portion of the affidavit where certain items were expressly excluded while not believing the other portion of the affidavit wherein the remaining expenses were stated to be incurred for setting up of the plant - None of the authorities cross examined the deponent ie. the director - It was not open to the Revenue to challenge the correctness of the affidavit - It is not clear whether the capitalised expenditure includes depreciation - Tribunal directed to ascertain the factual position - Whole of the expenditure except the depreciation, if any capitalised by assessee was includible in the actual cost of plant.
Glass Lines Equipments Co. Ltd. v/s. CIT
(2001) 170 CTR 470 = 119 TAXMAN 813(GUJ)

(2) Subsidy from Government – Depreciation was admissible on entire cost of plant and machinery despite the fact that 30 per cent of the

value of plant and machinery was received by way of subsidy from the Government.
Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002) 175 CTR 612 = (2003) 132 Taxman 50 (Guj)

(3) Investment allowance – Actual cost – Government subsidy not deductible in computing actual cost.
Swastik Sanitary Works Ltd. , CIT v/s.
(2006) 286 ITR 544 = 205 CTR 517(2007) 197 Taxation 324 (Guj)

(c) **ALLOWABILITY**

(1) Lease of electrical equipment – Rent received from State Electricity Board taxed as business income – Tribunal finding that transaction genuine and allowing depreciation – Findings of fact – Income Tax Act, 1961, s. 32.
Gujarat Gas Co. Ltd., CIT v/s.
(2009) 308 ITR 243 = 222 CTR 297 = 19 DTR 175(Guj)

(2) Allowance/rate of – In case of plant and machinery whose cost does not exceed Rs. 5,000/- third proviso to section 32(1)(ii) would not be applicable since such assets are covered specifically under first proviso to said section and entire actual cost has to be allowed as a deduction, subject to assessee fulfilling all other requisite conditions – Held, yes.
Dhall Enterprises & Engineers (P) Ltd., CIT v/s.
(2006)150 Taxman 499 = 201 CTR 107 = 193 Taxation 587= 287 ITR 435 (Guj)

(3) Firm dissolved and business taken over by one partner during the previous year - Full depreciation on assets claimed by the partner – Assessee, the dissolved firm, also entitled to full depreciation - Relevant provisions do not circumscribe the rates of depreciation in case the asset has been owned and used for the purpose of business or profession for a part of the previous year – Depreciation was allowable if the assets were used for the purpose of business or profession at any time during the relevant previous year – There is nothing to show that the assessee should remain the owner of the asset in question for the entire previous year – Further, adjustment of rights of the partners in a dissolved firm does not amount

to a transfer nor it is for a price and hence it is not a case of sale of assets of the partnership firm – Accordingly, provisions of s. 34(2)(ii) would not be applicable.
Fluid Controls Mfg. Co., CIT v/s.
(2005) 196 CTR 1 = 147 Taxman 139 = 189 Taxation 601 (Guj)

(4) Assessee was entitled for depreciation on entire cost of plant and machinery, including 30 per cent of value of plant and machinery received by way of subsidy from Government.
Mehsana District Co-op. Milk Producers Union Ltd. , CIT v/s.
(2003) 130 Taxman 281 (Guj)

(5) Allowability - Conversion of proprietary business into partnership firm - Sec. 34(2)(ii) cannot be invoked to disallow the claim for depreciation against profits from proprietary business - Sec. 34(2)(ii) envisages denial of claim for depreciation only in the cases where the assets are sold, discarded, demolished or destroyed - Assets in question were neither discarded, demolished or destroyed - There is no sale when the assets of the proprietary business are brought as capital contribution in the partnership firm - Claim of the assessee for depreciation rightly upheld.
Ramlubhaiya R. Malhotra, CIT v/s.
(2001) 169 CTR 435(GUJ)

(6) When available – Subsidy - Plant and machinery received as subsidy from Government – Depreciation admissible on 30 per cent of value of such plant and machinery.
Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002) 256 ITR 322 = 166 Taxation 339 = 121 Taxman 689(Guj)

(7) Lunch room, extension of canteen and partition wall – Entitled to depreciation.
Gujarat State Fertilizer Co., CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651 (Guj)

(d) **BALANCING CHARGE**

(1) Acquisition of assessee's banking undertaking by Government – Sec. 4(2) is not attracted where assessee's entire undertaking is acquired and compensation is paid.
PNB Finance Ltd. v/s. CIT
(2008) 220 CTR 110 = 307 ITR 75 = 175 Taxman 242=
15 DTR 47=11 RC 607 = (2009) 208 Taxation 370 (SC)

(e) **CAR**
Motor Car – One-seventh portion of depreciation not disallowable.
Dinesh Mills Ltd. V/s. CIT
(2004)268 ITR 502 (Guj)

(f) **CHANGE OF A/C. YEAR**
Allowance/rate of – Assessee company who was following financial year as its accounting year up to assessment year 1981-82, made a request to change accounting period so as to end on 31st August – Assessing Officer granted request subject to condition that no depreciation claim would be allowed for five months, i.e for assessment year 1982-83 – Assessing Officer was not justified .
Electric Control Gear Ltd., CIT v/s.
(2003) 129 Taxman 722 = 183 CTR 540 = 176 Taxation 553
(2004) 266 ITR 338 (Guj)

(g) **COMPUTATION**
Change in previous year – Previous year longer than twelve months – Law applicable – Effect of substitution of rule 5 with effect from 2-4-1987 – Rule cannot override provisions of Act – Assessee entitled to depreciation for entire period – Tribunal directed to decide issue afresh – Income tax Act, 1961, s. 32 – Income tax Rules, 1962, r. 5.
Crown Products , CIT v/s
(2008) 304 ITR 106 == 7 DTR 385= (2009) 177 Taxman 266 (SC)

(h) **EXTRA SHIFT ALLOWANCE**
(1) Cinema theatre – Not a "plant" – Depreciation and extra shift allowance applicable Income Tax Rules, 1962, Appex. I, item III(iv) (prior to 2-4-1987).
A.B.A Sons, CIT v/s.
(2003) 264 ITR 469 = (2004) 186 CTR 77(SC)

(2) Air conditioning plant - Business of manufacture of artificial silk – Even assuming that air conditioning plant was essential in the manufacturing process carried on by the assessee and was a part of integral or composite plant of the assessee, extra shift allowance was not allowable on the air conditioning plant in view of specific provisions contained in part I of Appendix I to the IT Rules.
Garden Silk Mills (P) Ltd., CIT v/s.
(2001) 170 CTR 450 = 252 ITR 804(GUJ)

(i) **INITIAL DEPRECIATION**

(1) Building for residence of low paid employees – Firm of chartered accountants – Carries on a "profession " - Does not carry on "business" – Not entitled to initial depreciation on such building – Income tax Act, 1961, s. 32(1)(iv).
G.K Choksi & Co. v/s. CIT
(2007) 295 ITR 241 =165 Taxman 299 = 213 CTR 425 (SC)

(2) Initial depreciation allowed under s. 32(1)(v) – Though cl. (v) appears in s. 32(1) which deals with depreciation, initial depreciation under cl. (v) is not depreciation as understood in the commercial circles, nor has the legislature treated the same to be depreciation within the meaning of the provisions of the Act – It is primarily in the nature of incentive – Once this allowance does not bear the characteristics of depreciation, it would not form part of depreciation actually allowed so as to be deducted while computing the WDV - Further, WDV as computed at the end of the immediately preceding previous year becomes the starting point for the purposes of computing depreciation allowable in the year in question - Any allowance which has not gone into computation of WDV in any of the earlier years cannot be brought into consideration while computing the taxable income of the year under consideration – Thus, initial depreciation granted in asst. yr. 1982-83 cannot be brought into computation of WDV for the asst. yr. 1985-86 and could not be deducted for the purposes of computation of WDV despite the amendment made by the Finance Act, 1983.
Daudayal Hotels (P) Ltd., CIT v/s.
(2005) 199 CTR 556 (2006)282 ITR 132= 152 Taxman 389 = 192 Taxation 329 (Guj)

(3) Initial depreciation under s. 32(1)(iv) - Allowability to professionals i.e chartered accountants - Legislature has used both the terms "business" and "profession" as having distinct meaning and operating in specified situation for the purpose of computing income specified in s. 28 - Wherever the legislature intended that a benefit of a particular provision should be available to both 'business' or 'profession' it has used the phrase 'business' or 'profession' or after using the said phrase in the opening portion of the section not specified in relation to each individual sub section or clause where the benefit of deduction is available to both categories of assessees - Provisions of s. 36 provide for almost identical situation - It is not possible to accept the contention that the opening portion of s. 32(1) would govern the operation of all clauses which follow - Submission that the word "business" occurring in cl. (iv) of s. 32(1) includes the term "profession" and the benefit is available even to an assessee who employs specified category of persons in profession cannot be accepted - Second limb of cl. (iv) is an inherent indicator that the deduction is available only in relation to an assessee carrying on business - It is not possible for the Court to adopt an interpretation which would render one portion of the same clause otiose for the purpose of holding that the relief would be available to one class of assessee under another portion of the same clause - Assessee firm of chartered accountants was not therefore entitled to initial depreciation.

Choksi & Co.(G.K) v/s. CIT

(2001) 171 CTR 396 = 252 ITR 863 =(2003) 127 Taxman 109 = 175 Taxation 222 (Guj)

(j) **<u>OWNERSHIP</u>**

Buildings not registered in favour of assessee - Assessee having acquired possession of factory and office buildings under an agreement on payment of substantial amount is entitled to depreciation thereon even though the buildings had not been transferred in favour of assessee.

Deepak Nitrite Ltd. v/s. CIT

(2008) 220 CTR 390 = 206 Taxation 422 = 307 ITR 289= 175Taxman 230 = 7 DTR 313 (Guj)

(k) **PARTIAL DEPRECIATION**

Block of assets - Whether can be claimed – Provision omitted with effect from April 1, 1988 – Supreme Court – Matter remanded to High Court for fresh consideration – Income Tax Act, 1961, ss. 32(1), Expln.5, 34(1).

United Phosphorous Ltd., Jt. CIT v/s.
(2008) 299 ITR 9 = 215 CTR 13 = 167 Taxman 261 =204 Taxation 114 = 3 DTR 61(SC)

(l) **PLANT**

(1) Ore shed – In view of clear finding that the ore shed situated within the factory
premises performs the functions of the plant and is an integral part thereof, it is eligible for depreciation as also extra shift allowance -
Amol Dicalite Ltd. , CIT v/s.
(2006)205 CTR 521 = 286 ITR 648=
(2007) 197 Taxation 330(Guj)

(2) Purchase of undertaking – Accrued and future gratuity liability of vendor also taken over it was capital expenditure but not capital asset covered by s. 32(1)(ii) or plant under s. 43(3) - Hence purchaser has no right to depreciation on land – No depreciation.
Hoogly Mills Co. Ltd. , CIT v/s.
(2006) 287 ITR 333 = 206 CTR 301=157 Taxman 347=
(2007) 196 Taxation 734(SC)

(3) Fencing - Assessee not entitled to depreciation on fencing at the rate of 10 per
cent applicable to plant.
Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002) 175 CTR 612(Guj)

(4) Hotel building - Not plant - Not entitled to extra shift depreciation allowance -
Abad Hotels India P. Ltd., CIT v/s.
(2001) 251 ITR 204 = 170 CTR 185 (SC)

(5) Theater building not "plant" - Assessee not entitled to higher depreciation on theatre -

Raiban and Sons , CIT v/s.
(2001) 251 ITR 881 = 171 CTR 191 = 119 TAXMAN 1029(SC)

(6) Building - Plant – Roads to be treated as building and not as plant – Fencing cannot be treated as plants - Are to be treated as building and not as plant for the purpose of Depreciation.
Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002) 256 ITR 322 =175 CTR 612= 166 Taxation 339 =
121 Taxman 689 = (2003) 130 Taxman 281 (Guj)

(m) **RATE**

(1) Business of running motor vehicles on hire – User of trucks in the business of transportation is the test for allowing higher depreciation under Item III(2)(ii) of Appendix 1 to IT Rules – Matter having not been examined from the point of view whether trucks were run on hire, matter remanded for fresh consideration.
Gupta Global Exim (P) Ltd., CIT v/s.
(2008) 216 CTR 368 = 171 Taxman 474 = 305 ITR 132= 7 DTR 62= (2009) 208 Taxation 26(SC)

(2) Dumpers – Depreciation at the rate of 30 per cent is available on dumpers.
Gujarat Tube Well Co., CIT v/s.
(2006)206 CTR 14 =(2007) 288 ITR 301= 196 Taxation 210(Guj)

(3) Depreciation under section 32(1) has to be granted in computation of income from business and this necessarily involves maintenance of proper books of account and depreciation has to be necessarily granted on gross income computed based on books of account – Assessee cannot make estimation of net income and then claim depreciation therefrom – Held, yes.
Ratan Corpn., Dy. CIT v/s.
(2005)275 ITR 503 = 187 Taxation 275 = 197 CTR 536 (Guj)

(4) Diesel generating set – Claim for depreciation at 15 per cent – Allowance – .
Transpek Industry Ltd. , CIT v/s.
(2004) 265 ITR 493 = 187 CTR 337 = 136 Taxman 488 (Guj)

(5) Diesel generating set – Higher rate of 30 per cent is allowed only on renewable energy devices as specified in the sub items of Item 10A

of the Table in Part I of Appendix 1 to IT Rules, 1962 – Generator sets running on diesel would not fall under sub item (xiii) of Item 10A so as to entitle the assessee to claim depreciation at the higher rate of 30 per cent – It would be allowable at the normal rate of 10 per cent.

Anang Polyfil (P) Ltd. , CIT v/s.
(2004)187 CTR 576= 136 Taxman 692=267 ITR 266 =
180 Taxation 217 (Guj)

(6) Assessee claiming depreciation on Hot Mixing Plant and Payer Finishing Machine @ 30% and claiming both machines to be 'earth moving machinery' – Held, since both the machines used for road making assessee not entitled to depreciation at a higher rate, i.e @ 30 per cent – Depreciation to be allowed @ 15 per cent only.

Utkarsh Builders, CIT v/s.
(2003) 176 Taxation 563=184 CTR 293 =264 ITR 697=
134 Taxman 701 = (2004)134 Taxman 701(Guj)

(7) Fencing - Entitled to depreciation at rate applicable to buildings.

Gujarat State Fertilizer Co., CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651(Guj)

(8) Rate of depreciation – Motor lorry – Meaning of "motor lorry" – Mobile crane is a motor lorry – Entitled depreciation at rate applicable to lorries - Mobile crane run for hire – Entitled to higher rate of depreciation.

Gujco Carriers v/s. CIT
(2002) 256 ITR 50 = 174 CTR 324 = 122 Taxman 206(Guj)

(9) Assessment year 1984-85 – Assessee, being a firm of Chartered Accountants, made a claim in respect of intital depreciation under section 32(1)(iv) on cost of building erected during accounting period relevant to assessment year under consideration – Claim was disallowed on ground that said provision was meant to apply only in case of assessee carrying on 'business' and not in case of assessee involved in 'profession' – Whether expression 'business' as defined in section 2(13) can be extended to include 'profession' – Held, no – Therefore assessee was disentitled to deduction under section 32(1)(iv) in instant case.

G.K Choksi & Co. v/s. CIT
(2002) 122 Taxman 316 = 166 Taxation 86(Guj)

(10) Allowance / rate of – Depreciation at rate of 30 per cent can be allowed on dumpers employed in business of road construction.

HMT Construction Co., CIT v/s.
(2002) 124 Taxman 470 (Guj)

(n) **UNABSORBED DEPRECIATION**

Carry forward and set off - Carrying on of business – Assessee need not carry on same or any business or profession for availing of the benefit of sub s.(2) of s. 32 – Entitled to carry forward and set off unabsorbed depreciation.
Fabriquip (P) Ltd. , CIT v/s.
(2002) 177 CTR 149 = 123 Taxman 820 = 171 Taxation 291=
(2003) 260 ITR 207(Guj)

(o) **USER**

(1) Suspension of business vis-à-vis passive user – High Court having dismissed assessee's appeal without examining its claim that it is entitled to depreciation on plant and machinery despite suspension of business operations during the relevant previous year on the ground of passive user, the impugned judgment is set aside and the matter is remitted to the High Court for fresh decision in accordance with law.
Nirma Credit & Capital Ltd. v/s. Asstt. CIT
(2008) 220 CTR 537 = 16 DTR 75(SC)

(2) Finding of Tribunal - Tribunal, on examining the statements of certain witnesses and after analyzing the material on record, having come to the conclusion on facts that there was nothing to show that the machinery, namely, expellers remained idle for the entire block period, no interference was called for.
N.K Industries Ltd., Dy CIT v/s.
(2008)216 CTR 114 = 170 Taxman 22 = 305 ITR 274 = 6 DTR 131=
(2009) 208 Taxation 673(SC)

(3) Condition precedent for allowance - Use of machinery or plant - Machinery or plant - Machinery purchased for expansion of business - Trial run of machinery - Assessee entitled to depreciation -
Ashima Syntex Ltd., CIT (ASST) v/s.
(2001)251 ITR 133(GUJ)

35. DEVELOPMENT REBATE – UNABSORBED

Carry forward and set off – Carrying on of business - Industrial unit transferred within 8 years from the date of purchase and installation of assets – Assessee not entitled to carry forward and set off of unabsorbed development rebate and investment allowance -

Fabriquip (P) Ltd. , CIT v/s.
(2002) 177 CTR 149 = 123 Taxman 820 = 171 Taxation 291=
(2003) 260 ITR 207(Guj)

(a) **WHEN AVAILABLE**

Effluent system – Instruments – Entitled to development rebate – Telephone equipment – Not entitled to development rebate.

Gujarat State Fertilizer Co. , CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651(Guj)

36. DISALLOWANCE

(a) **EXCESSIVE PAYMENT**

Revision ecessive or unreasonable payments - Assessment year 2001-02 – Commissioner by invoking powers under section 263 set aside assessment order passed by Assessing officer on ground that in its trading account assessee company has reduced gross receipts by claiming sub-let payments to subcontractors and in his view said payments could not be considered as genuine ones and legitimate business expenditure – Accordingly, he made addition by disallowing said payments – On appeal, Tribunal recorded findings that there was no illegality committed by assessee in entrusting its work to sub contractors and in making all due payments to them and that there was no evidence on record that said contractors were related to assessee or were associates or sister concerns of assessee – It therefore held that no disallowance could be made on account of said payments – On facts Tribunal was justified in quashing order of Commissioner passed under section 263.

R.K Construction Co. , CIT v/s.
(2008)175 Taxman 165 = (2009) 221 CTR 415(Guj)

(b) **s.37(3A)**

Commission on sales – Any expenditure incurred for effecting sales cannot be termed to be expenditure for sales promotion – Expenditure incurred for making sales is a part and parcel of the expenditure for selling the products or the goods - Tribunal was right in deleting the disallowance made under s.

37(3A) by treating the commission paid as not falling within the scope of provisions of s. 37(3B).
Zippers India, CIT v/s.
(2006) 203 CTR 52 = 284 ITR 142 = 194 Taxation 632 (Guj)

(c) **s. 40(a)(i)**

Payment of usance interest to foreign concerns in connection with purchase of ship – Assessee purchased ships from two non-residents on an agreed credit for 180 days usance period - Invoices of the purchase price of the ships and the interest amount were separately made and the customs duty was paid on the purchase price excluding interest – Price of the ships was considered to be separate and there was no nexus between the interest amount and the fixation of the price - Usance interest could not therefore be treated as part of the price – Further, meaning of the word "interest" as defined in s. 2(28A) is very wide and would include interest on unpaid purchase price payable by means of irrevocable letter of credit - Price payable under the memorandum of agreement was an ascertained sum of money and it could not be said that the unpaid price was not a debt incurred within the meaning of s. 2(28A) or a "debt claim" under the article concerning taxation of interest in DTAAs – Interest payable for usance period was "interest" and not part of purchase price - Assessee was responsible for paying both the amounts viz., the purchase price and the interest amount to the seller and not to the bank that had issued the letter of credit – Liability of deduct tax at source was of the assessee and not of the issuing bank – Assessee having failed to make deduction of tax from the interest, disallowance of interest under s. 40(a)(i) was justified – (The appeal is pending in Supreme Court – Further by Taxation Laws (amendment) ordinance 2003 the decision is superceded with effect from 1-4-1962 by adding explanation 2 to s. 10 (15)(iv) by creating a fiction that usance interest payable outside India by an undertaking engaged in Ship Breaking business shall be deemed to be interest payable on a debt incurred in a foreign country in respect of purchase outside India).
Vijay Ship Breaking Corpn. , CIT v/s.
(2003)181CTR 134 =261 ITR 113=129 Taxman 120 =
175 Taxation 233(Guj)

decision is now superceded by retrospective amendment from 1-4-1962 by ordinance of 2003.
And reversed Supreme Court in (2008) 219 CTR 639(SC) =
175 Taxman 77(SC)

(d) **s. 40(b)**

(1) Interest, salary etc. paid by firm to partner - Tribunal was justified in disallowing under section 40(b), salary, consultancy and professional fees paid to partners, in their individual capacities even though each of them was a partner in assessee firm in his capacity as karta of his HUF.
Industrial Linings v/s. CIT
(2003) 130 Taxman 258 = 263 ITR 315 = 177 Taxation 297(Guj)

(2) Firm – s. 40(b) disallowance under s. 40(b) – Interest to partner - Interest paid to HUF partner by the firm has to be disallowed under s. 40(b).
Simplex Rayon & Silk Processors , CIT v/s.
(2002) 177 CTR 393 = 171 Taxation 289 = 123 Taxman 838(Guj)

(3) s. 40 (b) - Business disallowance – Interest salary etc. paid by firm to partners – Remuneration in form of salary paid to partners in individual capacity is disallowable under section 40(b) when they are partners in firm in representative capacity as karta of HUF.
Nanalal N. Chokshi, CIT v/s.
(2002) 125 Taxman 460 (Guj)

(e)s. 40(c)

(1) Allowability – Disallowance of motor car expenses for personal use – Expenses incurred on running of motor cars cannot be disallowed on the ground of personal and non business use of motor car in the hands of assessee company.
Dinesh Mills Ltd., CIT v/s.
(2005)199 CTR 509 (Guj)

(2) s. 40(c) - Reimbursement of medical expenses – Cannot be excluded while computing the disallowance under s. 40(c). - Disallowance under s. 40(c) –Group insurance premium – Reimbursement of group insurance premium is to be excluded in computing disallowance under s. 40(c).
Rohit Mills Ltd., CIT v/s.
(2004) 187 CTR 623 = 180 Taxation 91 = 139 Taxman 429 (Guj)

(3) S. 40(c) - Commission paid to Managing Director – To be taken as perquisite for purposes of section 40(c) – Income Tax Act, 1961, s. 40 (c)
Dinesh Mills Ltd. V/s. CIT
(2004) 268 ITR 502 (Guj)

(4) Disallowance of benefit or amenity given to a Director – s. 40(c) - Assessee giving Rs. 5,400 for bonus and Rs. 10,500 being leave encashment and leave travel concession to a Director – AO including all the amounts for disallowance under section 40(c) – Held, all the items to be included for disallowance under section 40(c).
Mehta Parikh & Co. (P) Ltd. , CIT v/s.
(2003) 174 Taxation 554(Guj)

(5) S. 40(c) - Remuneration etc. paid in excess of prescribed limit in case of company, etc. – Tribunal was right in law in considering commission paid to managing director as perquisite for purpose of section 40(c).
Dinesh Mills Ltd. Ltd. V/s. CIT
(2003) 130 Taxman 260 (Guj)

(6) S. 40 (c) - Remuneration, etc. paid in excess of prescribed limit – Payment on account of bonus and leave encashment to directors is not required to be excluded for computing disallowance under section 40(c).
Mehta Parikh & Co. (P) Ltd. , CIT v/s.
(2002) 124 Taxman 466(Guj)

(7) Remuneration paid to Managing Director – Disallowance to be made notwithstanding fact that remuneration was reasonable having regard to business requirements of company.
Commission – To be taken into account for computing disallowance under section 40(c) - Expenditure incurred for maintenance of house at Bombay - House used by assessee for accommodating officers and executives as and when they were on official business on behalf of company – Provisions of section 37(5) cannot be invoked.
Mihir Textiles Ltd., CIT v/s.
(2002) 256 ITR 528 = 172 CTR 344 – 166 Taxation 713 =
121 Taxman 60 (Guj)

(8) Limits on certain expenditure on exployees towards benefit or perquisites -Disallowance of excess - Extent of disallowance - Provision of statute to be applied - Rule relating to computation of such benefit or perquisite to assess it in hands of employee not relevant -
British Bank of Middle East, CIT v/s.
(2001) 251 ITR 217(SC)

(9) Reimbursement of medical expenses to managing director - Has to be included for the purpose of disallowance under s. 40(c) –
Ahmedabad New Cotton Mills Co. Ltd., CIT v/s.
(2001) 171 CTR 495(GUJ)

(10) House rent allowance to managing director -Cannot be considered for the
purpose of disallowance under s. 40(c) –
Ahmedabad New Cotton Mills Co. Ltd., CIT v/s.
(2001) 171 CTR 495(GUJ)

(f) **s. 40A(5)**

(1) Remuneration etc. paid in excess of prescribed limits in case of company, etc. – Assessment year 1978-79 – Whether only one limit is prescribed for deduction under section 40A(5) on account of salary whether paid to an employee in service or a retired employee in any one previous year – Held, yes - Circular and clarifications – Circular dated 6-10-1952, Circular dated 5-10-1984.
Mercantile Bank Ltd. v/s. CIT
(2006)153 Taxman 97= 202 CTR 457 = 283 ITR 84 =
193 Taxation 563 (SC)

(2) Leave salary paid to retiring employees – Is specifically included in the definition of "salary" directly by virtue of s. 17(1)(va) and indirectly by the provisions of s. 17(3)(ii) - Therefore, the same is to be taken into consideration for the purposes of determination of the limit specified in sub.s (5) of s. 40A – Therefore, such expenditure is not deductible subject to the specified limit – Provision of s. 10(10AA) can come into play in the hands of the recipient employee and cannot be projected while computing the income under the head "profits and gains of business or profession" in the hands

of the employer when the limit of disallowance expenditure is to be worked out under s.40A(5).
Alembic Glass Industries Ltd., CIT v/s.
(2004) 197 CTR 514 = 279 ITR 331=149 Taxman 15 =
(2006) 190 Taxation 520(Guj)

(3) Remuneration to employee – Payment on account of medical insurance and accident insurance premium – Not to be taken into account for computing disallowance under section 40A(5).
Mihir Textiles Ltd., CIT v/s.
(2002) 256 ITR 528 = 172 CTR 344 = 166 Taxation 713 =121 Taxman 60 (Guj)

(4) Accident insurance in respect of Managing Directors - Insurance policy of the directors was taken by the company and premium was also paid by the company – Same not includible for the purposes of computing disallowance under s. 40A(5).
Gujarat Steel Tubes Ltd., CIT v/s.
(2002) 177 CTR 191=123 Taxman 994=171 Taxation 274=
258 ITR 235(Guj)

(5) s. 40A (5) - Medical expenses in respect of Managing Directors – Includible for the purpose of computing disallowance under s. 40A(5).
Gujarat Steel Tubes Ltd., CIT v/s.
(2002) 177 CTR 191=123 Taxman 994=171 Taxation 274=
258 ITR 235(Guj)

(6) s. 40A (5) - Medical benefits and group term insurance – Expenditure in respect of medical benefits and group term insurance has to be excluded for the purpose of s. 40A(5).
Sarangpur Cotton Mfg. Co. Ltd., CIT v/s.
(2002) 177 CTR 467 = 124 Taxman 30 = 171 Taxation 499(Guj)

(g) <u>s. 40A(8)</u>

(1) Disallowance under s. 40A(8) – Financial company – Business of purchase and sale of shares – In order to be and "investment company", the company has to carry on as principal business acquisition of either any one or all the three categories of

specified financial instruments – A narrow view cannot be ascribed to the term acquisition so as to mean acquiring of shares and securities only for the purposes of receiving dividend of interest therefrom – A company which makes investment only for the purposes of yield from the investments cannot be taxed under the head 'profits and gains of business or profession' – Moreover, assessee company is treated and registered as an "investment company" by the RBI under the provisions of Non- Banking Financial Companies (Reserve Bank) Directions, 1977, which are issued under the provisions of RBI Act – Any decision by RBI which has been arrived at after consultation with the Central Government as to the status of a company, namely whether a company which is a financial institution is an investment company or not, would be final insofar as the financial system is concerned – Chapter III-B of the RBI Act has an overriding effect – Further, the definitions of 'financial institution" are identically worded in the RBI Act and the IT Act – That apart, assessee has been treated as an "investment company" in the past – Revenue has not been able to show any change of circumstances – Therefore, Tribunal erred in holding that the assessee company was not a "financial company" within the meaning of cl. (c) of Explanation to s. 40A(8).

Barkha Investment & Trading Co. v/s. CIT
(2006)200 CTR 342 =150 Taxmman 523 = 281 ITR 316 = 193 Taxation 90 (Guj)

(2) Sharafi accounts maintained by agents with assessee - In order to have the benefit of cl. (b)(vii) of explanation to s. 40A(8) the assessee has to show that the amount of interest was paid on amount received by it by way of security of goods or for rendering of any service - No evidence to the above effect was adduced before the lower authorities - On the contrary there is a finding to the effect that interest was paid on Sharafi accounts maintained by the agents with the assessee - Assessee cannot claim any benefit under the explanation - Disallowance justified - Matter cannot be remanded to the Tribunal to enable the assessee to adduce additional evidence.

Jagdish Processors (P) Ltd., CIT v/s.
(2001)171 CTR 85 = 252 ITR 755(GUJ)

(h) **s. 43A(3)**

Rule 6DD(j) – Cash Expenditure - Tribunal finding payments made by assessee in cash beyond prescribed limit in village where no banking facilities available – Payments covered by exceptional circumstances as prescribed in rule 6DD(j) – Income Tax Rules, 1962, r. 6DD(j).

Parle Sales and Services Pvt. Ltd., CIT v/s.

(2008) 307 ITR 87(Guj)

(i) **s. 43B**

Contribution to provident fund – Contribution towards PF and ESI having been paid by the assesse within 2 to 4 days after the grace period provided under s. 43B but before filing the return, disallowance under s. 43B was rightly deleted by the Tribunal.

Vinay Cement Ltd., CIT v/s.

(2007) 213 CTR 268(SC)

37. DIVERSION OF INCOME BY OVERRIDING TITLE

Co-operative society – Amount transferred to reserve fund under section 67 of Gujarat Co-operative Societies Act – Portion of profits transferred - Assessee having control over funds – Amounts not diverted by overriding title – Amount not deductible as business expenditure – Amount assessable - Income tax Act, 1961, ss. 28, 37.

Mehsana Dist. Co-op. Milk Producers' Union Ltd. CIT v/s.

(2008) 307 ITR 83 = 205 Taxation 278= 2 DTR 280 = 4 DTR 222

(2009) 309 ITR 100 =176 Taxman 416 (Guj)

38. **DOUBLE TAXATION**

(1) Double Taxation relief - Assessee not having permanent establishment in India – Income derived from sale of immovable property and from business in Malaysia – Not assessable in India – Agreement for avoidance of double taxation between India and Malaysia.

Kulandagan Chettiar (P.V.A.L), CIT v/s.
(2008) 300 ITR 5 = (2004)189 CTR 193=137 Taxman 460(SC)

(2) Agreement between India and Malaysia - Dividend income – Dividend income derived by the assessee from a company in Malaysia is not liable to be taxed in the hands of the assessee in India by virtue of provisions of DTAA between India and Malaysia.

Torqouise Investment & Finance Ltd. & Ors., Dy. CIT v/s.
(2008) 215 CTR 209 = 168 Taxman 107 = 300 ITR 5 =
205 Taxation 184 = 3 DTR 322(SC)

(3) Non-resident of Korea – Contract for designing, fabrication, hook-up and commissioning of platform in Bombay High – Fabrication completed in Korea – Permanent establishment in India after fabrication but before installation – Profits relating to fabrication in Korea not taxable – Only income relating to installation taxable – Accounts of non-resident rejected – Non-resident taxable on 10 per cent of gross receipts relating to installation – Convention for the Avoidance of Double Taxation between India and Korea, art. 7 – Income Tax Act, 1961, ss. 9, 44BB.

Hyundai Heavy Industries Co. Ltd., CIT v/s.
(2007) 291 ITR 482 = 210 CTR 178 =161 Taxman 191 (SC)

(4) Where agreement exists – Once a notification is issued under section 90 provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income Tax Act – Therefore, Circular No. 789, dated 13-4-2000 clarifying that FIIs, etc. which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares is valid and efficacious – Double taxation agreement between India and Mauritius is valid in law – An attempt

by residence of a third party to take advantage of existing provisions of DTAC is per se not illegal.
Azadi Bachao Andolan, Union of India
(2002) 125 Taxman 826 =
(2003) 132 Taxman 373 =263 ITR 706 =184 CTR 450 =
177 Taxation 775 (SC)

(5) Agreement between India and Austria – Retention remuneration of foreign technician deputed in India – Condition (c) of cl. (2) of art. 14 only requires that the individual claiming exemption from tax liability in India should be liable to tax under the Austrian statute – Said condition does not stipulate actual payment of tax as insisted upon by the Revenue authorities – It is possible that a person may be liable to tax under a statute but may not be actually taxed by virtue of some other provision under the same statute – In order to claim benefit under the exception clause (c), the assessee has to discharge the onus to show that he is subject to Austrian tax – Tribunal is directed to decide the issue of his tax liability in accordance with law after taking into consideration further evidence that may be adduced by the parties.
Emmerich Jaegar v/s. CIT
(2005)193 CTR 57= 185 Taxation 92 = 274 ITR 125=
144 Taxman 203 (Guj)

(6) DDA prevails over provisions of Income Tax Act – Income Tax Act, 1961 ss. 4, 5, 90.Agreement between India and Malaysia – Effect – Assessee not having permanent establishment in India – Income derived from rubber estate in Malaysia – Not Assessable in India – Capital gains arising on sale of immovable property in Malaysia – Not assessable in India – Agreement for avoidance of double taxation between India and Malaysia - Assessee not having permanent establishment in India – Income derived business in Malaysia – Not assessable in India – Agreement for avoidance of double Taxation between India and Malaysia,

Capital Gains - Treated as 'income' under Income Tax law of India – Is 'income' and covered by double taxation agreement - Agreement for avoidance of double taxation between India and Malaysia - Residence - No permanent establishment in India – Residence in

India becomes irrelevant – Agreement for avoidance of double taxation between India and Malaysia,
P.V.A.L Kulandagan Chettiar, CIT v/s.
(2004)267 ITR 654 = 137 Taxman 460 = 181 Taxation 557 (SC)

39. **ESTATE DUTY**

(a) **AGGREGATION OF ESTATE**

For purpose of working out rate under section 34(1)(c), interest in joint family property of all lineal descendants of deceased member is to be aggregated with all property passing on death of deceased – Only property that can be divided on partition is coparcenary or joint family property - Interest of wives of coparceners (sons) has not to be excluded in determining share of lineal descendants which is to be included in principal value of estate left by deceased (father) for rate purposes under section 34(1)(c).
Geetaben Vipinbhai Shah (Smt), CED v/s.
(2004)139 Taxman 99 =190 CTR 612=270 ITR 282=
183 Taxation 391 (Guj)

(b) **DEDUCTIONS**

Deceased had withdrawn Rs. 3,14,345 from firm in which he was a partner and had invested same in construction of house which passed on his death– Accountable person claimed deduction of said debt amount from aggregate value of property passing on death of deceased – Assistant Controller disallowed deduction on ground that debt amount was allowable only from value of house property and not from aggregate value of property – Tribunal allowed the claim of accountable person – Since amount withdrawn by deceased was not a loan taken by him from any bank or financial institution which had created any charge over house property constructed with said funds, Tribunal was justified in treating it as a general debt allowable from aggregate value of property .
Lalitkumar Savjibhai , CED v/s.
(2004)136 Taxman 662 =181 Taxation 650 =190 CTR 620=
270 ITR 195 (Guj)

(c) **ESTATE DUTY ACT - DEBTS**

For purpose of levying estate duty, liability of ancestral or coparcenary property of a Hindu to pay for marriage expenses of unmarried daughters in family would be a proper debt deductible under general provisions of section 44, where deceased died possessed of such property .

Kamlaben Subodhchandra , CED v/s.
(2004)137 Taman 414=190 CTR 110 =269 ITR 570 =
182 Taxation 689 (Guj)

(d) **REASSESSMENT**

Upon death of deceased, his wife i.e accountable person, offered for estate duty one-half of share of deceased in HUF consisting of deceased and his wife - Assistant Controller completed assessment proceedings – Subsequently, he issued a notice for reopening of assessment on ground that deceased was sole surviving coparcener and, thus had power to dispose of property as if it was his separate property, and that wife could not have objected to such alienation during his lifetime - Since in original order of assessment, revenue had accepted that wife had half a share and that only deceased's half share passed on his death, it could not be said that case called for any reassessment.

Hemkunverben Kalyanji AP of Late Kalyanji Bachulal (Smt),CED v/s.
(2004) 139 Taxman 143 = 192 CTR 532 = (2005) 184 Taxation 85 =
275 ITR 635(Guj)

(e) **REFERENCE**

Scope - Additional or new ground – Not referable to any material on record and regarding which no submissions were made earlier at any stage - Further, reference is pending for long and ED Act also stands repealed - Additional or new ground therefore could not be admitted.

Vipin K. Nagori, CED v/s.
(2002) 177 CTR 160 = 123 Taxman 955 = 171 Taxation 262 =
258 ITR 326 (Guj)

(f) **VALUATION**

Section 36, read with section 33(1)(n), of the Estate Duty Act, 1953, read with rule 14 of the Estate Duty Rules, 1952 and rule 1BB of the Wealth Tax Rules, 1958 – Valuation of estate – Where residential house belonging to deceased (which is to be specified by accountable person at his or her option) is assessed to wealth tax on valuation date immediately preceding date of deceased's death, it is mandatory for authorities under Estate Duty Act to adopt valuation in respect of said property under Wealth Tax Act .

Lalitkumar Savjibhai , CED v/s.
(2004)136 Taxman 662 = 181 Taxation 650 = 190 CTR 620
=270 ITR 195 (Guj)

40. EXECUTOR

Income derived from estate of deceased husband – Assessee sole legal heir – Assessee as an individual cannot be charged to tax – Income tax Act, 1961, s. 168.

Mrunalinidevi Puar of Dhar , CIT v/s.
(2008) 305 ITR 263(Guj)

41. EXEMPTION

(1) Value of occupied residential house of deceased was shown at Rs. 1,33,000 – Accountable person claimed exemption of Rs. 1 lakh under section 33(1)(n) out of said property that actually belonged to HUF - Assistant Controller taking a view that exemption was available to extent of share of deceased in HUF property or Rs. 1 lakh whichever was less, granted an exemption of around Rs. 22,200 - In view of fact that HUF had number of other immovable as well as movable properties, it was possible that at that time of fictional or notinal partition immediately prior to death of deceased entire self – occupied property in question could have gone to share of deceased – Therefore, exemption of Rs. 1 lakh could be allowed to estate of deceased under section 33(1)(n).

Kamlaben Subodhchandra, CED v/s.
(2004)137 Taxman 414= 190 CTR 110 =269 ITR 570=
182 Taxation 689 (Guj)

(2) Foreign technician - Daily allowance received for services in India – Exempt from tax – Income Tax Act, 1961, s. 10(14) – Notification No. S.O 143(E) dated February 21, 1989.
Morgenstern Werner, CIT v/s.
(2003) 259 ITR 486 = 180 CTR 202 = 132 Taxman 214 (SC)

(a) **s. 10(4A)**

Interest on "non-resident (external) account" - Resident but not ordinarily resident - By virtue of Circular No. 6-P of 1968, dt. 6th July, 1968 and assessee who fulfilled the eligibility conditions under the scheme framed by the RBI was entitled to operate "non resident (external) account" and, therefore, he was entitled to the benefit of being treated as "non-resident" for the purposes of the Act as specified in the circular - What was stated by way of said circular was later incorporated as part of the provisions w.e.f 1st April, 1982 - Therefore, an assessee who is otherwise eligible to open and operate "non-resident (external) account", as per guidelines issued by the RBI is entitled to be treated as "non-resident" for the purpose of exemption under s. 10(4A) - Even otherwise, the term "non-resident" as defined in s. 2(30) has to be read in the contextual setting of s. 10(4A) and if read in that manner it will include within its fold the meaning as prescribed under the provisions of FERA and the rules made thereunder - Assessee was permitted to open "non resident (external) FD account" when hsi status was non-resident - Exemption under s. 10(4A) cannot be denied in the years under consideration when the status of the assessee is "resident, but not ordinarily resident".
Rambhai L. Patel v/s. CIT
(2001)171 CTR 16= 252 ITR 846= 166 Taxation 261=
(2003) 129 Taxman 866(GUJ)

(b)s. 10(10C)

Allowability – Vol. Retired Scheme - Limits specified in R. 2BA(vi) – Rule 23A does not restrict the exemption under s. 10(10C) to the amount representing the lower of the two limits specified in Cl. (vi) of r. 2BA – Amount upto Rs. 5,00,000 qualifies for exemption under s. 10(10C).

Guidelines prescribed in r. 23A – It is not the intention of the legislature that every scheme must provide for payment of an

amount equivalent to (1) three months salary for each completed year of service or (2) salary at the time of retirement multiplied by balance months of service left before the date of retirement on superannuation - Only condition of r. 2BA is that the amount receivable should not exceed these limits.

Arunkumar T. Makwana v/s. ITO
(2006) 204 CTR 433=286 ITR 502= 195 Taxation 611 (Guj)

(c) <u>s. 10(20)</u>

(1) Local authority - Agricultural Market Committee – After insertion of explanation to s. 10(20), Agricultural Market Committee no more remains a "local authority", hence not entitled to exemption under s. 10(20).

Agricultural Produce Market Committee v/s. CIT
(2008)216 CTR 433 = 173 Taxman 115 = 305 ITR 1 = 11 DTR 289 = (2009) 208 Taxation 103(SC)

(2) As amended by the Finance Act, 2002) of the Income Tax Act, 1961, read with article 289 of the Constitution of India Local authority - Assessee, an Industrial Area Development Authority Act, 1974to provide for planed development of industrial area, for promotion of industries and matters appurtenant thereto – By Finance Act 2002, section 10(20A) providing for exclusion of income of an authority constituted under any law enacted for purpose of meeting need for housing accommodation and for purpose of planning development or improvement of cities, towns and villages, was omitted and Explanation, explaining local authorities whose income is not chargeable to tax under Act, was added to section 10(20) with effect from 1-4-2003 – In view of amendment, Commissioner issued a notice to Manager of Bank to deduct income tax at source from interest accrued on fixed deposit receipt of assessee - Assessee filed writ challenging notice of Commissioner on ground that its income was not liable to be assessed under Act, in view of article 289(I) – High Court held that in view of amendment, assessee could not claim benefit under section 10(20A) and Explanation to section 10(20) after 1-4-2003 and that exemption under article 289(1) was also not available to assessee as it was a distinct legal entity and its income could not be said to be income of

State so as to be exempted from Union taxation – Whether High Court was right in holding so – Held, yes.

Adityapur Industrial Area Development Authority v/s.
Union of India
(2006)153 Taxman 107= 202 CTR 464 = 283 ITR 97 =
193 Taxation 570 (SC)

(d) <u>s. 10(22)</u>

(1) Educational institution -Absence of formal education vis-à-vis ancillary activities to impart education - Expression "educational institution" in s. 10(22) would take colour from the preceding word "university" – Hence, the expression "other educational institution" would mean an institution imparting formal education in an organized and systematic training where the institution would be accountable to some authority and where there would be teachers and taught, the former having some degree of control over the latter – Term "educational institution" contemplated by s. 10(22) is a narrower concept – It must be more than a body carrying on charitable activities in the field of education as contemplated by s. 2(15) – Assessee itself does not conduct any courses in formal education – It runs English coaching classes for school students, guidance classes for CA entrance examinations and refresher courses for English language teachers and for banking service recruitment - Assessee is not affiliated to, or registered by, any authority – Also, assessee does not exercise any control over the recipients of training being given by it – Therefore, it was not entitled to exemption under s. 10(22).'

Saurashtra Education Foundation v/s. CIT
(2004) 190 CTR 295 = 183 Taxation 379=141 Taxman 26 =
(2005) 273 ITR 139(Guj)

(e) <u>s. 10(23)</u>

Charitable purpose - Registration under s. 12A - Order of the Tribunal holding that registration under s. 12A was fait accompli to hold the AO back from further probe into the objects of the assessee stands concluded by the earlier decision of the High Court which has not been challenged by the Revenue and, therefore, exemption under s. 10(23) cannot be denied.

Surat City Gymkhana, Asstt. CIT v/s.
(2008) 216 CTR 23 = 300 ITR 214 = 170 Taxman 612= 5 DTR 115(SC)

(f) s. 10(23C)

Educational institution – Existing solely for educational purposes and not for profit - Change of law - Application for recognition - Initial approval – Considerations – Prescribed authority – Possible aspects – Income tax Act, 1961, s. 10(23C)(vi), prov. (iii), (xii), (xiii) – Income tax Rules, 1962, r. 2CA, Form No. 56D -University or other educational institution - Existing solely for educational purposes and not for profit – Income tax Act, 1961, ss. 10(22) (omitted w.e.f April, 1, 1999), 11, 13 – Requirement before & after amendment analyzed.

American Hotel and Lodging Association Educational Institute
v/s. CBDT
(2008) 301 ITR 86 = 216 CTR 377 = 170 Taxman 306 =
206 Taxation 126 = 7 DTR 183 (SC)

(g) **Passing of Property**

(1) Estate - Part of Indian state which merged in dominion of India in 1948 – Estate
ceasing to exist by Act of State – Fresh grant to son after death of erstwhile owner on fresh terms in 1958 – Subsequent statute abolishing tenure of estate and fixing of compensation – No restoration of rights over estate – Estate did not pass on death of erstwhile owner.

Pratapsinhji Ramsinhji, CED v/s.
(2002) 255 ITR 365 = 174 CTR 591 = 169 Taxation 54 =
(2003) 127 Taxman 66 (Guj)

(2) Share in HUF Property – Inheritance from husband - K, the pre-deceased husband of the deceased H, had bequeathed his undivided interest in all the property of the bigger HUF upon the HUF consisting of his two sons and his wife H – Since the undivided interest of K. devolved upon the said HUF, H did not inherit any portion of the said undivided interest in her individual capacity - Consequently no share of HUF estate was includible in the property passing on her death – Provisions of s. 39 apply only when there is cessation of coparcenary interest – Since the female cannot be a coparcener under the Mitakshara law, the interest of H in the smaller HUF at the time of her death cannot be said to be coparcenary interest - Hence, the provisions of s. 39 were also not applicable.

Vipin K. Nagori, CED v/s.
(2002)177 CTR 160 = 123 Taxman 955 = 171 Taxation 262=
258 ITR 326 (Guj)

(3) Sagbara Estate was feudatory of State of Rajpipla but had distinct status and political entity – In year 1948, State of Rajpipla merged into dominion of India – Government of India took administration and control of Rajpipla and Sagbara Estate without any separate agreement with Sagbara Estate Government of India neither granted recognition to ruler of Sagbara Estate nor restored property – Properties of Sagbara Estate were taken over by an act of State in 1948 – Acquisition of territory by a Sovereign State for first time is an act of State which cannot be challenged, controlled or interfered with by Courts of State – Once area of Sagbara Estate became part of Indian Territory, it could not be restored retrospectively from date of merger of State of Rajpipla as if it had not merged under cession – Subsequent restoration of Sagbara Estate on 13-1-1958 was just an instance of grace shown by Government of India, necessarily to be treated as fresh grant and it was not an act of State – K, ruler of Sagbara, was not competent to dispose of any of properties which were taken over by act of State on 10-6-1948, and had vested in Dominion of India under merger agreement - Only property which deceased K had at time of his death and which deceased was competent to dispose of, shall be deemed to pass on death, as provided by section 6 and since there was no property which could pass on death of deceased under section 5, there could arise no question of levy of estate duty from accounting person.

Pratapsinhji Ramsinhji , CED v/s.

(2003)127 Taxman 66 =(2002) 255 ITR 365 = 174 CTR 591 = 169 Taxation 54 (Guj)

42. EXPORTS MARKETS DEVELOPMENT ALLOWANCE – S. 35B

(1) Scope of allowance – Small-scale exporter – Provisions of section 35B do not apply to mere "processing" – Assessing purchasing different grades and brands of tea and blending them and exporting them – Activity amounts only to "processing" – Assessee not entitled to weighted allowance – Income tax Act, 1961, s. 35B(1A).

Tara Agencies, CIT v/s.

(2007)292 ITR 444 = 210 CTR 454 = 162 Taxman 337 = 201 Taxation 359 (SC)

(2) Weighted Deduction - Assessee a bank – Assessee claiming that its Branch in Bangkok paying interest to depositors and thus it was entitled to weighted deduction under section 35B91)(b)(iv) – Held, assessee not entitled to deduction in view of judgment of Apex Court in the case of Arvinda paramila Works vs. Commissioner of Income Tax , reported in (1999) 150 Taxation 128, 237 ITR 284.
Indian Overseas Bank v/s. CIT
(2004) 179 Taxation 5 = 190 CTR 105 = 140 Taxman 454(SC)

(3) Assessee claiming weighted deduction on Rs. 2,434 in respect of rent - Assessee claiming further weighted deduction on Rs. 20,640 on account of interest paid to bank on export packing credit – Held, assessee not entitled to weighted deduction for any of the items.
Mehta Parikh & Co. (P) Ltd. , CIT v/s.
(2003) 174 Taxation 554(Guj)

(4) Commission payments – Assessee is not entitled to claim weighted deduction under s. 35B in respect of the commission payments to agents in India.
Sarangpur Cotton Mfg. Co. Ltd., CIT v/s.
(2002) 177 CTR 467 = 124 Taxman 30 = 171 Taxation 499 (Guj)

(5) High Court, following CIT v. C. Tharian & Sons, Cashew Exporters (1987) 166 ITR 607/34 Taxman 76, held that assessee was not entitled to weighted deduction under section 35B - Whether answer by High Court to question posed to it, relying exclusively upon Tharian's case, which was per incuriam, was bad in law - Held, yes.
Albert (N.J) v/s. CIT
(2001) 116 TAXMAN 536(SC)

(6) Whether export markets development allowance would be allowable under section 35B(1)(b) in respect of expenditure incurred for foreign indenting business where services in this connection were rendered in India - Held, no.
Chika Ltd., CIT v/s.
(2001) 117 TAXMAN 345(SC)

(7) Weighted deduction - Failure to mention specific clause under which allowed - Order not invalid - Income Tax Act, 1961, s. 35B.
Pubjab Bone Mills , CIT v/s.
(2001) 251 ITR 780 = 170 CTR 558(SC)

(8) Export insurance, freight, packing and stitching charges - Not eligible for weighted deduction under s. 35B –
Mihir Textile Ltd. v/s. CIT
(2001) 170 CTR 606 = 252 ITR 686(GUJ)

(9) Weighted deduction - Expenditure incurred in India for analysis of product
for obtaining certificate of standard - Not entitled to weighted deduction.
Patidar Oil Cake Industries, CIT v/s.
(2001) 252 ITR 450 = 171 CTR 492(GUJ)

43. **FIRM**

(a) **CLUBBING - COMMON PARTNERS**
Not an independent entity -Only a compendious name given to partnership for convenience – Partners are real owners of assets of firm.
Khadervali Saheb(N), v/s. N. Gudu Sahib
(2003) 261 ITR 1 = 129 Taxman 597 = 175 Taxation 431 (SC)

(b) **DISSOLUTION**
(1) Two assessments or one - Reconstitution of firm after retirement of some partners – After retirement of some partners, remaining partners entered into a new partnership agreement with some new partners incorporating fresh terms including a change in accounting period – Books of account of old partnership were closed and balance sheet was drawn up on the date of retirement – There was no mention of old partnership in the new partnership deed – Change in accounting period accepted by AO – Therefore, Tribunal was justified in holding that two separate assessments had to be made.
Ketan Chemicals, CIT v/s
(2006) 200 CTR 638 = 281 ITR 244 = 192 Taxation 349 (Guj)

(2) Arbitration for division of assets of firm - Award distributing residue of assets of firm, after settlement of accounts, between partners in accordance with their shares - Does not transfer or assign interest in any asset - Does not require registration.
Khadervali Saheb(N), v/s. N. Gudu Sahib
(2003) 261 ITR 1 = 129 Taxman 597 = 175 Taxation 431 (SC)

(c) **REGISTRATION**

(1) Genuineness of firm – Question of fact – What inference of facts should be drawn from fact available on record – Question of fact -
Arvind Jewellers, Commissioner of Income Tax v/s
(2007) 290 ITR 689(Guj)

(2) Income tax principle that firm is a separate assessee – Does not apply in the context of immunity under Voluntary Disclosure of Income Scheme, 1997.
Tanna and Modi v/s. CIT
(2007) 292 ITR 209 =210 CTR 273 = 161 Taxman 329 = 201 Taxation 194 (SC)

(3) S.185 - Validity of partnership – Firm with trustees as partners – Trustees neither authorized by trust deeds nor empowered by beneficiaries t enter into partnership - Firm not valid – Not entitled to registration.
Swashraya , CIT v/s.
(2006)286 ITR 265 = 205 CTR 290 =(2007)197 Taxation 297(Guj)

(4) Individual partners representing their respective AOPs – AO denied registration to assessee firm on the ground that it was not a genuine firm as individuals representing their respective AOPs were not real partners and that some of the members of said AOPs were minors, and the AOPs had been constituted with the sole object of reducing tax liabilities - Not justified - Tribunal fond that the assessee firm had complied with the statutory requirements prescribed for seeking registration - There is no infirmity in the order of the Tribunal holding that assessee is entitled to registration.
Jupiter Construction Co., CIT v/s.
(2005) 193 CTR 292 = 185 Taxation 313= 274 ITR 454(Guj)

(5) Position prior to 1-4-1993 – There was persistent non compliance by assessee firm to notices issued by ITO under sections 143(2) and 142(1) – By a letter dated 8-2-1985 ITO intimated assessee that in case of non compliance, it would be treated as an unregistered firm (URF) - However, assessee failed to attend hearing which resulted in exparte assessment under section 144 and also refusal of registration – Commissioner (Appeals) treated order refusing registration as order under section 186(2) and letter dated 8-2-1985 as notice within meaning of said section – Notices issued by ITO from time to time could not be treated as notice under section 186(2) since those notices primarily related to assessment proceedings for purposes of computing taxable income – Though order of ITO in effect was an order refusing to grant registration and not cancelling registration, if assessee firm was granted registration for any previous assessment year, Tribunal was right in holding that provisions of section 186(2) were applicable to facts of assessee's case and that requirements of said section were not complied with – Since ITO had cancelled registration without giving minimum notice period of 14 days and reasonable opportunity of being heard to assessee, Tribunal was right in quashing and setting aside order passed by ITO as confirmed by Commissioner (Appeals) and also in restoring matter to file of ITO since relevant facts were not available on record i.e compliance by assessee with all necessary formalities entitling it to registration ..

Trimurti Builders, CIT v/s.

(2004)137 Taxman 344 = 189 CTR 444= 269 ITR 225=

182 Taxation 682 (Guj)

(6) Conditions precedent – Specification of shares – No minor admitted to benefit of partnership- Shares can be ascertained by taking into consideration deed of partnership, accounts and other documents – That shares in loss not specified – Not ground for rejecting registration – Specification of shares in capital - Not a requirement - Kerala Agricultural Income Tax Act, 1950, ss. 20, 27 – Income Tax Act, 1961, s. 184.

Balakrishnan Nair (P.V)., Commr. of Agrl. I.T v/s.

(2003) 264 ITR 563 =(2004) 186 CTR 101= 134 Taxman 261(SC)

(7) Firm constituted in violation of Arms Act and Rules – Not entitled to registration.
Friends & Co. , CIT v/s.
(2002) 256 ITR 177 = 172 CTR 386 (SC)

(8) During accounting period 12-11-1977 to 30-8-1978, minor 'G' attained majority on 9-8-1978, thereafter a new partnership deed was executed, admitting 'G' to a partnership effective from 12-11-1977 – Commissioner, acting under section 263 cancelled registration granted by ITO on view that a valid partnership deed could not be said to be in existence from 12-11-1977 onwards – Tribunal granted registration to firm – Whether Tribunal was right – Held, no.
Nathalal Karsandas, CIT v/s.
(2002) 120 Taxman 424(Guj)

(d) **TRUST OR INDIVIDUAL**
Person assessable – Income received in the capacity of trustee – Assessee, a trustee of a trust, representing the trust in a partnership firm – Income allocated to the assessee as a partner already assessed in the hands of the beneficiaries – Same could not be said to be the income of the assessee, especially when the firm was duly registered and had been assessed.
Rangraj Keshumal, CIT v/s.
(2004) 187 CTR 471 = 267 ITR 476 = 141 Taxman 290 (Guj)

See also Trust.

44. FRINGE BENEFIT TAX

Tour and travel - Expenditure incurred on traveling of non-resident employees from home country to India and from city in India to place of work – Assessee having a PE in India carrying business in India, having for its business activities
engaged persons from India and outside India, if incurs any expenditure for bringing any employee from abroad, the same would be liable to FBT under s. 115WB(1) – For purposes of applicability of s. 115WB(1), employee need not be resident in India.
R & B Falcon (A) Pvt. Ltd. V/s. CIT
(2008) 216 CTR 289 = 169 Taxman 515 = 301 ITR 309 =
206 Taxation 241 = 6 DTR 313(SC)

45. GIFT TAX ACT

(a) CHARGEABILITY

Issue of bonus shares – No chargeable gift arose out of issue of bonus shares to its shareholders by assessee company as fully paid bonus shares are merely a distribution of capitalized undivided profit as it would be a misnomer to call the recipients of bonus shares as donees of shares from the company.

Khoday Distilleries Ltd. v/s. CIT

(2008) 220 CTR 228 = 307 ITR 312 = 15 DTR 126(SC)

(b) **DEEMED GIFT**

(1) Deemed gift under s. 4(1)(a) – Inadequate consideration - Allotment of rights shares – No taxable gift within the meaning of s. 2(xii) r/w s. 4(1)(a) arose on allotment of rights shares by assessee company to 7 investment companies out of 27 shareholders on the remaining 20 renouncing the offer.

Khoday Distilleries Ltd. v/s. CIT

(2008) 220 CTR 228 = 307 ITR 312(SC)

(2) Assessee company entered into a composite agreement with housing society and one "G', whereunder reversionary rights of assessee company in land were purchased by society and in return assessee company was to withdraw two suits filed against society – One clause of said agreement further required society to waive certain amount payable to it by 'G', who was sister of one of directors of assessee company – GTO opined that 'G' was got released by assessee company without any consideration, accordingly , GTO taxed said released amount after allowing statutory deduction - In instant reference from records, it was apparent that in composite agreement entered into nowhere it was mentioned that amount payable by 'G' to society was to be deducted from any amount agreement to be paid by society to assessee company for purchase of reversionary rights – Moreover, in said agreement nowhere assessee company asked society to waive such amount as assessee company had not specifically given up any claim or released any debt in favour of 'G' – Whether, in view of abovementioned circumstances, it could be concluded that assessee company was 'Person responsible' for getting debt of 'G' released - Held, no - Whether, moreover, fact that composite agreement was reached with a view to put an end to all disputes between parties as mutually agreed inter se between them, that would by itself

constitute a good consideration for effecting release of 'G' - Held, yes – Whether therefore Tribunal was right in holding that neither a taxable gift nor a deemed gift under section 4(c) was proved to have been made by assessee company in favour of 'G' – Held, yes.

Gautam Sarabhai Ltd. , CGT v/s.

(2003) 132 Taxman 315 = 263 ITR 602 = 184 CTR 280 = 177 Taxation 58(Guj)

(3) Inadequate consideration-Agreement for transfer of business for five years - Power to either party to terminate agreement by giving six months notice - Valuation - Capitalised value of income - Rule prescribing product of number of years included in period for which gift is not revocable -Value of deemed gift nil as agreement revocable with six months' notice - Period during which agreement subsisted not relevant.

Khoday Eswara and Sons v/s. CGT

(2001)251 ITR 883 = 170 CTR 553 =165 Taxation 739 =119 TAXMAN 346(SC)

(4) Surrender or forfeiture of interest in immovable property as contemplated by clause (c) of section 4(1) or vesting of any immovable property in another person as contemplated by clause (d) of section 4(1) will attract provisions of section 17 of the Registration Act - Held, yes - Whether, therefore, declaration assessee sought to give gift could be said to have been made without registered deed - Held, No.

Sirehmal Nawalakha , CIT v/s.

(2001) 118 TAXMAN 316 = 169 CTR 493(SC)

(c) EXEMPTION

s. 5(1)(ii) - Gift of movable proeprty situated outside the taxable territories - Gift in Jammu and Kashmir - Assessee, a resident but not ordinarily resident, transferred a sum from his bank account at Ahmedabad to his account at Srinagar branch of the bank, withdrew the amount and handed it over to the donee at Srinagar - All conditions necessary for claiming exemption under s. 5(1)(ii) stand fulfilled - Gift not taxable.

Dipak A. Sheth, CGT v/s.

(2001) 171 CTR 408 = (2003) 128 Taxman 577(Guj)

(d) **HUF - GIFT OF ANCESTRAL IMMOVABLE PROPERTY**

Gift/Settlement by father in favour of married daughter – A father can make a gift of ancestral immovable property within reasonable limits, keeping in view the total extent of the property held by the family, in favour of his daughter at the time of her marriage or even long after her marriage – Question as to whether a particular gift is within reasonable limits or not has to be judged according to the status of the family at the time of making a gift, the extent of immovable property owned by the family, and the extent of property gifted – Respondent (father) has failed to plead and prove that the gift made by him to his daughters was unreasonable keeping in view the total holding of the family – Thus, respondent had capacity to make gifts of ancestral immovable property in favour of his daughters.

Kuppayee R. & Anr. v/s. Raja Gounder
(2004)186 CTR 106= 135 Taxman 37= 180 Taxation 1 (SC)

(e) GIFT TAX – (F) RE CONSTITUTION OF FIRM

(1) Chargeability – Assignment of share in partnership firm - Assessee did not retire from the firm but merely assigned 50 per cent of his share in the firm in favour of a trust – There was no question of transfer of goodwill of the firm – New partner agreed to share the profits and losses of the firm – GTO was not justified in treating the transaction as a gift.

Kamruddin M. Ravji, CGT v/s.
(2004)187 CTR 338 = 136 Taxman 278= 267 ITR 553 (Guj)

(2) Assessee assessed to Gift Tax on ground that assessees had relinquished their respective share in firm in favour of a new partner without adequate consideration – Deputy Commissioner and Tribunal cancelled orders of GTO holding that new partner had brought in capital equivalent to capital withdrawn by assessee - Whether new partner had given adequate consideration for being inducted as a partner and outgoing partners had also received consideration i.e their capital for retiring from partnership firm – Held, yes - Therefore Tribunal was right in holding that there was no deemed gift when assessees relinquished their share in partnership firm in favour of new partner.

Ramniklal M. Bambhania, CGT v/s.
(2004)136 Taxman 181 =188 CTR 539 =181 Taxation 477=
269 ITR 438 (Guj)

(3) Deemed gift under s. 4(1)(a) - Inadequate consideration – Reconstitution of partnership firm - Existing partner surrendered a portion of his share - Incoming partners brought in capital to the partnership and also undertook obligations to sincerely and faithfully carry on the business to the common advantage of the firm - There was adequate consideration and, therefore there was no gift.

Rameshchandra Ravjibhai, CGT v/s.
(2004) 188 CTR 543= 181 Taxation 64 = 269 ITR 146=
(2006)154 Taxman 424 (Guj)

(4) Although relinquishment of the share of profit by the assessee partner in favour of the inducted partner amounted to a transfer, it cannot be said that it was for inadequate consideration so as to amount to a taxable gift within the meaning of s. 4(1)(a) – Incoming partner contributed Rs. 25,000 towards her share of capital – Mere fact that upon reconstitution of the firm the share of assessee partner decreased cannot lead to the inference that it gifted the difference to the incoming partner - Contribution towards the capital together with the obligation to participate in the business for common advantage of the firm was adequate consideration for re-allocating the share of the profits and giving 12 per cent share in favour of the incoming partner – Hence, there was no taxable gift within the meaning of s. 4(1)(a).

Sree Narayana Chandrika Trust v/s. CGT
(2003) 180 CTR 395=261 ITR 279 = 129 Taxman 477 =
175 Taxation 639 (SC)

(5) Reduction of share in partnership firm – Assessee partner was 80 years old and totally blind and, therefore, physically unfit for continuing as a partner to the firm – Share of assessee reduced from 25 per cent to 4 per cent – No taxable gift is involved.

Maneklal Hargovandas Patel, CGT v/s.
(2002) 177 CTR 552 =124 Taxman 55 = 171 Taxation 630 =
(2003)264 ITR 592 (Guj)

(6) Assessee retiring from business and passing on his share in the firm to other Partners – AO treating reduction in shares of the assessee as a deemed gift – Held, in view of the judgment of the Apex Court in the case of CGT v/s. T.M Louiz (2002) 245 ITR 831, gift tax not leviable.

Arvindkumar Chandulal , CGT v/s.
(2002)171 Taxation 690=123 Taxman 1107= 178 CTR 537=
(2003)264 ITR 594(Guj)

(f) **GIFT TAX – RETIREMENT OF PARTNER**

Upon his retirement from the firm assessee withdraw the capital – There was no gift of his capital in favour of his mother, the incoming partner, or his brother whose share stood increased on assessee's retirement – Also, thee was not transfer of property from the assessee to his mother and brother as the goodwill of the firm continued remain that of the firm notwithstanding the change of partners – Assessee not liable to gift tax.

Arunbhai Hargovandas Patel, CGT v/s.
(2003) 179 CTR 420 = 173 Taxation 182 = 264 ITR 586(Guj)

(g) **GIFT – REVOCATION**

Variations made in trust deed vis-à-vis creation of new trust - Though the trust was irrevocable for six years and one day as mentioned in the original trust deed dt. 11th April, 1961, it continued to exist even thereafter and was not revoked - Deed of 31st Dec., 1970 had the effect of merely substituting subordinate clauses and making the deed irrevocable – Property that was transferred to the trustees for perfecting the trust had never reverted to the settlor because that part of the trust deed continued to operate – No fresh trust was created nor was the property again transferred in the name of the trustees – Trustees remained the same - Even if the trustees had changed that property would have vested by operation of law to new trustees by virtue of the provisions of s. 75 of the Indian Trusts Act – Merely by change in the manner of disposition of the trust property, without affecting the creation of the trust and the trust property which already vested in the trustees, the trust itself cannot be said to be revoked or the property cannot be said to have been reverted to the settlor – Therefore, assessee settlor was not liable to gift tax on account of such variation – Members of the Tribunal deprecated for making

acrimonious comments against each other after expressing differing opinions on the controversy involved.

Nandkishore Sakarlal, CGT v/s.
(2003) 184 CTR 27= 132 Taxman 325 =176 Taxation 695 =
264 ITR 453 = (2003) 264 ITR 592 (Guj)

(h) **GIFT TAX ACT – MEANING OF GIFT**

Trust created by assessee for her sole benefit – Properties settled on trust transferred to trustee – Income from properties to be given to assessee for a period of thirty years and thereafter corpus of trust also – Corpus to be distributed to her relatives only if assessee not alive – Trustee holds property for benefit of beneficiary, i.e assessee herself – Interest in property does not pass - No gift liable to tax.

Bhavna Nalinkant Nanavati v/s. CGT
(2002) 255 ITR 529 = 174 CTR 152 (Guj)

(i) **GIFT TAX ACT – TRANSFER**

Exercise of power of appointment by beneficiary of trust – Provision of s. 2(xxiv), even prior to its amendment w.e.f 1st April, 1980, referred to the exercise of power of appointment – Words "in favour of any person other than donee of the power" qualifies the words "exercise of power" and not the words "power of appointment"– A was vested with power to transfer the slice "A" funds of the trust without any limitation and the power was capable of being exercised in favour of A herself also – On 31st March, 1976 – A exercised the power of appointment in favour of four trusts which were not beneficiaries of the original trust - They were certainly the persons other than the donee of the power – Ingredients of s. 2(xxiv) clearly satisfied - Circular No. 281, dt. 22nd Sept., 1980, cannot be interpreted as laying down that for the period prior to 1st April, 1980 exercise of general power of appointment was outside the scope of s. 2(xxiv) (c) – It is the date of exercise of power of appointment which is the material date and not the date on which the consequences of the exercise of power would flow – Thus, transfer of property did take place in the year ended 31st March, 1976 i.e asst. yr. 1976-77 – Admittedly, the said four trusts were not beneficiaries covered by the trust deed - Therefore, the contention that gift tax was already paid at the time when the original trust was settled and there was no obligation to pay gift tax again is not tenable – By exercising power of appointment only the right of A to receive the trust funds came to be transferred and not

the corpus of the trust fund – Hence, GTO was not justified in levying gift tax on the value of the entire corpus.
Anarkali Sarabhai (Late) v/s. CGT
(2002) 177 CTR 324 (Guj)

(j) VALUATION OF SHARES
Unquoted equity shares – Allicability of r. ID – Rule ID of WT Rules, 1957 providing for valuation of unquoted shares by break up method is mandatory – Tribunal not justified in directing the GTO to value the shares according to the yield method.
Mohanlal Chaturbhuj, CGT v/s.
(2002) 178 CTR 71 = 171 Taxation 284 = 123 Taxman 993 = (Guj)

(k) **GIFT - VALIDITY**
Gift – Validity- Gift to minor - There is no prohibition in law that ownership in property cannot be gifted without its possession and right to enjoyment - Clause (d) of s.6 Transfer of Property Act is not attracted to a property absolutely owned by a person and the enjoyment of which is not restricted to the owner personally – Gift deed was not ineffectual merely because the donor had reserved to herself the possession and enjoyment of the gifted property – Transfer of Property Act does not prohibit transfer of property to a minor Last part of s. 127 clearly indicated that a minor, though incompetent to contract, is competent to accept a non-onerous gift – When a gift is made to a child, generally there is presumption of its acceptance without any overt act because express acceptance in this case is not possible – Knowledge of gift deed to both the parents as natural guardians and the donee himself is sufficient to indicate acceptance of gift by the minor himself or on his behalf by the parents – Such acceptance is confirmed by its non-repudiation by his parents or by donee on attaining majority consequently, gift having been duly accepted in law and thus, being complete, it was irrevocable under s. 126 of the Transfer of Property Act – It was, therefore not competent for the donor mother to have cancelled the gift in favour of her minor son and execute a will in relation to the gifted property.
Balakrishnan K. v/s. Kamalam K. & Ors.
(2004)186 CTR 209 = 135 Taxman 48 =181 Taxation 574 (SC)

46. HINDU UNDIVIDED FAMILY

(a) AOP or HUF

HUF or individual property - Impartible Estate - Impartible estate - Applicability of s. 4(6) - Legal title of the impugned property vested in the dynasty as per the terms of the covenant and did not devolve upon a single heir - Such property therefore lost its characteristics of being an impartible estate by operation of the provisions of s.4 of the Hindu Succession Act and did not fulfil the description of the property which could be brought within the purview of the provisions of s. 4(6)-Thus, assessee could not be treated as holder of impartible estate for the purpose of s.4(6).

Mayurdhwajsinghji v/s. CWT
(2001) 171 CTR 411 =(2002) 253 ITR 621 =166 Taxation 329=
(2003) 126 Taxman 307 (Guj)

(b) PARTITION – PARTIAL OR COMPLETE

(1) Partition – In view of provisions of section 171(9) introduced with effect from 1-4-1980, Assessing Officer was justified in refusing to recognize partial partition claimed to have taken place amongst members of HUF on 3-3-1979 – Tribunal was not right in law in directing Assessing officer to pass an order under section 171 for partial partition.

Maganlal Mohanlal Panchal, CIT v/s.
(2002) 124 Taxman 34 =(2003) 172 Taxation 363(Guj)

(2) Share income of HUF from firm partitioned – Share falling to unmarried coparcener–Marriage of Coparcener – HUF consisting of sole coparcener and his wife- Absence of son irrelevant–Share income received on partition assessable in the hands of HUF.

Parshottamdas K. Panchal , CIT v/s.
(2002) 257 ITR 96 = 176 CTR 586 = 170 Taxation 653=
(2003) 127 Taxman 565 (Guj)

(c) Partial partition - Bar of s. 171(9) - Income of bigger HUF or smaller HUFs - Partial partition took place after 31st Dec. 1978 in assessee - HUF which was partner in three firms - Three members separated from the HUF taking away respective portions of their shares in the firms - Fresh partnership deeds were executed by incorporating the necessary changes - Whole of the shares of profit of the original HUF assessable in the hands of HUF and not the diminshed shares in the firms - Interest income earned by the alleged smaller HUFs was also

includible in the total income of the assessee - Full effect to the prohibition contained in sub-s. (9) of s. 171 has to be given in determining the tax liability of the erstwhile HUF as it existed prior to partial partition.
Punjalal L. Shah (HUF) v/s. CIT
(2001)170 CTR 444(GUJ)

(d) **HINDU SUCCESSION ACT**

(1) Individual or coparcenary property – Half share of the deceased in coparcenary property devolved upon all his heirs and legal representatives as one of his two sons was born prior to coming into force of Hindu Succession Act, 1956 -
Sheela Devi & Ors., v/s. Lal Chand & Anr.
(2006)206 CTR 149 =157 Taxman 527=(2007)197 Taxation 395 (SC)

(2) Hindu female dying intestate - Property inherited by hindu female from father or mother - Death of such hindu female without any children - Property would devolve on heirs of father - Property inherited by hindu female from husband or father-in-law - Death of such hindu female without any children - Property would devlove on heirs of husband - Such rule applies even to property inherited before commencement of Act - Hundu Succession Act, 1956, s. 15(2)(a), (b).
Bhagat Ram v/s. Teja Singh
(2001) 252 ITR 324(SC)

47. INCOME

(a) ACCRUAL

(1) Interest on deferred purchase consideration – Assessee following mercantile system of accounting selling its business to its wholly owned subsidiary on deferred payment basis with stipulation of payment of interest w.e.f 1st July, 1977 in view of resolution dt. 30th June, 1978 to defer payment of interest, no interest can be said to have accrued to assessee for asst. yr. 1980-81.
Sarabhai Holdings (P) Ltd., CIT v/s.
(2008) 219 CTR 644= 307 ITR 89 = 175 Taxman 82 = 14 DTR 137= 11 RC 593 = (2009) 208 Taxation 351 (SC)

(2) Sale of plots vis-à-vis method of accounting – In the absence of any allegation or anything else to indicate that the method of accounting followed by the assessee results in under estimation of profits/net income, it has to be accepted that the income from the sale of plots accrued to the assessee only on the date of conveyance and not at the time of execution of tripartite agreement when the assessee received consideration.

Realest Builders & Services Ltd., CIT v/s.
(2008)216 CTR 345=170 Taxman 218 =307 ITR 202=
209 Taxation 132 = 7 DTR 97 (SC)

(b) <u>BUSINESS INCOME OR CAPITAL GAINS</u>

(1) Period of formation - Income from house property, guest house, charges for equipment and recoveries from contractors for supply of water and electricity - Received during period of formation - Capital receipts and not income - To be adjusted against project cost for main business –

Bongaigaon Refinary and Petrochemicals Ltd. v/s. CIT
(2001) ITR 251 329(SC)

(2) Power subsidy to new industries - Based on consumption per unit for small scale industry and percentage of electricity charges for medium and large industries subject to specified limits - Revenue receipt - Is benefit arising out of business - Income Tax Act, 1961, s. 28(iv).

Rajaram Maize Products., CIT v/s.
(2001) 251 ITR 427(SC)

(3) Section 4 of the Income Tax Act, 1961 - Income - Assessable as - Assessee earned interest on deposit made to open a letter of credit for purchase of machinery required for setting up its plant - Whether deposit of money was directly linked with purchase of plant and machinery and, therefore, any income earned on such deposit was incidental to acquisition of assets for setting up of plant and machinery - Held, yes - Whether thus interest was a capital receipt which would go to reduce cost of asset - Held, yes.

Karnal Co-operative Sugar Mills Ltd. , CIT v/s.
(2001) 118 TAXMAN 489(SC)

Also see under head "Business Income".

(c) CAPITAL OR REVENUE RECEIPT

Subsidy for setting up or expansion of sugar mills – Incentive subsidy under a scheme floated with a view to boost the tempo of establishing new sugar factories and substantial expansion of existing factories and to facilitate repayment of term loans for that purpose was capital in nature, notwithstanding the mechanism of price and duty differential through which it was routed.

Ponni Sugars & Chemicals Ltd. & Ors., CIT v/s.
(2008) 219 CTR 105 = 174 Taxman 87 = 306 ITR 392= 13 DTR 1= (2009) 208 Taxation 59 (SC)

(d) GENERAL PRINCIPLES

(1) Income tax Act - Unless benefit or receipt made taxable – Not taxable as income.

Infosys Technologies Ltd., CIT v/s.
(2008) 297 ITR 167 =166 Taxman 204 =204 Taxation 13 = 214 CTR 293 = 1 DTR 330 (SC)

(2) Trading receipts – Co-operative Society engaged in manufacture and sale of sugar – Deposits received from members – To be utilized by society only in repayment of loans taken by society from Government and financial institutions or to fully repay Government's contribution towards capital – Interest payable on deposits – Deposits transferable, returnable to member one year after ceasing to be member and heritable on member's death – Deposits are not trading receipts of society.

Siddheshwar Sahakari Sakhar Karkhana Ltd. V/s. CIT
(2004) 270 ITR 1 = 139 Taxman 434 =191 CTR 66 = 183 Taxation 477 (SC)

(3) Manufacture and sale of sugar– Amount set apart as required by Molasses Control Order towards molasses storage reserve fund - Not includible in total income.

New Horizon Sugar Mills P. Ltd. , CIT v/s.
(2004) 269 ITR 397 = 141 Taxman 254(SC)

(4) Outgoings cannot be treated as income – Modvat credit available to assessee manufacturing goods with duty paid raw materials - Not income liable to be taxed.

Indo Nippon Chemical Co. Ltd., CIT v/s.
(2003)261 ITR 275 =182 CTR 291 =130 Taxman 179 = 176 Taxation 1 (SC)

(5) Addition – Tax avoidance by selling goods to sister concerns at low prices – Goods were sold by the assessee to its sister concerns at prices much below the prevailing market prices and the same goods were immediately sold to third parties at a substantially higher rate and in the same lot – Said findings of fact have become final – Tribunal was right in coming to the conclusion that tax was avoided by the assessee – It was not necessary for the Tribunal to ascertain whether any loss was caused to the Revenue on account of non – inclusion of income in question in the assessee's assessment and its inclusion in the assessment of the sister concerns.
Patel Chemical Works v/s. CIT
(2003) 184 CTR 288 = 177 Taxation 71= (2004) 265 ITR 273 = 134 Taxman 694 =(2008) 14 DTR 21 (Guj)

(6) Contract with Government for executing certain works – Dispute – Arbitration – Award – Interest on compensation awarded – Is income in nature – Assessable as business receipt .
B.N Agarwala and Co., CIT v/s.
(2003) 259 ITR 754 = 180 CTR 311 = 129 Taxman 78(SC)

(7) Assessee receiving cash assistance – Tribunal holding in favour of assessee – Held, in view of insertion of clause (iiib) in section 28 with retrospective effect from 1st April, 1967, cash assistance is a revenue receipt.
Deversons P. Ltd., CIT v/s.
(2003)175 Taxation 513 =260 ITR 336 = 2002)124 Taxman 472 (Guj)

(8) Additions to income – Compensation money received by other coparceners was held by Tribunal to be not belonging to assessee and, hence, addition of interest to such amount was deleted - Whether in view of fact that in similar controversy involving very same assessee, Court had directed Tribunal to decide appeal afresh, instant question referred was to be remanded back to Tribunal to decide it afresh – Held, yes.
Chanchalben (Smt), CIT v/s.
(2002) 124 Taxman 476(Guj)

(9) Section 28(i) of the Income Tax Act, 1961 – Business Expenditure - Chargeable as – Assessee claimed deduction of trading receipt of excise duty received by him as part of sale price, contending that it had received said amount on condition that deposit should be refunded to buyer in case it was not finally paid by assessee– Whether excise duty received by assessee as part of sale price would be assessable as trading receipt in assessee's hands – Held, yes – Assessee would be entitled to claim deduction when occasion for same arose and it was for assessee to raise claim before Tribunal.
Plastic Products Engg. Co. v/s. CIT
(2002) 125 Taxman 541(Guj)

(e) <u>OTHER SOURCES</u>

(1) Chargeable as - Assessment years 1986-87, 1987-88 and 1989-90 – Assessee trust took on lease a partly constructed building and after completing construction work rented out whole premises to Posts and Telephone Department - In its return of income it showed rental income as income from house property – Assessing Officer however held that trust was created for specific purpose of leasing out property with intention to sublet in order to earn profit and therefore income was taxable as business income - Whether since assessee was merely a lessee and not owner of property rental income from said property could not be taxed under head income from house property in its hands – Held, yes - Whether further since assessee at no point of time had indulged in any systematic activity so as to treat it as having indulged in business or a venture in nature of business income from property could not be taxed as business income and therefore income was liable to be taxed as income from other sources – Held, yes -
Harikrishna Family Trust v/s. CIT
(2008) 173 Taxman 170 = 306 ITR 303(Guj)

(2) Business income, income from property or income from other sources – Assessee trust lessee of property – Income from sub-lease - No systematic business activity – Income from sub-lease not business income - Assessee not owner of property – Income not assessable as income from house property – Income assessable as income from other sources – Income tax, 1961, ss. 22, 28, 56.
Rohitasava Chand v/s. CIT

(2008) 306 ITR 303(Guj)

(f) TIME OF RECEIPT – INTEREST ON SECURITIES

Chargeability – Accrual vis-à-vis receipt basis – Second proviso to s. 145 inserted w.e.f 1st April, 1989 clearly provides that any income by way of interest on securities would be chargeable to tax as the income of the previous year in which such interest is due to the assessee only where no method of accounting is regularly employed by the assessee - Thus, if the assessee is maintaining cash system of accounting aforesaid proviso would not apply – This amendment appears to be more clarification in nature than making any departure from the previous law on the subject - Further, the provisions of s. 193 require the company making the payment of interest and not when the amout is due - Thus, the legislative intent is that when the assessee is maintaining cash system of accounting, income by way of interest on securities is to be charged to tax only when the assessee actually receives the interest and not on the date on which interest might become due – In the instant case, accounts were admittedly maintained on cash system for which AO had granted permission – Assessees, who were bondholders of ASE Ltd. and R Ltd. admittedly did not receive any interest or any amount in lieu of interest in the years under consideration – Interest on debentures was therefore liable to be considered as income only when received by the assessee.

Upnishad Investment (P) Ltd. & Ors., CIT v/s.
(2002) 177 CTR 176 = 171 Taxation 669 =(2003)260 ITR 532= 131Taxman 20 (Guj)

(g) UNEXPLAINED MONEY

(1) Search in premises of firm run by depositor – Unaccounted money seized – Deposits made by firm in the names of third persons related to depositor – Person in whose name deposits made – Onus to prove source of deposits on such person – Failure to explain source of deposits – Money deemed to be income of such person.

Chinnnathamban K., CIT v/s.
(2007)292 ITR 682 = 211 CTR 86 = 162 Taxman 459 = 201 Taxation 157 (SC)

(h) UNDISCLOSED SOURCES

(1) Rough estimates and estimation for shops for submission to bank to obtain loan – Difference between estimation and books of account – Assessing Officer drawing inference that assessee received on money – No evidence – Rates of all shops at time of actual sales cannot be same as in rough estimate – Concurrent finding that on basis of rough estimates no addition could be made – No interference - Income tax Act, 1961, s. 132.
Maulikumar K. Shah, CIT v/s.
(2008) 307 ITR 137(Guj)

(2) Addition under s. 69 - Alleged unaccounted sales – In absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged unaccounted sales, the finding of the Tribunal that only the GP on the said amount can be brought to tax does not call for any interference.
Gurubachhan Singh J. Juneja, CIT v/s.
(2008)215 CTR 509 =302 ITR 63 =205 Taxation 264 =171 Taxman 406 (Guj)

(3) Addition under s. 69 - Excess stock found by excise authorities – Tribunal having reversed the findings recorded by CIT(A) and deleted the addition in respect of unexplained stock found at assessee's premises without dealing with the reasoning of the CIT(A) and without showing as to how the order of the CIT(A) is incorrect, impugned order of the Tribunal is quashed and set aside and the appeal is restored to the Tribunal for being decided afresh.
C. Lajpatrai Ltd. , CIT v/s.
(2007)212 CTR 292(Guj)

(4) Addition – Cost of construction of building – AO estimated cost of construction of additional floors constructed - CIT(A) as well as the Tribunal have come to concurrent findings of fact that the cost of construction as worked out by the assessee was fair and reasonable – No material brought on record to dislodge the said findings – Addition rightly deleted.
Nathubhai H. Patel, CIT v/s.
(2006)201 CTR 102=154 Taxman 113=193 Taxation 114 =
285 ITR 67 (Guj)

(5) Addition under s. 69 – Presumption under s. 132(4A) vis-à-vis burden of proof – Clause (iii) of s. 132(4A) raises a presumption in relation to signature and handwriting to be of the person in whose handwriting the books, etc. are purportedly written – Unlike cls. (i) and (ii) this clause does not necessarily raise a presumption qua the person searched or from whose possession the books are found – Thus, there could be no presumption that the seized books and documents are in the handwriting of the assessee – Further, for making addition under s. 69 it is necessary to show that investments have been made in the financial year immediately preceding the relevant assessment year and the same are not recorded in the book – Even if presumption available under s. 132(4A) can be raised against the assessee, the pre-requisite conditions of s. 69 have to be satisfied for making the addition and cannot be presumed to have been established on the basis of s. 132(4A) – Tribunal was not justified in remanding the matter to CIT(A) without dealing with applicability of s. 132(4A) vis-à-vis s. 69 – Matter is restored to the Tribunal to rehear the appeal.

Ushakant N. Patel v/s. CIT

(2006) 201 CTR 501 = 282 ITR 553= 154 Taxman 55(Guj)

(6) Alleged fictitious purchases of raw material – Finding recorded by the Tribunal that the purchase of raw material cannot be doubted as the Revenue has not disputed the details of the closing stock and that there was no material on record to conclude that besides the alleged fictitious purchases there were other purchases for the same materials under different invoices which could be reflected in the closing stock – Thus, the finding of the Tribunal that no addition was warranted on account of alleged fictitious purchases was solely based on appreciation of evidence and records – No interference is called for.

Kashiram Textile Mills (P) Ltd., CIT v/s.

(2006) 202 CTR 293 = 284 ITR 61 = 193 Taxation 438 = (2007)160 Taxman 4 (Guj)

(7) Addition – Alleged suppression of stock – AO made addition towards value of certain steel rounds purchased by assessee but not shown as closing stock, rejected the explanation of the assessee that the steel rounds had been received at an earlier point of time and had been consumed in the construction work carried on by the assessee - On appeal CIT(A) found that the assessee was receiving building material from the supplier as and when required but the bills were raised at a later point of time and thus the dates of delivery of certain materials differed from the dates mentioned in the corresponding bills – CIT(A) found that the AO has failed to bring on record any evidence to draw an adverse inference vis-à-vis items purchased vide a particular bill – CIT(A) also found that if the addition made by the AO is upheld, the GP rate in the adjusted trading account would get enhanced to 19.3 per cent whereas the GP rate in this type of cases is around 16 per cent as found by the AO himself and, therefore, addition for the alleged undisclosed closing stock was not warranted – Aforesaid findings upheld by the Tribunal – There is no infirmity in the concurrent findings of fact recorded by the appellate authorities - Even otherwise, the aforesaid findings are findings of fact arrived at after appreciating the evidence on record and no question of law is involved.

P. Pravin & Co., CIT v/s.
(2005) 193 CTR 213 = 144 Taxman 210 = 274 ITR 534 = 186 Taxation 43 (Guj)

(8) Addition - Alleged suppression of production/sales – Regular books of account along with records of stock as required under the excise law have been maintained by the assessee - Correctness of book results relating to production of oil and oil cakes has been accepted in the past – Neither the excise authorities nor the sales tax authorities have found any discrepancy in the records maintained by the assessee – Even the surprise checks by the officials of the Civil Supplies Department have not revealed any irregularity in the maintenance of stock – Tribunal has accepted the fact that the yield of oil cakes depend on the quality of groundnut which is likely to vary due to several reasons – Tribunal has further found that the AO has not pointed out any specific omission or suppression in the assessee's books of account – Findings recorded by the Tribunal are supported by evidence

available on record – Tribunal was justified in upholding the finding of CIT(A) deleting the additions.
Sanjay Oil Cake Industries , CIT v/s.
(2005) 197 CTR 520 = 149 Taxman 190=
(2006) 190 Taxation 476 = (2008) 10 DTR 153 (Guj)

(9) Addition under s. 69 – Natural justice – AO making addition of Rs. 67.75 lakhs towards undisclosed investment as revealed in search proceedings of LT Group - CIT(A) setting aside assessment on the ground that only three days time was given to assessee and remanding the matter – While reframing set aside assessment AO excluded the addition of Rs. 67.75 lakhs but made an altogether new addition of Rs. 137 lakhs – In second round of appeal, CIT(A) set aside addition of Rs. 137 lakhs but issued enhancement notice in respect of Rs. 67.75 lakhs – It is at this stage that the assessee produced passbook issued by LT Group – CIT(A) making the addition of Rs. 67.75 lakhs and Tribunal sustaining the same on the ground that assessee did not produce the passbook during original assessment proceedings – Not justified – In the facts and circumstances, assessee was prevented by sufficient cause from producing the passbook at any stage prior to the appellate stage in the second round - Matter remanded to the Tribunal to provide proper opportunity to the parties.
Nitin P. Shah alias Modi v/s. Dy. CIT
(2005)194 CTR 306=276 ITR 411=146 Taxman 536=
187 Taxation 390 (Guj)

(10) Addition under s. 69 – Unexplained investment in property – Last page of the diary recovered from assessee's premises mentioned complete particulars of the property purchased by the assessee, including its area - Therefore, the contention of the assessee that there is a mistake in mentioning the amount of sale consideration does not merit acceptance – Admittedly, all other pages except the last page of the diary are in the handwriting of the assessee's husband – Thus, burden was on the assessee to explain as to who had made the noting on the last page – Both assessee and her husband pleaded ignorance about the identity of the person who had made such noting in the diary – Explanation offered by the assessee cannot be said to be satisfactory – Assessee's version

cannot be accepted on the solitary ground that no acquisition proceedings were initiated after submission of Form No. 37G – Assessee having failed to place any evidence on record to show that the position was to the contrary, Tribunal was right in confirming the addition on the basis of notings in diary.
Ramilaben Ratilal Shah v/s. CIT
(2005) 199 CTR 340=282 ITR 176 =(2006) 52 Taxman 351 = 192 Taxation 351 (Guj)

48. <u>INCOME TAX PROCEEDINGS – POWER TO CALL FOR INFORMATION</u>

(1) Information on points or matters useful for proceedings – Scope of provisions -Pending proceedings not necessary before issuing notice calling for information Approval of Director or Commissioner sufficient if no proceedings pending – Income Tax Act, 1961, s. 133 (6), Second proviso.
Karnataka Bank Ltd. v/s. Secretary, Government of India,
Manipal Co-op. Bank Ltd. v/s. ITO & Ors.,
South Canara District Central Co-op. Bank Ltd. v/s. ITO & Ors. &
Gurusiddheshwar Co-op. Bank Ltd. v/s. ITO & Ors.
(2002) 255 ITR 508 = 123 Taxman 219 = 175 CTR 405 =
(2003) 172 Taxation 476 (SC)

(2) Section 131, read with sections 133 & 142 the Income Tax Act, 1961 – Income Tax Authorities - Powers regarding discovery production of evidence etc. – Power of Assessing Officer under sections 131(1) and 133(6) is distinct from and does not include the power to refer a matter to the Valuation Officer under section 55A nor does section 142(2) allow him to do so – A report by Valuation Officer under section 55A cannot be the result of an inquiry by the Assessing Officer under provisions of section 133(6) or section 142(2) - Power of inquiry granted to an Assessing Officer under sections 133(6) and 142(2) does not include power to refer matter to Valuation Officer for an enquiry by him .
Amiya Bala Paul (Smt) v/s. CIT
(2003)130 Taxman 511=182 CTR 489= 262 ITR 407 =
176 Taxation 221 (SC)

49. INDUSTRIAL COMPANY

(1) Construction activity – Tribunal categorically found that the AO has granted investment allowance to the assessee, a construction company, in respect of plant and machinery used in construction business and the said action has not been challenged or disturbed in any manner whatsoever - Hence, the finding of the Tribunal that the assessee has to be held to be an industrial company is upheld without going into the merits of the controversy.

Advance Construction Co. (P) Ltd., CIT v/s.
(2004) 193 CTR 127 = 143 Taxman 61=275 ITR 30 =
186 Taxation 55(Guj)

(2) Assessee had undertaken contracts from Gujarat Mineral Development Corporation, (GMDC) for removal of overburden and earth excavation in lignite mineral areas of GMDC – Assessee claimed benefit of lower rates of income tax on ground that it was an industrial company engaged in mining which was rejected by ITO – As per agreement between parties, depth of earth which was required to be excavated by assessee ranged from 8 to 30 metres which was required to be done so as to expose lignite mineral for further mining by GMDC – Entire earth excavation work which was to be done by assessee was required to be done as prescribed under mining rules/regulations and was to be carried out under instructions issued from time to time by mines mangaer/engineer-in-charge of GMDC – On facts, assessee had satisfactorily discharged burden of showing that it was a company, which was mainly engaged in activity of mining and, therefore, an industrial company as defined by section 2(7)(c) and was entitled to benefit claimed..

Sundeep Construction (P) Ltd., CIT v/s.
(2004)137 Taxman 287 =189 CTR 440 =269 ITR 343 =
182 Taxation 112 (Guj)

(3) Processing of tobacco leaves – Assessee's business consists of crushing large tobacco leaves and cutting into smaller pieces, sieving them, i.e removing the dust and unwanted stems from the tobacco leaves, and selling them to the Bidi manufactures - Same

involves manaufacutring or processing of goods – Assessee is, therefore an industrial company.
Gordhanbhai Jethabhai Tobacco Industrial (P) Ltd., CIT v/s.
(2002) 177 CTR 339 = 123 Taxman 825 = 171 Taxation 296 = 258 ITR 727 (Guj)

(4) Purchasing, feeling, freezing and exporting shrimps - Whether involves production or manufacture - No material produced regarding the stages through which the shrimps passed as processes involving production or manufacture - Assessee not industrial company - Not eligible to be taxed at lower rate of Income Tax - Finance Act, 1981, s. 2(7)(c).
Kala Cartoons P. Ltd., CIT v/s.
(2001) 252 ITR 658(SC)

50. INTEREST PAYABLE BY ASSESSEE

(a) **BORROWED CAPITAL**

(1) Interest free loan to sister concern – Interest on borrowed funds cannot be disallowed if the assessee has advanced interest free loan to a sister concern as a measure of commercial expediency - What is to be seen is "business purpose" and what the sister concern did with the money advanced.
S.A Builders Ltd. v/s. CIT(A) & Anrs.
(2006) 206 CTR 631=(2007)288 ITR 26= 158 Taxman 74 =197 Taxation 20(SC)

(2) Assessee a subsidiary of a holding company – Interest paid by assessee to holding company - Necessary entry made during accounting period – Finding that assessee had incurred losses and no benefit was derived by paying interest – Holding company paying tax on interest - Interest deductible - Income Tax Act, 1961, s. 36(1)(iii).
Nima Ltd. , CIT v/s.
(2005) 278 ITR 588 =199 CTR 360=
(2006) 190 Taxation 335 =153 Taxman 212 (Guj)

(3) Financing company - Borrowing huge sums of money – Interest free loans to sister concern - Disallowance of part of interest on borrowed money – Appeal to High Court - Decision affirming disallowance on the basis that assessee failed to furnish Bank statement to examine whether loans were given out of borrowed

money – Statement in fact produced before authorities and on record - Appeal to Supreme Court – High Court's decision set aside.

Motor General Finance Ltd. v/s. CIT
(2005) 267 ITR 381=189 CTR 297=138 Taxman 235=
183 Taxation 5(SC)

(4) Advance at lower rate of interest for business purposes – Though the assessee company had agreed to advance only Rs. 6 lacs to the lessor of the building taken by it on lease, additional amount of Rs. 2.50 lacs was advanced to the lessor so as to enable it to complete the construction of additional floors which were to be made available to the assessee company at a low rent – Thus, funds were advanced at lower rate of interest in furtherance of business interest of the assessee - No portion of the interest paid by the assessee on its borrowings could be disallowed.

Amora Chemicals (P) Ltd., CIT v/s.
(2002)178 CTR 64=125 Taxman 255=171 Taxation 505=
258 ITR 519 (Guj)

(5) Money received for charitable purposes utilised in business - Revenue has not doubted the genuineness of the stand taken by the assessee in respect of the nature of the accounts - Once the Department has accepted that the monies lying to the credit of various accounts do not belong either to the assessee firm or to its partners but belong to third party and such funds are utilised for the purpose of business, interest paid thereon is an deductible item of expenditure.

Nanalal Mansukhram, CIT v/s.
(2001) 171 CTR 490(GUJ)

(b) **<u>INTEREST TAX ACT – CHARGE – SCOPE</u>**

Provisions of Income Tax Act relating to method of accounting adopted by assessee incorporated in Interest Tax Act – Assessee following cash system in respect of interest income – Computation of chargeable interest – To be on basis of total income received -

Kerala State Industrial Development Corpn. Ltd. v/s. CIT
(2003)259 ITR 51 = 180 CTR 192 = 128 Taxman 29 =
174 Taxation 766(SC)

(c) **INTEREST ON SECURITIES**

(1) Accounting – Effect of amendment of section 145 w.e.f 1-4-89 – Proviso that interest on securities taxable when due where assessee employs no regular method of accounting – Clarificatory – Assessee regularly following cash system of accounting - Interest on securities assessable only on receipt in assessment years 1987-88 and 1988-89.
Upanishad Investment P. Ltd., CIT v/s.
(2003) 260 ITR 532=131 Taxman 20= (2002) 177 CTR 176 = 171 Taxation 669 (Guj)

(2) Scope of section 18 – Interest on securities issued by any company – Assessable under section 18 .
Upanishad Investment P. Ltd., CIT v/s.
(2003) 260 ITR 532 =131 Taxman 20(2002) 177 CTR 176 = 171 Taxation 669 (Guj)

(3) Chargeability – Interest on debentures, etc. issuing by a company – Sec. 8 of the1922 Act covered the securities of a local authority and a company without any further reservation - The 1961 Act added "public corporations established by a Central, State of provincial Act" and enlarged the class of persons issuing the securities – Words "established by a Central State or Provincial Act" qualify only the works "a corporation" and not "a local authority or a company" – Accordingly the interest on debentures issued by all companies whether or not established by a Central, State or Provincial Act, is liable to be computed, is liable to be computed as income under the head "interest on securities".
Upnishad Investment (P) Ltd. & Ors., CIT v/s.
(2002) 177 CTR 176 = 171 Taxation 669 =(2003) 260 ITR 532= 131 Taxman 20 (Guj)

(d) **PAYABLE BY ASSESSEE**

(1) Interest payable to I.T- Interest under s. 234B- Chargeability – s.115J - Assessment of company under s. 115J – Interest under s. 234B is not chargeable when income is computed under s. 115J.
Madhusudan Industries Ltd., Dy CIT v/s.
(2008) 218 CTR 493 = 11 DTR 144=(2009) 208 Taxation 442 (Guj)

(2) Interest payable to I.T- Interest under ss. 234A and 234B – Chargeability – Vires - Payment of tax after the end of financial year – Amount paid beyond the financial year before filing the return cannot be deducted from the tax on total income as determined on regular assessment for computing interest u/ss. 234A and 234B – Defaults contemplated under ss. 234A and 234B are independent of each other and, therefore interest under both the provisions is payable even though there is overlapping of period of defaults.
Constitutional validity - Arbitrary or unreasonable levy – There is no arbitrariness or unreasonableness in levy of interest under ss. 234A and 234B and the provisions do not seek to impose unequal burden on same class of persons similarly situated and therefore the provisions of ss. 234A and 234B cannot be held to be ultra vires the Constitution.
Roshanlal S. Jain & Ors. V/s. Dy. CIT & Anr.
(2008) 220 CTR 38 = (2009) 176 Taxman 95=309 ITR 174=
14 DTR 91(Guj)

(3) Interest payable to I.T - Interest under s. 234B – Chargeability - Consequent upon order of Settlement Commission – While passing an order under s. 245D(4), the Commission exercises powers of an IT authority as provided under s. 245F and the assessee is liable to pay interest under s. 234B for that portion of income forming part of the total income as determined by the Commission which was not earlier disclosed before the AO.
Sahitya Mudranalaya & Ors. V/s. ITSC & ors.
(2008) 216 CTR 174 = 205 Taxation 307 =
175 Taxman 30 = 5 DTR 194(Guj)

(4) Interest under s. 234B - Waiver or reduction - Addition on account of retrospective amendment of law – Respondent has recorded a finding that the assessee was under a bona fide belief that export assistance was not includible in the income and the assessee itself requested the AO to include the same in the

taxable income after the amendment – Court having earlier held that the assessee's case was covered under cl. (d) of Circular No. F. No. 400/234/1995-IT(B), dt. 23rd May, 1996, it was not open to the respondent to state that the said cl. (d) is broadly applicable to the assessee – No reason has been assigned by the respondent for part waiver and retaining the interest at Rs. 1,00,000 - Respondent is directed to waive the remainder interest by passing a fresh order.

Devarsons (P) Ltd. v/s. U.P Singh
(2006)203CTR 48 = 284 ITR 36 =194 Taxation 627(Guj)

(5) For default in furnishing return of income – Assessment year 1991-92 – Petitioners had to file return of income before 31-10-1991 for relevant assessment year – They however, did not file return before due date – On 19-5-1992, search and seizure operation took place and their books of account were seized by Income Tax Authorities – In June 1992, they made a request to concerned authority for returning books of account so as to enable them to get accounts audited and file return – Authorities returned books of account in October 1992 – Thereafter accounts were audited and ultimately returns were filed in march 1993 – Assessing Officer levied penal interest under section 234A – During period when books of account were in custody of concerned Income Tax Authorities, petitioners could not have filed return and, therefore they were not to be saddled with liability to pay penal interest under section 234A for that period.

Paras Bansilal Patel v/s. Jindel (B.M)
(2004)135 Taxman 125=187CTR 613=267 ITR 108=
180 Taxation 208 (Guj)

(6) Assessee in its return claimed exemption of export cash assistance amount on ground of same being a capital receipt – Because of retrospective amendment taxing export cash incentive as income Assessing Officer made addition of export cash assistance and also levied interest under section 234B on ground that advance tax paid by assessee under section 210 was less than 90 per cent of assessed tax – Held, since assessee's tax liability arose subsequently after filing of return and after expiry of assessment year on account of retrospective amendment of law, consequential levy of interest under section 234B was required to be dealt with as a fit case for reduction or waiver of interest.

Deversons (P) Ltd. V/s. Chairman, CBDT

(2004) 140 Taxman 628 = 192 CTR 400(Guj)

(7) Chargeability and computation – Computation consequent upon settlement of case by Settlement Commission – Settlement Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application made under s. 245C and continues to have the jurisdiction till it makes an order under s. 245D – Contention that there is no requirement to pay interest under s. 234B as no points of terminus have been fixed is untenable because the levy is mandatory – Equally, the contention that no interest is chargeable for that portion of income which was determined by the Commission and was not disclosed before the AO has no substance – Interest under s. 234B has to be charged for the period beginning from the first day of April next following the relevant financial year upto the date of Settlement Commission's order under s. 245D(4) on the consolidated income i.e both disclosed and undisclosed income – There is no question of charge of interest on interest.

Damani Bros., CIT v/s. &
Hindustan Bulk Carriers, CIT v/s.
(2003) 179 CTR 362 = 259 ITR 475= 173 Taxation 40 (SC)

51. <u>INTEREST PAYABLE TO ASSESSEE BY I.T</u>

(1) For delayed refund - Excise duty – Interest on equitable grounds -Only if written demand made – Central Excise Act, 1944, s. 11BB.

Shreeji Colour Chem Industries, Union of India v/s.
(2008) 11 RC 469(SC)

(2) s. 220(2) – Waiver or reduction under s. 220(2A) - Genuine hardship and circumstances beyond the control of the assessee - Department having not accepted to the request made by the assessee to expeditiously dispose of the seized shares and securities and to appropriate the sale proceeds towards taxes due from him, and the CIT having not considered the question as to whether the default in payment of demand was due to circumstances beyond the control of the assessee in its proper perspective, matter is remitted to CIT to reconsider the matter relating to waiver of interest as per the provisions of s. 220(2A) afresh.

Malani B.M v/s. CIT
(2008) 219 CTR 313 =174 Taxman 363 = 306 ITR 196= 13 DTR

186 (SC)

(3) Delay in Filing Return - Interest on refund – Advance Tax paid in excess of tax as assessed –or determined pursuant to decision of appellate or other authorities - Interest on such excess amounts – Statutory liability – Is "amount due" to assessee - Delay in paying - Interest payable also on such interest by way of compensation – Liability of Government on General principles to pay interest on sums wrongfully retained – Includes liability to pay interest on interest wrongfully retained – "Wrongfully", meaning of - Income Tax Act, 1961, ss. 214, 237, 240, 243, 244.

Sandvik Asia Ltd. v/s. CIT
(2006)280 ITR 643 = 200 CTR 505= = 150 Taxman 591=
193 Taxation 163 (SC) (SC)

(4) When no claim is needed - Basic requirements.

R.R Holding P. Ltd. v/s. CIT
(2006)284 ITR 674 = 204 CTR 35 = 155 Taxman 1(SC)

(5) Attachment of bank accounts – Petitioner assessee's FCNR/SDR account was attached by the Department in terms of s. 281B and the whole amount was realized by the Department out of the said account – On a writ petition, the High Court directed the Department to refund the amount along with "interest accrued thereon" so as to restore the assessee to the position that he enjoyed at last from the date of dismissal of Department's application under s. 256(2) against the order of the Tribunal setting aside the assessment order whereby the assessee became entitled to refund of the amount withdrawn from his account – Assessee entitled to interest accordingly – Computation of interest in terms of s. 244 or 244A by the Revenue authorities was clearly not in compliance with the order of the High Court – Department directed to finally determine the actual amount which would be payable in terms of the High Court's order by the respondent to the assessee.

Vijay Kumar Bhati v/s. CIT & Anr.
(2003) 179 CTR 397 = 128 Taxman 54 =264 ITR 657(SC)

(6) Excess amount of tax paid pursuant to order of assessment or penalty - Interest payments under sections 215, 217 and 220(2) – Assessee entitled to interest under section 244 (1A) in respect of interest payments.

Gujarat State Warehousing Corpn., CIT v/s.

(2002) 256 ITR 596 = 172 CTR 546 = 166 Taxation 117 = 122 Taxman 373(Guj)

(7) Interest payable by Government – Excess amount of tax paid on self assessment - Assessee entitled to interest under section 244(1A) on payment of tax under Section 140A.
Gujarat State Warehousing Corpn., CIT v/s.
(2002)256 ITR 596 =172 CTR 546 =166 Taxation 117 =122 Taxman 373 (Guj)

(8) Deficiency in paying, Advance Tax - Assessment order - Direction for charging interest for delay and deficiency - Reassessment - Assessment reopened only for adding income from interest - Interest for delay and deficiency under direction in original assessment order also added - Appellate Tribunal holding that interest for delay and deficiency could not be charged in reassessment - High Court - Reference of question whether direction for charging interest in original assessment does not survive - Decision of High Court - Savouring of appellate jurisdiction - Decision set aside - Case remanded for re-hearing reference -
Khodey Brewing and Distilling Industries Ltd.v/s.CIT
(2001)250 ITR 659(SC)

(9) Deduction of tax at source - Development authority constructing flats and allotting them to buyers - Interest paid to buyers for period of delay - Failure to deduct tax at source - Notice of demand for tax and recovery - Development authority an "assessee" - Appellate Tribunal finding development authority not liable to deduct tax - Refund of tax recovered - Interest - Provision applicable to assessees applies assessee entitled to interest.
Delhi Development Authority, ITO v/s.
(2001) 252 ITR 772 = 171 CTR 546 = 1 DTR 113(SC)

52. INTERPRETATION OF STATUTES

(1) Primary rule – Casus omissus – Not created by interpretation.
Dharmendra Textile Processors, Union of India v/s

(2008) 306 ITR 277 = 219 CTR 617 = 166 Taxman 65 = 204 Taxation 381 = 14 DTR 114(SC)

(2) Rule of legislative intention.
Dharmendra Textile Processors, Union of India v/s
(2008) 174 Taxman 571(SC)

(3) Object and scope of – Proviso – Proper functions.
Nagar Palika Nigam v/s. Krishi Upaj Mandi Samiti
(2008) 11 RC 522(SC)

(4) Prospective or retrospective.
Gold Coin Health Food (P) Ltd., CIT v/s.
(2008) 304 ITR 308=72 Taxman 386 = 206 Taxation 147=
11 DTR 185 (SC)

(5) Rule of literal construction - Plain language – If the language of the statute is capable of a plain meaning it is not open to the Court to add or substitute any words therein so as to give a meaning which one or the other side thinks to be more appropriate.
Cargo Clearing Agency v/s Jt. CIT
Kapurchand Kakaram Bansal v/s. Dy. CIT
(2008)218 CTR 541 =307 ITR 1=207 Taxation 586=12 DTR 50 (Guj)

(6) Machinery provision – Should be construed so as to be workable.
Mohammed Salim (K.P) v/s. CIT
(2008) 300 ITR 302 =216 CTR 97 =169 Taxman 465 =
207 Taxation 81 = 6 DTR 179(SC)

(7) Circulars of CBDT - Opinion of Minister introducing the Bill.
R & B Falcon (A) Pvt. Ltd. V/s. CIT
(2008) 301 ITR 309 = 216 CTR 289 = 169 Taxman 515 =
206 Taxation 241 = 6 DTR 313 (SC)

(8) Where two interpretations possible – Court will adopt that in favour of tax payer.
Pradip J. Mehta v/s. CIT
(2008) 300 ITR 231 = 216 CTR 1 = 169 Taxman 454=

206 Taxation 169 (SC)

(9) Legal fiction – Taxing statute – To be construed on basis of object sought to be achieved.
Ishikawajima-Harima Heavy Industry Ltd. v/s. Director of Income Tax, Mumbai
(2007)288 ITR 408 = 207 CTR 361=8 RC 149 = 158 Taxman 259 =198 Taxation 103 (SC)

(10) Plain meaning of statute to be considered -
Mugat Dyeing & Printing Mills v/s. Asstt. CIT
(2007) 290 ITR 282 = 207 CTR 606=
198 Taxation 439 (Guj)

(11) Taxing provision – Principle of strict construction – Where two interpretations possible construction in favour of taxpayer to be adopted.
Manish Maheshwari v/s. Asst. CIT
Indore Construction (P) Ltd. v/s. CIT
(2007) 289 ITR 341=208 CTR 97= 8 RC 455 =
199 Taxation 284 = (2008) 204 Taxation 205 (SC)

(12) Statute to be construed as a whole - No part to be rendered inoperative by another provision.
Krishi Utpadan Mandli Parishad v/s. I.T.C Ltd.
(2007) 9 RC 275(SC)

(13) "Includes" used in definition clause Scope of-
Rajasthan Taxchem Ltd., Commercial Taxation Officer v/s.
(2007) 8 RC 312(SC)

(14) Rights under old law – Continue to operate unless there is express or implied inconsistent provision in new law -
Baraka Overseas Traders v/s.
Director General of Foreign Trade.
(2007) 8 RC 205(SC)

(15) Taxing statute - Strict construction – Two interpretations possible – Provisions interpreted in favour of taxpayer - Machinery provision – construed so as to make provision workable.

Mahim Patram Pvt. Ltd. v/s. Union of India
(2007) 8 RC 364(SC)

(16) Contemporanea expositio – Tax authorities interpreting words in same way.
Balaji Computers, State of Karnataka v/s.
(2007) 8 RC 332(SC)

(17) Schematic interpretation.
Lakshmi Machine Works, CIT v/s.
(2007) 290 ITR 667 = 160 Taxman 404 = 210 CTR 1 = 200 Taxation 254 (SC)

(18) Explanation – Scope and purpose of
Dilip N. Shroff v/s. Joint CIT
(2007) 291 ITR 519 = 210 CTR 228 =161 Taxman 218 = 201 Taxation 53 (SC)

(19) Explanation
Corporation Bank, Government of Andhra Pradesh v/s.
(2007)8 RC 676(SC)

(20) Duty to interpret statute as it is – Not to read words which Legislature has deliberately not incorporated.
Tara Agencies, CIT v/s.
(2007)292 ITR 444 = 210 CTR 454 = 162 Taxman 337 = 201 Taxation 359 (SC)

(21) Purposive construction – Applicable to statute granting immunity – Executive instruction – Circulars of CBDT – Can be taken in aid of construction.
Tanna and Modi v/s. CIT
(2007) 292 ITR 209 =210 CTR 273 = 161 Taxman 329 = 201 Taxation 194 (SC)

(22) Provision providing incentive to exports – Liberal interpretation – But where provision clear, words cannot be ignored or misinterpreted to confer benefits not intended.
Moosa (A.M) v/s. CIT

(2007) 294 ITR 1 = 163 Taxman 741 = 212 CTR 89 (SC)

(23) Exemption notification – To be liberally construed.
Tata Sponge Iron Ltd. . v/s. State of U.P
(2007) 9 RC 539(SC)

(24) Validation clause – While it is permissible for the legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively - Liability to pay interest is really in the nature of a quasi punishment and although created retrospectively could not entail the punishment of payment of payment of interest with retrospective effect.
Star India P. Ltd. v/s. CIT
(2006)201 CTR 63(SC)

(25) Beneficial provision – Liberal interpretation.
Jamnagar Jilla Sahakari Kharidvechan Sangh Ltd. , CIT v/s
(2006) 283 ITR 116 = 153 Taxman 363 = 193 Taxation 592 = 201 CTR 243((Guj)

(26) Exemption provisions – Once found applicable to case of assessee to be construed liberally ..
Prabhakar (P.R) v/s. CIT
(2006) 284 ITR 548 = 154 Taxman 503= 204 CTR 27 = 195 Taxation 221 (SC)

(27) Penal Law – Strict interpretation – Scope of – Intention of legislature
Standard Chartered Bank v/s.
Directorate of Enforcement.
(2005)275 ITR 81=145 Taxman 154=195 CTR 465=188 Taxation 360 (SC)

(28) Ambiguity - Interpretation in favour of assessee.
Parmanand M. Patel , CIT
(2005)278 ITR 3 = 198 CTR 641 =149 Taxman 403= (2006) 190 Taxation 496 (Guj)

(29) Explanation – Scope of
Sedco Forex International Drill Inc. v. CIT
(2005)279 ITR 310 = 199 CTR 320= 149 Taxman 352=
(2006) 192 Taxation 27 (SC)

(30) Cardinal Principle – Law to be applied is that in force during assessment year – On the first day of assessment year.
Sedco Forex International Drill Inc. v. CIT
(2005)279 ITR 310 = 199 CTR 320= 149 Taxman 352 =
(2006) 192 Taxation 27 (SC)

(31) Provision providing for incentive – Where provision is clear – Benefit cannot be conferred by ignoring or misinterpreting words.
IPCA Laboratory Ltd. v/s. Dy. CIT
(2004)266 ITR 521 =135 Taxman 594= 187 CTR 513 =181 Taxation 2 (SC)

(32) Contemporary exposition only by officers charged with enforcement and administration of the statute to be given weight.
Indian Bank's Association v/s. Devkala Consultancy Service.
(2004)267 ITR 179 =137 Taxman 69= 189 CTR 157 =181 Taxation 43 (SC)

(33) Purposive construction – Avoidance of conflict – A statute or any enacting provision therein must be so construed as to make it effective and operative – Construction which reduces the statute to a futility or defeats the plain intention of the legislature has to be avoided – One provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute – Provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to reconcile them.
Damani Bros. , CIT v/s. &
Hindustan Bulk Carriers, CIT v/s.
(2003) 179 CTR 362 = 259 ITR 475(SC)

(34) Finance Minister's speech before Parliament while introducing bill – Can be relied on to throw light on object and purpose of provisions.
Kerala State Industrial Development Corpn. Ltd. v/s. CIT

(2003)259 ITR 51 = 180 CTR 192 = 128 Taxman 29 = 174 Taxation 766(SC)

(35) Greater latitude - Does not apply to a provision to validate levy having no sanction in law.
Shree Digvijay Cement Co. Ltd. V/s. Union of India
(2003) 259 ITR 705 =174 Taxation 744 (SC)

(36) Interpretation of definition clause – Rule of harmonious interpretation.
G.K Choksi & Co. v/s. CIT
(2003) 127 Taxman 109 = 174 Taxation 744 (Guj)

(37) Penal law – Strict interpretation – Casus omissus – Plugging loopholes only for legislature and not for the Court.
Velliappa Textiles Ltd., Asstt. Commissioner v/s.
(2003) 263 ITR 550= 132 Taxman 165 = 184 CTR 193 = 177 Taxation 354(SC)

(38) Primary rule – Intention to be found in words used – Courts cannot legislate – absuse of law to be corrected by legislature – Casus omissus – Cannot be supplied except in case of clear necessity and reason found in the statute.
Padmasundara Rao (Decd) v/s. State of Tamil Nadu
(2002) 255 ITR 147 = 176 CTR 104 = 170 Taxation 303(SC)

(39) Purposive interpretation - Only when language of statute ambiguous, conflicting or gives meaning leading to absurdity - Power vested in authority - To be exercised in particular manner - Authority has to exercise it only
manner provided.
Anjum M.H Ghaswala, CIT v/s.
(2001) 252 ITR 1 = 171 CTR 1 = 119 TAXMAN 352(SC)

(40) Doctrine of 'reading down' - Doctrine of reading down cannot be applied to add and read additional words into a statutory order which would transgress the limits of such order - It can be resorted to only to give the statute reasonable meaning and to

make it constitutionally valid.
Omkar S. Kanwar v/s. Union of India
(2001) 170 CTR 354(GUJ)

(41) Definition or interpretation clause - Ordinary meaning - Definition or interpretation clause which defines the meaning of a word should not be construed as taking away its ordinary meaning - Such a clause should be so interpreted as not to destroy the basic concept or essential meaning of the expression defined, unless there are compelling words to the contrary - Words which are not specifically defined must be taken in their legal sense or their dictionary meaning or their popular or commercial sense as distinct from their dictionary meaning or their unless a contrary intention appears.
Choksi & Co.(G.K) v/s. CIT
(2001) 171 CTR 396 = 252 ITR 863(GUJ)

53. INVESTMENT DEPOSIT ACCOUNT

(1) Assessment year 1989-90 – Whether there was no withdrawal of amount from reserves or provisions - Amount written back and credited to profit and loss account on account of reworking of depreciation as per circular of CLB could not be reduced from profits eligible for relief under section 32AB – Held, yes.
Alfa Laval (India) Ltd., CIT v/s.
(2008)170 Taxman 615(SC)

(2) Re-computation of depreciation in accordance with circular of Company Law Board – Amount credited to profit and loss account consequent on such re-computation – Amount not deductible from eligible profits – Income Tax Act, 1961.
Alfa Laval (India) Ltd. , CIT v/s.
(2007)295 ITR 451(SC)

(3) Business Profit – Special deduction in computation – Investment in new machinery or plant – Deduction based on – “Eligible business” – Purchase and sale of units of UTI

intertwined and interlaced with manufacture and sale of tyres – Is an "eligible business".
Apollo Tyres Ltd v/s. CIT
(2002)255 ITR 273 =174 CTR 521 =122 Taxman 562
=169 Taxation 522(SC)

(4) Claim by way of revised return – Claim for deduction under s. 32AB made in the revised was allowable in lieu of deduction under s. 32A claimed in the original return even though it was already processed under s. 143(1)(a).
Deepak Nitrite Ltd. v/s. CIT
(2008) 220 CTR 374 = 206 Taxation 422 = 307 ITR 289
= 175 Taxman 230 = 7 DTR 313 (Guj)

54. INVESTMENT ALLOWANCE

(a) ACTUAL COST

s. 32A – Investment allowance – Actual cost - Government subsidy not deductible in computing actual cost.
Swastik Sanitary Works Ltd. , CIT v/s.
(2006)286 ITR 544=205 CTR 517=
(2007)197 Taxation 324 (Guj)

(b) ALLOWABILITY

(1) Allowance based on – Not available for civil construction- Income Tax Act, 1961, s. 32AB.
S.A Builders Ltd. v/s. CIT(Appeals) .
(2007)289 ITR 26 = 158 Taxman 230 = 208 CTR 207
= 197 Taxation 1 (SC)

(2) Mining and excavation of lignite – Plant and machinery owned by the assessee and wholly used in mining and excavation which is the active business of the assessee fulfilled the pre-condition of s. 32A and, therefore, assesssee is entitled to investment allowance.
General Contracts Co. v/s. CIT
(2006) 206 CTR 10 = 287 ITR 416 (Guj)

(c) AVAILABILITY

Plant and machinery - Computers – computers constitute plant – Entitled to investment allowance – Income Tax Act, 1961, s. 32A.
Statronics & Enterprises (P) Ltd., CIT v/s.
(2007)288 ITR 455 = 207 CTR 96 = 196 Taxation 198 = 165 Taxman 153 = (2008) 3 DTR 343 (Guj)

(d) GENERAL

(1) Mining activity for extracting iron ore – Extraction and processing of ore amounts to "production" within the meaning of s. 32A(2)(b)(iii) since ore is "a thing" which is the result of human activity or effort – Some other provisions of the Act, particularly s. 33(1)(b)(B) r/w item No. 3 of Fifth Schedule and s. 35E also show that mining of ore is treated as "production" – Language of these sections is similar to the language of s. 32A(2) – There is no reason to assume that the word "production" was used in a different sense in s. 32A – Consequently, assessee was entitled to investment allowance in respect of machinery used in mining activity.
Sesa Goa Ltd. , CIT v/s.
(2004) 192 CTR 577 = 271 ITR 331 = (2005) 142 Taxman 16= 185 Taxation 1 (SC)

(2) Assessee was entitled to investment allowance in respect of liability arising out of fluctuation in exchange rate relatable to repayment of principal amount borrowed for purchase of capital equipment .
Ahmedabad Kaiser-Hind Mills Co. Ltd.
(2003)130 Taxman 262 = 177 Taxation 294 = 264 ITR 666(Guj)

(3) Actual Cost - Additional liability due to fluctuation in exchange rate – Assessee
was not entitled to investment allowance in respect of the amount paid as a result of fluctuation in exchange rate.
S.G Chemicals & Pharmaceuticals Ltd., CIT v/s.
(2002) 175 CTR 618 = 169 Taxation 679 = 258 ITR 109 (Guj)

(4) Change in – Rate of exchange of currency – Assets were acquired and payment was to be made in instalments over a period of time – Liability for years under consideration increased by reason of fluctuation in exchange rate – Assessee claimed investment allowance in respect of additional expenditure on account of cost of plant and machinery in view of realignment of currency – Once section 43A(1) comes into play and increase in liability is taken as actual cost within meaning of section 43(1), effect is that such adjusted actual cost has to be taken as actual cost for all purposes other than development rebate and all allowances would have to be based on such adjusted actual cost – In view of section 43A, assessee was entitled to investment allowance on figure on enhanced actual cost.
Gujarat State Fertilisers Co. Ltd. , CIT v/s.
(2002) 125 Taxman 593 = 259 ITR 526 = 15 DTR 108 (Guj) (FB)

(5) Curing of coffee - Process of manufacturing coffee beans from raw berries - Amounts to manufacturing activity - Coffee beans produced from berries have distinct identity and are a new commodity - Assessee entitled to benefit of investment allowance on machinery installed for curing coffee -
Aspinwall and Co. Ltd. v/s. CIT
(2001) 251 ITR 323(SC)

(6) Electrical installations and electrification in workshop - For the purpose of availing investment allowance under s. 32A, the equipments or installations even though not directly used in the manufacturing process should be necessary for it - electrical installations and electrification in mechanical workshop were necessary for the manufacturing processes in the plant - Claim for investment allowance was allowable.
Mihir Textile Ltd. v/s. CIT
(2001) 170 CTR 606 = 252 ITR 686(GUJ)

(e) <u>MANUFACTURE OR PRODUCTION</u>

(1) Conversion of jumbo rolls of photographic films into small flats and rolls in desired sizes - Amounts to manufacture or production eligible for deduction under s. 32AB.
India Cine Agencies v/s. CIT
(2008) 220 CTR 223 = 175 Taxman 361 =15 DTR 121 =(2009)308 ITR 98(SC)

(2) Pathological laboratory - Report obtained as a result of a pathological test is something different from the input and, therefore, a pathological laboratory can be said to be an industrial undertaking and investment allowance is allowable on pathological equipments -

Suresh Amin Family Trust, CIT v/s.
(2006) 205 CTR 577=(2007)288 ITR 101 =197 Taxation 462= 158 Taxman 105(Guj)

(3) Construction of road – Road construction activity is not manufacture or production of an article or thing and, therefore investment allowance was not allowable on cost of dumpers and water tank used by the assessee engaged in such activity.

Gujarat Tube Well Co., CIT v/s.
(2006) 206 CTR 14=(2007)288 ITR 301 = 196 Taxation 210 (Guj)

(4) Investment allowance (B) General -Manufacture or production - Heart monitoring machine and treadmill – Printing of functional status on
ECG paper can be said to be production of an article or thing falling within the ambit of s. 32A – Thus, investment allowance was allowable in respect of heart monitoring machine and treadmill.

Nathubhai H. Patel, CIT v/s.
(2006)201 CTR 102= 154 Taxman 117= 193 Taxation 114 = 285 ITR 67 (Guj)

(5) Condition precedent – Creation of reserve – Bakery producing bread, biscuits etc. – Process amounts to manufacture – Reserve not created in relevant accounting year due to loss – Reserve created in the following year - Sufficient compliance with condition – Assessee entitled to investment allowance – Income Tax Act, 1961, s. 32A.

Sidral Food P. Ltd. , CIT v/s.
(2006)282 ITR 563= 200 CTR 135 = 192 Taxation 200 = 154 Taxman 412 (Guj)

(6) Manufacture or production – Preparation of bread, biscuits, etc. in bakery – End products which are obtained after processing /consumption of raw materials are articles which have a distinct identity from the commodities involved in the preparation – Change which occurs as a result of processing produces a commercially different commodity which is recognized as a new and distinct article – Final product has essentially a different identity vis-à-vis inputs – Therefore, assessee was carrying on a business of manufacture or production and was entitled to investment allowance in respect of plant and machinery used for the production of bakery products like bread, biscuits and cakes.
Sidral Food (P) Ltd., CIT v/s.
(2006) 200 CTR 135 = 282 ITR 563= 192 Taxation 200= 154 xman 412(Guj)

(7) Computers – Entitled to investment allowance – Income Tax Act, 1961, s. 32A.
Sayaji Iron and Engineering P. Ltd., CIT v/s.
(2006) 281 ITR 438 =192 Taxation 588 (Guj)

(f) PLANT

(1) Drainage and sewerage network – Said network was installed in factory for channelising the waste materials obtained on chemical reaction while manufacturing fertilizers – Tribunal found that the drainage and sewerage network running through the factory was a part and parcel of plant and machinery – Hence, it was eligible for investment allowance Held, valid..
Tractor trailers used for lifting and carrying equipments and materials – Tribunal found that the tractor trailers were used to transport raw materials, finished products and equipments within the factory premises – In view of said finding of fact, it cannot be held that the tractor trailers were road transport vehicles – Applying the functional test, tractor trailers are to be treated as "plant" – Such tractor trailers having been inducted or introduced in the business, they were "installed" for the purpose of business – Hence, assessee was entitled to investment allowance.
Gujarat Narmada Valley Fertilizer Co. Ltd, CIT v/s.
(2005)195 CTR 404 = 189 Taxation 414 (Guj)

(2) Computers – Computer ORG 200-B microprocessor has to be considered as an item of plant and machinery entitled to investment allowance.
Dinesh Mills Ltd., CIT v/s.
(2005)199 CTR 509=148 Taxman 76= (2004) 186 CTR 634= 268 ITR 502 (Guj)

(3) Plant and machinery – User for manufacturing activity – Fact that the electric installations, transformer and air conditioning plant area plant and machinery is not disputed – Concurrent finding recorded by the CIT(A) and the Tribunal that these items form part of integrated manufacturing plant and are not items which can be operated independent of each other for the purpose of the business of the assessee – No material brought on record to dislodge the said finding – Therefore, investment allowance was allowable on electrical installations, transformer and airconditioning plant.
Starlight Silk Mills (P) Ltd. , CIT v/s.
(2005) 199 CTR 718=(2006) 280 ITR 257= 192 Taxation 342 (Guj)

(4) Compound walls and fencing - Assessee not entitled to investment allowance on compund wall and fencing.
Gujarat State Fertilizer Co., CIT v/s.
(2002) 255 ITR 294 = 174 CTR 318 = 123 Taxman 651 (Guj)

(5) Investment allowance not allowable for office appliances – Meaning of "office appliance" – Co-operative Milk Producers' Union – Wireless equipment installed at factory, chilling centers and vehicles – Not an office appliance – Entitled to investment allowance.
Mehsana District Co-op. Milk Producers Union Ltd. v/s. CIT
(2002) 256 ITR 322 = 166 Taxation 339 = 121 Taxman 689= 175 CTR 612 (Guj)

(6) Hotel building - Not a plant- Not entitled to investment allowance -
Abad Hotels India (P) Ltd., CIT v/s.
(2001) 170 CTR 185= 251 ITR 204 (SC)

(7) Condition precedent – Manufacture or production of article – Data processing through computer – Amounts to production of article - Assessee providing computer services – Investment allowance available on cost of computer – Income Tax Act, 1961, s. 32A.

Professional Information Systems and Management, CIT v/s.
(2005) 274 ITR 242 = 146 Taxman 673 =
187 Taxation 586(Guj)

(8) Sale/use of plant and machinery as scrap – Plant and machinery was scrapped and scrap was utilized as raw material for manufacture of steel and the steel was subsequently sold – Neither machinery nor plant on which investment allowance had been granted was sold or otherwise transferred - What was sold was steel recovered from the scrap of plant and machinery - Hence, there is not question of application of s. 155(4A)(a) so as to withdraw the investment allowance.

Star Steel (P) Ltd., CIT v/s.
(2003) 184 CTR 521 = 264 ITR 236 = 177 Taxation 711 (Guj)

(9) During previous year relevant to assessment year under consideration assessee firm was dissolved and its assets and reserve credited under section 32A(4) were distributed amongst partners in specie – During assessment proceedings, ITO withdrew investment allowance granted to assessee on ground that on dissolution of firm, machineries and reserve were transferred to partners before 8 years within meaning of section 32A(5) – Where an assessee disables himself from continued exclusive user of plant or machinery for purpose of his business for period specified in section 32A(5), consequences specified in said section will follow, provided machinery or plant is 'otherwise transferred' - Where machinery or plant is not wholly used by assessee for purpose of business carried on by him for specified period and such user is given over to another, it can be stated that machinery or plant is otherwise transferred by assessee to another person – Therefore ITO was justified in withdrawing investment allowance granted to assessee.

Nipa Twisting Works, CIT v/s.
(2003) 130 Taxman 649 = 183 CTR 465 =263 ITR 697 =
177 Taxation 573 (Guj)

(g) WITHDRAWAL

(1) Withdrawal of allowance – Effect of sub section (5) of section 32A – Investment allowance granted to firm – Amount in investment allowance reserve utilized to purchase machinery – Amount in reserve credited to capital accounts of partners – Not relevant - Investment allowance could not be withdrawn - Income tax Act, 1961, s. 32A.

Shree Shantinath Silk Mills , CIT v/s
(2008) 303 ITR 58 = 205 Taxation 228(Guj)

(2) Foreign currency, rate of exchange, change in - Assessment year 1993-94 – Whether whenever there is fluctuation in foreign exchange rate in any previous year section 43A(1) comes into play – Held, yes – Assessee company claimed increased amount as investment allowance on account of increase in cost of plant and machinery due to exchange rate fluctuation – Assessing Officer disallowed claim, but on appeal, Tribunal allowed assessee's claim and said order was upheld by High Court in appeal – Since no factual details were furnished by assessee regarding alleged fluctuation in foreign exchange rate matter was to be remitted back to Tribunal to grant an opportunity to assessee to establish factual position relating to fluctuation in foreign exchange rate and thereafter to consider whether assessee was justified in claiming deduction in background of section 43A(1)as it stood then.

Gujarat Siddhi Cement Ltd., CIT v/s.
(2008)174 Taxman 598 = 220 CTR 217 = 307 ITR 393= 15 DTR 89= (2009)208 Taxation 363 (SC)

(3) No transfer of assets is involved when distribution of partnership assets takes place upon dissolution of firm – It is not the case of the Revenue that the machinery which was allotted to the partner was subsequently transferred within the statutory period – For invoking cl. (b) or (c) of sub-s (5) of s. 32A, the existence of the assessee who was granted investment allowance is a pre-requisite condition - This position is abundantly clear from s. 155(4A) wherein period of limitation is prescribed for all the three situations envisaged by cls. (a), (b) and (c), respectively - Thus, where the assessee itself does not exist, it is not possible to state that the assessee has not utilized the reserve within the

statutory period - Moreover, in the instant case, the reserve pertaining to asst. yr. 1977-78 was utilized when the assessee firm was in existence and the reserve relating to asst. yr. 1978-79 was utilized by the partner who took over the business – Thus, investment allowance could not be withdrawn.
Pratik Prints , CIT v/s.
(2005)193 CTR 361=144 Taxman 126=185 Taxation 327= 274 ITR 289 (Guj)

(4) Provisions of section 32A cast a duty on assessee to inform Assessing Officer about transfer of machinery or plant, on which investment allowance has been claimed or its carry forward has been claimed in return, if such transfer takes place at any time before expiry of eight years from end of previous year in which asset was acquired or installed.
Mamta Type Setting Works v/s. Asstt. CIT
(2004) 134 Taxman 34=187 CTR 151-180 Taxation 421=267 ITR 623(Guj)

(5) Utilization of investment allowance reserve – Assessee having utlised more amount than credited to investment reserve account for purchase of new machinery and plant before expiry of ten years mentioned in cl. © of s. 32A(5), there was no violation of said provisions by crediting the partners, capital account by the amount standing to the credit of the investment allowance reserve account so as to attract withdrawal of investment allowance under s. 32A(5) r/w s. 155(4A).
Shree Shantinath Silk Mills, CIT v/s.
(2008)215 CTR 434 = 205 Taxation 228 (Guj)

55. **JUDICIAL PRECEDENTS**

Binding nature - Decision of High Court appealed before the Supreme Court – Apex Court restored the matter to CIT(A) to decide the issue afresh and also to decide any consequential issue that may arise – Finding of the High Court on that question did not survive - Further, the judgment of the High Court when carried in appeal before the apex Court on very same issue would not have any independent existence thereafter in the light of principle of merger.
Baroda Peoples Co-operative Bank Ltd., CIT v/s.
(2005)198 CTR 1 =149 Taxman 509 =
(2006) 190 Taxation 108 =280 ITR 282 (Guj)

56. KAR VIVAD SAMADHAN SCHEME

(1) Immunity from prosecution - Offence under IPC – Immunity under the Kar Vivad Samadhan Scheme, 1998, is restricted to prosecution for offences covered under the direct tax enactments and indirect tax enactments and is available only to the tax payer who has made the declaration under s. 88 of Finance (No.2) Act, 1998 – Appellant was not entitled to immunity under s. 91 against prosecution in respect of offences allegedly committed under s. 120B r/w ss. 468, 471 of IPC and s 13(2) s. 13(1)(d) of Prevention of Corruption Act, on the basis of the declaration made under KVSS by a co-accused.
Natarajan M. v/s. State by Inspector of Police, Chennai
(2008) 217 CTR 1 = 7 DTR 294(SC)

(2) Whether Tax arrears - Order under s. 245D(4) in the case of firm – Order under s. 245D(4) in the case of firm cannot be equated with the order in the case of partner and AO having raised the demand against the petitioner (partner) only on 1st July, 1998 by framing an order under s. 155 pursuant to the order passed under s. 245D(4) in the case of the firm, there was no outstanding tax arrears before that date and therefore declaration made by the petitioner under KVSS could not be accepted.
Kailash T. Agrawal v/s. M.S Thanvi, Designated Authority
(2008) 218 CTR 291 = 10 DTR 10(Guj)

(3) Payment of tax arrears - Computation of time limit – For the purpose of payment of tax under s. 90(2) of Finance (No.2) Act, 1998 the period of 30 days is required to be computed from the date of receipt of the order of the Designated Authority and not from the date of the order itself.
Shreeji Shroff v/s. CIT
(2008) 218 CTR 296 = 207 Taxation 622 = 10 DTR 14(Guj)

(4) Pendency of appeal, revision etc - Belated filing of revision application – Declaration under KVSS made during the pendency of belated application under s. 264 filed by the assessee along with an application for condonation of delay has to be accepted -
Sheela Ashokkumar Goenka v/s. Designated Authority
(2008) 218 CTR 287 = 207 Taxation 625 = 10 DTR 1(Guj)

(5) Pendency of appeal, revision etc -Fling of revision application – It is not open to the Designated Authority under the KVSS to take recourse to either the provisions of s. 264(4)(c) or s. 249(4)(a) for holding that the revision application and the appeal, respectively, were not maintainable and, therefore, the Designated Authority could not reject the declaration filed by the petitioner on the grounds that the revision petition is infructuous as the order under s. 143(3) has been made subject of an appeal to the CIT(A) and that the appeal filed before the CIT(A) cannot be admitted in view of non compliance with the provisions of s. 249(4)(a) -

Deval Sales Tax Corporation v/s. CIT
(2008) 218 CTR 282 = 207 Taxation 456 = 10 DTR 5(Guj)

(6) Pendency of appeal, revision, etc - Belated filling of appeal before Commissioner of Central Excise (Appeals) – Tribunal having held that appeal filed by assessee before CCE(A) was within time, the same was to be treated as pending for purposes of KVSS and assessee's declaration could not be rejected on the ground that no appeal was pending.

Swan Mills Ltd. v/s. Union of India & Ors.
(2007) 211 CTR 78 = 165 Taxman 621 = (2008) 296 ITR 1 (SC)

(7) Sales Tax - Finality of Order – Applicability to sales tax laws of States – Provisions of Kar Vivad Samadhan Scheme, 1998, such as finality of orders under s. 90(3) and immunity under s. 91 thereof cannot be availed in proceedings under the sales tax of States.

Master Cables (P) Ltd. v/s. State of Kerala & Anr
(2007)210 CTR 86 = 162 Taxman 479 = 200 Taxation 246=
(2008) 296 ITR 8 (SC)

(8) Finality of order - Applicability to sales tax laws of States – Provisions of Kar Vivad Samadhan Scheme, 1998 such as finality of orders under s. 90(3) and immunity under s. 91 thereof cannot be availed in proceedings under the sales tax laws of States.

Master Cables (P) Ltd. v/s. State of Kerala & Anr
(2007) 210 CTR 86 = 162 Taxman 479 = 200 Taxation 246=
(2008) 296 ITR 8 (SC)

(9) Immunity from prosecution and imposition of penalty in certain cases - Public servants who can never file a declaration under scheme would not come within purview of Act – An immunity under section 91 is granted only in respect of offences purported to have been committed under direct tax enactment or indirect tax enactment, but by no stretch of imagination, same would be granted in respect of offences under Prevention of Corruption Act, 1988 – Held, yes.
Sashi Balasubramanian, State, CBI v/s.
(2006) 157 Taxman 261 = 206 CTR 587=
(2007) 8 RC 57= 289 ITR 8 (SC)

(10) Payment of tax arrear – Delay in payment - Order issued by the Designated Authority on 19th Feb., 1999, was received by the petitioner on 24th Feb., 1999 – Assuming that the 30 day period prescribed in s. 90(2) of the Finance (No. 2) Act, 1998, was to start from the date of receipt of said order, tax was payable on or before 26th March, 1999 – Petitioner having not paid the amount by the said date, Jt. Commr. Was justified in refusing to issue the certificate of declaration, there being no provision for condoning the delay in making payment of tax arrears.
Refund - Bar of s. 93 of Finance (No. 2) Act, 1998 – Respondent not issuing necessary certificate in favour of petitioner on the ground of delayed payment – As per s. 93, any amount paid pursuant to the declaration made under s. 88 by the declarant is not refundable under any circumstances - Hence, amount deposited by the petitioner in pursuance of declaration could not be refunded.
B & Brothers Engineering Works & Anr. V/s. Union of India.
(2005)197 CTR 306=(2006) 190 Taxation 779 =
282 ITR 474 =153 Taxman 405 (Guj)

(11) Declarations for composition – Arrears of tax – Liability to pay interest on arrears of tax arises only after determination by designated authority - Rejection of declaration – Writ – Declaration held valid – Direction for payment of interest – Set aside – Finance (No.2) Act, 1998, ss. 87(f), 90, 92.
Shatrusailya Digvijaysingh Jadeja v/s. CIT
(2005) 277 ITR 449 = 197 CTR 596 = 147 Taxman 563=
(2006) 190 Taxation 9 (SC)

(12) Pendency of appeal, revision etc. – Belated filing of revision applications – Although there is a difference between appeals revisions and reference under the IT Act, those differences are obliterated and appeals, revisions and references are put on par under s. 95(1)(c) of Finance (No.2) Act, 1998 – It could not be said that the revisions were not "pending" in terms of s. 95(i)(c) because they were time barred – Therefore, orders of the designated authority rejecting the declarations are quashed.
Shatrusailya Digvijaysingh Jadeja, CIT v/s.
(2005)197 CTR 590 = 147 Taxman 566= 277 ITR 435=
190 Taxation 3 = (2006) 190 Taxation 3(SC)

(13) Scope of – "Tax arrears" – Modified demand after March, 31, 1998 – Whether as a result of concession by assessee or otherwise not relevant – No requirement for modification to be completed before March, 31, 1998 – Finance (N0.2) Act, 1998, ss. 87(f), (m) (i), 88, 89, 95(i)(c) .
Renuka Datta (Dr.) (Mrs.) v/s. CIT
(2003)259 ITR 258 =179 CTR 218 =126 Taxman 427 =
173 Taxation 51(SC)

(14) Condition – Pendency of appeal, etc. – Designated authority – No power to question possible outcome of appeal – High Court – No power to hold appeal etc.to be sham, ineffective or infructuous – Finance (No.2) Act,1998, s. 95(i)(c).
Renuka Datta (Dr.) (Mrs.) v/s. CIT
(2003)259 ITR 258= 179 CTR 218 = 126 Taxman 427 =
173 Taxation 51 (SC)

(15) Declaration filed within time – Revision application preferred to commissioner after long delay with application for condonation of delay – Delay not condoned - Revision application not pending on date of declaration – Declaration not maintainable - Finance (No. 2) Act, 1998, ss. 87(m), 88, 95(i)(c) - Income Tax Act, 1961, s. 264.
Computwel Systems P. Ltd. V/s. W. Hasan (2003) 260 ITR 86 =
184 CTR 92 = 174 Taxation 566 (SC)
[but see it case No. 16 above which takes contrary views.]

(16) Initiation and continuation of prosecution proceedings after settlement under Scheme – Two machines were imported by GCS on the basis of the exemption certificate issued in the name of GCRI, an institution funded by GCS – Customs authority denied the concessional duty benefit and demanded duty under s. 28 of the Customs Act, 1962 – Availing the benefit of Kar Vivad Samadhan Scheme , GCS deposited the stipulated amount and withdrew the civil appeal which was pending at that time against the order of CEGAT – Designated Authority under the Scheme issued the certificate to declarant certifying the receipt of payment towards full and final settlement of tax arrears and granting immunity from prosecution for any offence under the Customs Act in respect of matters covered in the aforesaid declaration – Thus GCS acquired immunity from any criminal proceedings pursuant to the certificate and the complaint filed against the office bearers of GCS for the alleged offences under s. 120B r/w s. 420 of IPC is not sustainable - Further, no prosecution was pending nor the appellants stood convicted for an offence falling in Chapter IX or XVII of the IPC on the date they submitted their declaration – Otherwise, they would not have been eligible to seek benefit under the Scheme - Once the settlement is brought about criminal proceedings cannot be initiated and continued for such an offence in relation to the matter covered under the declaration.
Hira Lal Hari Lal Bhagwati v/s.Central Bureau of Investigation
(2003) 182 CTR 1 = 129 Taxman 989 = 262 ITR 466=
176 Taxation 231 (SC)

(17) Revision application under section 264 had been filed by petitioner assessee but Commissioner did not condone delay in filing such application – Declaration under section 88 was also filed but same was not entertained as according to Commissioner there was no revision application pending because delay had not been condoned – On writ, High Court upheld Commissioner's order – Revision petition was not pending when application under section 88 had been filed – Revision petition itself was never entertained as delay was not condoned – High Court was justified .
Computwel System (P) Ltd. V/s. W. Hasan
(2003)129 Taxman 67 = 184 CTR 92 =174 Taxation 566 =
260 ITR 86 (SC)
[but see contrary view taken in case No. 16 above)

(18) Assessment years 1982-93 to 1988-89 and 1991-92 - Petitioner was a partner in few firms – When Settlement Commission passed order under section 245D(4) in case of those firms, share income of petitioner increased – When Assessing Officer gave consequential effect by order under section 155, petitioner preferred appeals under section 246A and also filed declaration under section 89 to avail benefit of KVS Scheme – Designated authority rejected declaration in view of provisions of section 95(i)(b) and also held appeal under section 246A as not valid – Petitioner contended that firm and partners were two different entities and order passed by Settlement Commission in case of a firm could not automatically lead to conclusion that said order was passed in case of partner also – In instant case section 155(1) was required to be read with section 95(i)(b) and if firm was prohibited from approaching designated authority for settlement of its tax disputes as those disputes were already resolved by Settlement Commission, partner was equally prohibited from approaching designated authority qua share income from firm – Appeal/revision filed by petitioner against order under section 155 was rightly considered as not valid appeal or revision in eyes of law, as there was no grievance as such against that order and frivolous appeal/revision had been filed only for purpose of availing benefit under KVS Scheme – Designated authority was, therefore, certainly justified in rejecting impugned declaration.
Manibhai Prabhudas Patel v/s. Koolwal (L.K) Designated Authority
(2003)133 Taxman 247 = (2002) 177 CTR 386 =
170 Taxation 662 =258 ITR 308 (Guj)

(19) Order of adjudication – If amount determined and assessee called upon to pay - Demand made earlier confirmed – Amount to adjudication – Kar Vivad Samadhan Scheme, 1998 – No appeal, reference, writ petition or application pending - Declaration under scheme – Rejection - Proper – Finance (No. 2) Act, 1988, s. 95 – Central Excise Act, 1944, ss. 11A(2), 35 - Central Excise Rules, 1944, R.213.
Laiya Dyeing and Bleaching Works v/s. Union of India.
(2003) 263 ITR 763 = 185 CTR 329(SC)

(20) Order made by designated - Authority - Effect - Full and final settlement of tax arrears – Declaration by designated authority determining arrears and payment by applicant of arrears - Immunity springs into effect – Assessing Officer – No jurisdiction to issue notice for assessment thereafter – Only exception – Where material particulars furnished in declaration found to be false.
Killick Nixon Ltd. v/s. Deputy CIT
(2002) 258 ITR 627 = 178 CTR 387 = 125 Taxman 1055 =
(2003) 172 Taxation 373 (SC)

Effect of removal of difficulties order – Order effective from 1-9-98 – Settlement of dues by company under Kar Vivad Samadhan Scheme – Imposition of penalties on directors on November 30, 1998 – Not valid – Kar Vivad Samadhan Scheme (Removal of Difficulties) order, 1998.
Radheshyam Tilochand Agarwal Saraogi v/s. Union of India
(2002) 257 ITR 249 = 175 CTR 322 = 124 Taxman 872(Guj)

(21) Condition precedent for filing declaration - Tax arrears – Relevant date – Date of declaration – Subsequent wiping out by rectification order – No effect – Benefit under scheme cannot be denied.
Shaily Engineering Plastic Ltd., CIT v/s.
(2002) 258 ITR 437 = (2003) 179 CTR 14 =126 Taxman 177 (SC)

(22) Maintainablity of declaration – Order under s. 245D(4) in the case of firm – Since the firm is prohibited from approaching the designated authority for settlement of its tax disputes in view of bar of s. 95(i)(b) of the Finance (No. 2) Act, 1998 the partners are equally prohibited from approaching the designated authority qua thee share income from the said firm – Further, the appeal/revision filed by the petitioners against the order under s. 155 cannot be considered to be a valid appeal or revision in the eye of law as there was no grievance as such against that order – Designated authority justified in rejecting the impugned declaration.
Manibhai Prabhudas Patel & Anr. V/s. L.K Koolwal
Designated Authority
(2002) 177 CTR 386 = 170 Taxation 662 = 258 ITR 308=
(2003)133 Taxman 247 (Guj)

(23) Pendency of appeal, revision etc. – Belated filing of revision applications – Sec.95(i)(c) of the Finance (No.2) Act, 1998, uses only the word "pendency" as far as revisions are concerned and not the expression "admitted and pending" which is used for appeals – Therefore, the submission that unless the delay in filing the revision application is condoned, it cannot be said that the revision application was pending has no force – Further, submission that since the appeals filed by the petitioner for the relevant assessment years were earlier dismissed for non deposit of tax, the revisions were not maintainable by virtue of the provisions of s. 264(4) also cannot be sustained - Contention of the Revenue that pendency of the revision, etc. on the date of the commencement of the scheme is also a condition precedent for obtaining the benefit of the scheme cannot be accepted since this involves addition of the words "as on the date of commencement of the scheme as also" at two places in s. 95(i)(c) – Apart from that Revenue had accepted the declarations of the assessee where belated appeals were filed after the date of commencement of the scheme – No reason to infer a casus omissus and supply the same – Designated Authority directed to accept the petitioner's declarations under the scheme which were filed when the revision applications were pending.

Shatrushailya Digvijaysingh Jadeja v/s. CIT
(2002) 177 CTR 508 =(2003) 172 Taxation 16 =259 ITR 149= 132 Taxman 644(Guj)

(24) Section 91 of the Finance (No.2) Act, 1998, read with KVSS (Removal of Difficulties) Order – Kar Vivad Samadhan Scheme – One show cause notice was issued by excise authorities on company and directors/officers alleging evasion of excise duty - Subsequently, show cause notice was adjudicated requiring company to pay tax arrears and penalty – Further, each director/officer was required to pay personal penalty - When appeal was pending before Tribunal, KVSS 1998 was announced – Company and directors/officers filed separate declarations - Commissioner determined settlement assessment – Company paid amount so determined – Directors/ officers also paid amounts determined for them, which they claimed to have been paid under protest – Subsequently, in writ, directors/officers claimed that as company had settled issue under KVSS, directors/officers would be entitled to refund of amount personally paid – Whether matter covered in declaration by company was 'tax arrears' of company which did not cover arrears

of directors/officers and, therefore, directors/officers would get no immunity under section 91 on a settlement by company – Held, yes – Whether a settlement by main declarant was to operate as full and final settlement in respect of all other persons on whom show cause notice was issued in respect of same matter – Held, yes – Whether object of Kar Vivad Samadhan Scheme (Removal of Difficulties) Order is to give benefit of a settlement by main party (i.e company in instant case) to all other co-notices and that being object a classification restricting benefit only to cases where show cause notice is pending adjusdication, would be unreasonable – Held, yes - Whether, therefore, words "pending adjudication" cannot be read to exclude cases where proceedings are still pending in appeal – Held, yes – Whether since all assessees paid amounts in pursuance of declaration made by them under section 88, even if they had paid amounts under protest, they were not entitled to refund by virtue of section 93 which prohibited refund under any circumstances – Held, yes.

Onar S. Kanwar, U O I v/s.

(2002) 125 Taxman 121 = 258 ITR 761= (2003)174 Taxation 213(SC)

(25) Firm - Partner - Concession to firm and partners - Concession applies only where firm and partners have tax arrears - Partner paying taxes - Subsequent declaration and payment of taxes under Kar Vivad Samadhan Scheme by firm - Partner not entitled to refund of tax.

Shankerlal Nebhumal Uttamchandani v/s. CIT

(2001) 251 ITR 876 = 165 TAXATION 67 = 171 CTR 203(GUJ)

(26) Maintainability of declaration - Scope of Kar Vivad Samadhan Scheme (Removal of Difficulties) Order, 1998 - Para 2 of the Order is intended to give a restrictive meaning to the expression "civil proceedings" as to include only proceedings at the demand notice or show cause notice stage - It cannot be understood to mean proceedings against the co- notice pending even at the appellate stage - Central Government could never have intended that all the co-noticees who had submitted declaration and paid 50 per cent of the tax arrears would be totally exempted from tax, on settlement of case/cases against the main noticee - Order of the Central Government has to be interpreted reasonably on its plain language and in consonance with the Scheme under which it has been issued - Doctrine of reading down cannot be applied to add and read additional words into a statutory order - Co-noticees

against whom the penalties have been quantified at the appellate stage and who have made declaration and payment constitute a class separate from those co-noticees who are facing proceedings at the show-cause notice stage - The two classes can reasonably be treated differently - Such classification is not unreasonable or discriminatory.

Omkar S. Kanwar v/s. Union of India
(2001) 170 CTR 354= 259 ITR 761 = 125 Taxman 121(SC)

57 . **KNOW – HOW**

Section 35AB of the Income Tax Act, 1961 - Technical know how expenditure - Assessment year 1981-82 - Assessee had paid an amount of Rs. 7,16,654 being payment of third and last instalment in pursuance of an agreement with a foreign company for providing technical know how, drawings, designs documents etc. which was entered into n 13-12-1978 and was approved by Government of india on 29-3-1979 - Assessee had also paid a sum of Rs. 1,12,30,810 as fees for design, calculations, manufacturing drawings, specifications, etc. to a foreign collaborator as per agreement dated 6-8-1980 - This payament was claimed for reason that assessee had acquired know how etc. on behalf of another company which paid for it to assessee company which in turn paid fees to foreign collaborator - Know how was never utilised by assessee - Both payments were claimed by the assessee to be revenue expenditure - In view of decision of Gujarat High Court in CIT v/s. Suhrid Geigy Ltd. (1996) 220 ITR 153, expenditure in question was rightly held allowable by Tribunal as revenue expenditure - Held, yes -

Elecon Engg. Co. Ltd, CIT v/s.
(2001)117 TAXMAN 442(GUJ)

58. LIMITATION FOR ASSESSMENT

(1) Draft assessment order - Extended period of limitation where draft assessment order is forwarded to inspecting Assistant Commissioner – Inspecting Assistant Commissioner exercising jurisdiction to assess by virtue of order conferring powers of Assessing Officer on him – Extended period of limitation not available-Income Tax Act,1961, ss.125A,144B, 153.

Saurashtra Cement and Chemical Industries Ltd., CIT v/s.
(2005)274 ITR 327 = 195 CTR 33= 187 Taxation 599(Guj)

(2) A mandate on judicial forum is that limitation aspect even if not raised, it has to consider and apply.
British India Corporation Ltd., Union of India v/s.
(2004)268 ITR 481= 190 CTR 385= 183 Taxation 1= 140 Taxman 357 (SC)

(3) Time limit for completion of - For assessment year 1984-85, return was due to be filed on 30-6-1984 by assessee – In meanwhile search was conducted and Assessing Officer by order dated 1-9-1984, directed assessee to get accounts audited under section 142(2A) – Assessee received report on 18-8-1987 – Assessing Officer completed assessment on 23-9-1987 – On appeal, Tribunal held that assessment should have been completed on or before 31-3-1987 (date ending two years from end of relevant assessment year), and since it was completed only on 23-9-1987, it was barred by limitation, and reference under section 142(2A) was unauthorized as there was no pending proceeding in which such order could be made by Assessing Officer and, consequently, department could not get benefit of extended time under proviso to section 153(1) – Since assessee paid advance tax for relevant assessment year on basis of original estimate and had subsequently filed a revised estimate in December 1983 and had paid the balance amount of tax on 5-12-1983, it could not be said that no proceeding was pending before Assessing Officer as on date of order under section 142(2A) – In view of Explanation 1(iii) to section 153(3), period commencing from date on which Assessing Officer directed assessee to get its accounts audited under section 142(2A) and ending with date on which assessee furnished report, is liable to be excluded – Therefore, if in instant case abovesaid period was excluded , assessment completed on 23-9-1987 was within time provided in Explanation 1(iii) of section 153(3).
N.C John & Sons Ltd. v/s. CIT
(2003) 128 Taxman 857 =183 CTR 32= 176 Taxation 471 =
264 ITR 645 (SC)

(4) Applicability of s. 153(1)(c) – Assessee filed return for asst. yr. 1973-74 on 14th Aug, 1973 on the basis of general extension granted by Circular No. 113, dt. 20th June, 1973 – Same has to be treated as a return under s. 139(1) – Accordingly, revised return filed thereafter by the assessee is necessarily to be considered as a return under s. 139(5) - Provisions of s. 153(1)(c) clearly attracted – Since the assessment was made within one year from the end of the month in which the revised return was filed, it was neither invalid nor non est nor barred by limitation.
Hargovind Damji v/s. CIT
(2002) 177 CTR 20 = 123 Taxman 949 =(2003)259 ITR 617 (Guj)

59. LOSS – CARRY FORWARD

(1) Belated filing of return - In the absence of communication of the factum of rejection of assessee's application for extension of time for filing the return, the order passed by the AO refusing to extend time was ineffective and therefore, claim of carry forward of assessed loss could not be denied on the ground that the return was filed late -
Dhatu Sanskar (P) Ltd., CIT v/s.
(2007)209 CTR 39=292 ITR 135=209 CTR 39 =
199 Taxation 499 =163 Taxman 684(Guj)

(2) Loss - Carry forward and set off on succession by inheritance – Assessment -Year 1965 – 66 to 1971-72 – Legal heirs of deceased proprietor entered into partnership and carried on same business in same premises under same trade name - There was succession by inheritance as contemplated in section 78(2) and assessee firm was entitled to carry forward and set off deceased's business loss against its income for subsequent years.
Madhukant M. Mehta, CIT v/s.
(2002) 124 Taxman 130(SC)

(3) Application for extension of time to file return – No reply from Revenue – Presumption that time had been extended - Assessee entitled to carry forward and set off loss -
Swastik Sanitary Works Ltd. , CIT v/s.
(2006)286 ITR 544 =205 CTR 517(2007)197 Taxation 324 (Guj)

(4) Admittedly notice under s. 143(2) was issued beyond the statutory period of limitation prescribed under proviso to s. 142(2) i.e one year from the end of the month of filing of return - CIT(A) and the

Tribunal were correct in holding that the assessment was void ab initio.

Mahi Valley Hotels & Resorts, Dy. CIT v/s.
(2006) 201 CTR 308 = 193 Taxation 418 = 287 ITR 360 (Guj)

(5) Return filed within time for which extension was sought - A return of loss has to be furnished within the time allowed under sub. S. (1) of s. 139 or within such further time which, the AO may, in his discretion, allow - Due date for filing the return is either the one stated under cl. (a) or cl. (b) of sub.s (1) of s. 139 or the extended date application was made in time before the AO under the proviso to sub.s (1) of s. 139 – Same not dealt with by the AO – Assessee justified in presuming that the application has been granted in the absence of any order granting or rejecting the same – Return of loss was filed within the period for which extension was sought - Benefit of carry forward of business loss could not be denied – Tribunal deprecated for disposing of the appeal cursorily and in a casual manner and contrary to the settled legal position.

Mehsana Ice & Cold Storage (P) Ltd. v/s. CIT
(2005)195 CTR 571= 275 ITR 601=146 Taxman 454 =189 Taxation 744(Guj)

(6) Carrying on of same business – Assessee sold its entire textile unit and subsequently started activity of purchasing gray cloth, getting it processed and then selling the same in the market - Finding recorded by the Tribunal that there was common management and common control in respect of the said business activities and that there was no difference in the business carried on by the assessee in two different accounting periods considering the unity of control - Thus, Tribunal was justified in holding that the new business run by the assessee was the same business and the assessee was entitled to carry forward and set off the accumulated losses.

Amarsinghji Mills Ltd., CIT v/s.
(2006) 201 CTR 265 = 192 Taxation 313 = 286 ITR 129= 156 Taxman 429 (Guj)

(7) Condition - Loss to be determined pursuant to return filed under section 139(3) – Best judgment assessment - Assessee filing return with application of cancellation – Cancellation of best judgment assessment on ground that assessee was prevented by sufficient cause from making a return - Assessing Officer has to accept return - Return to be treated as one filed under section 139 for purposes of carry forward and set off of loss.
H M T Bearings Ltd., CIT v/s.
(2003) 263 ITR 7 = 132 Taxman 600 = 185 CTR 35 =
(2004) 179 Taxation 1 (SC)

(a) **GENERAL**

Allowable as – Exercising power under section 263, Commissioner directed Assessing Officer to disallow assessee's claim of business loss on ground that no business activity was carried on by assessee in year under consideration as there was no computation of income or loss under head 'Profits and gains of business or profession' and profit and loss account did not show any business activity – It is not necessary that for every year, an assessee must have earned income from business or profession so as to say that he is carrying on business activities – Tribunal observed that assessee had past and subsequent records to show that he was carrying on consultancy and commission business and also derived agricultural income – Tribunal was, therefore, right, in law and on facts, in setting aside order passed by Commissioner under section 263.
Prayashvin B. Patel, CIT v/s.
(2003) 132 Taxman 677(Guj)

(b) **SPECULATIVE LOSS**

(1) High Court – Application for reference – Speculative loss – Whether covered by exception in clause (c) of proviso to section 43(5) – Onus on Revenue – No material to show assessee not covered by exception – Supreme Court – Appeal by special leave – Dismissed for other reasons – Income Tax Act, 1961, ss. 43(5), prov. Cl. (c), 256(2).
Sharwan Kumar Agarwal, CIT v/s.
(2007) 292 ITR 3 = 210 CTR 616 = 163 Taxman 187 (SC)

(2) Deeming provision in UTI Act that UTI deemed to be "company" and income distributed to unitholder "dividend" for purposes of Income Tax – Does not amount to units being, "shares" – Purchase and sale of units – Not speculation – Loss on purchase and sale of units is business loss.
Apollo Tyres Ltd. v/s. CIT
(2002) 255 ITR 273 = 174 CTR 521 = 122 Taxman 562 =
169 Taxation 522(SC)

(c) <u>TRADING LOSS</u>

(1) Business loss – Fraud by foreign supplier – Assessee entered into a contract for importing dates from a Dubai party – Said party presented false shipping documents and collected money without loading and dispatching the agreed quantity of dates – Tribunal has found evidence that the assessee had made attempt to recover the money but failed – Two post dated cheques received through an intermediary were also not honoured – In the face of correspondence and telegrams on record the assessee has prima facie established that it has incurred loss – In view of the findings recorded by the Tribunal, it was right in holding that the assessee is entitled to deduction of impugned amount as business loss – Entire issue is based on facts and appreciation of evidence and no question of law is involved.
Mahendra N. Shah, CIT v/s.
(2006)200 CTR 18 = 280 ITR 462 = 192 Taxation 203=
155 Taxman 49 (Guj)

(2) Business loss - Communication charges or discount towards share call moneys – Amount was owed to the assessee company originally by its holding company KPPL towards call money which was later assigned to SCPL, another wholly owned subsidiary of KPPL – Assessee company was not carrying on any business of holding of investments – It was a debt due to the assessee on capital account – Therefore, commutation of debt by way of discount allowed by assessee was not deductible under s. 28 or s. 37.
Kailash Investmens (P) Ltd. v/s. CIT v/s.
(2006)200 CTR 21= 281 ITR 92= 192 Taxation 583 (Guj)

(3) Loss of stock in trade – Is a business loss – Medical practitioner – Heroin forming part of stock in trade of assessee seized – Assessee entitled to deduct value of heroin seized from gross income as business loss – That possession of heroin is an offence irrelevant – Provision in s. 37, expl. relating to allowance of business expenditure does not govern deduction of business loss.
Quereshi (Dr.) (T.A) v/s. CIT
(2006)287 ITR 547= 206 CTR 489 = 157 Taxman 514 =
(2007) 196 Taxation 740 (SC)

60. <u>MERGER</u>

(1) Doctrine of merger - Scope of
Alagendran Finance Ltd. , CIT v/s.
(2007) 293 ITR 1 = 211 CTR 69 = 162 Taxman 465
= 201 Taxation 379 (SC)

(2) Scope of – Supreme Court – Mere dismissal of appeal as not properly constituted as necessary party not impleaded - Merger only of final order of High Court and not reasoning - High Court – Constitution of full bench to consider that decision of High Court – Full bench can consider correctness – Constitution of India, art. 141.
Shamugavel Nadar (S) v/s State of Tamil Nadu
(2003)263 ITR 658 = 185 CTR 593 =(2004) 179 Taxation 409 (SC)

(3) Merger of Orders - During assessment proceedings, assessee was allowed weighted deduction under section 35B in respect of 3 items – Deduction was disallowed in respect of "export freight" - Assessee filed appeal against disallowance of weighted deduction in respect of "export freight" – On appeal, Commissioner (Appeals) confirmed ITO's order – Later on, Commissioner passed an order under section 263 directing ITO to withdraw deduction allowed by him in respect of 3 items – Whether there was merger of Assessing Officer's order in appellate order in respect of three items so as bar Commissioner's revisionary jurisdiction under section 263 – Held, no
Panna Knitting Industries, CIT v/s.
(2002) 123 Taxman 216 (Guj)

61. NATIONAL TAX TRIBUNAL ACT

Appearance before National Tax Tribunal -Petitioner challenged constitutional validity provisions of Act including section 13 which, inter alia, permits any person duly authorized to appear before National Tax Tribunal – Union of India filed an affidavit in this regard, stating that Government would make appropriate amendments in Act to ensure that only lawyers, chartered accountants and party-in-person are permitted to appear before amendments in section 13, as stated in affidavit, or such other amendments which Government may want to make in Act are in fact made–Held, yes.

Writ petitions challenging validity of provisions - Appropriate changes proposed to be made in Act – Supreme Court - Petitions to be heard after such amendments made – National Tax Tribunal Act, 2005.,

Sandeep Goyal v/s. Union of India
(2008) 298 ITR 10 = 204 Taxation 388 =
(2007) 160 Taxman 171 (SC)

62. NATURAL JUSTICE, PRINCIPLES OF

(1) Licence granted - Deprivation of right thereunder without hearing – Violation of natural justice -
Baraka Overseas Traders v/s.Director General of Foreign Trade.
(2007) 8 RC 205(SC)

(2) Natural Justice – Conduct of Authorities - Comment on irrational conduct of authorities .
Amtek India Ltd., Assistant Commissioner,
Anti-evasion, Commercial Taxes v/s.
(2007)8 RC 360(SC)

(3) Principles of – Scope of
Sahara India (Firm) v/s. CWT
(2008)300 ITR 403 = 169 Taxman 328 = 216 CTR 303 =
206 Taxation 180 = 7 DTR 27(SC)

(4) Natural Justice-Principles of -Judicial bias– No one shall be judge in his own cause –Principles may be excluded by statute-Existence of judicial bias has to be established as a matter of fact.
Vipan Kumar Jain, Union of India v/s.
(2003) 260 ITR 1 = 181 CTR 24 = 129 Taxman 59 =
174 Taxation 781 (SC)

63 NEW INDUSTRIAL UNDERTAKING

(a) COMPUTATION OF CAPITAL

(1) Liabilities in respect of new industrial undertaking deductible from aggregate value of assets of new industrial undertaking - Circular No. 380 dated April 10, 1984 – Income Tax Act, 1961, s. 80J.
Cadila Chemicals P. Ltd. , CIT v/s.
(2005) 278 ITR 633 = 199 CTR 507 (Guj)

(2) Subsidy for establishing industry in backward area – Should not be deducted from the cost of plant and machinery for computation of capital employed for the purpose of deduction under s. 80J.
Cadila Chemicals (P) Ltd., CIT v/s.
(2003)179 CTR 37 = 259 ITR 692 (Guj)

(3) Capital computation – Plant and machinery under erection and building under construction – Cost of plant and machinery under erection as also the cost of building under construction was to be included in the capital for the purpose of deduction under s. 80J.
S.G Chemicals & Pharmaceuticals Ltd., CIT v/s.
(2002) 175 CTR 618 = 169 Taxation 679 = 258 ITR 109 (Guj)

(4) Capital computation – Actual Cost – Plant and machinery received under loan cum grant scheme from Indian Dairy Corporation – Government of Gujarat passed a resolution to the effect that 30 per cent of the value thereof was to be treated as grant – Amount received by way of grant could not be taken into account for considering capital employed by the assessee for the purpose of s. 80J.
Mehsana District Co-op. Milk Produceres Union Ltd. v/s. CIT
(2002) 177 CTR 333 = 258 ITR 780 (Guj)

(5) Capital Computation – Work in progress – Includible in computation of capital employed for granting relief.
Mehsana District Co-op. Milk Produceres Union Ltd. v/s. CIT
(2002) 175 CTR 612 (Guj)

(b) **COMPUTATION OF PROFITS**

(1) Special deduction not confined to income from new units – Special deduction to be given from total income of assessee – s. 80J.
Panna Knitting Industries, CIT v/s.
(2002) 257 ITR 195 = 175 CTR 616 = 123 Taxman 105 = 170 Taxman 671 (Guj)

(2) Section 80J, read with section 80HH, of the Income Tax Act, 1961 - Deductions - Profits and gains of newly established industrial undertakings, etc. –Assessment year 1981-82 - Whether deductions under sections 80J and 80HH are to be allowed in full without reducing from deduction under section 80J amount of deduction under section 80HH - Held, yes -
Sidhpur Isabgul Processing Co. Ltd.,CIT v/s.
(2001)119 TAXMAN 245=171 CTR 106=252 ITR 777=166 Taxation 273(GUJ)

(c) Backward Area

(1) New industrial undertaking in backward areas - Special Deduction - Tyre retreading does not amount to production - Not entitled to relief - Income Tax Act, 1961, ss. 80HH, 80J.
Tamil Nadu State Transport Corpn Ltd. v/s.CIT
(2001)252 ITR 883(SC)

(2) Special deduction - Computation of capital exployed - Capital employed in machinery purchased but not installed - To be taken into account - Income Tax Act, 1961, s. 80J - Income Tax Rules, 1962, R. 19A(2).
Cibatul Ltd. , CIT v/s.
(2001) 252 ITR 336(SC)

(d) **MANUFACTURE**

(1) Mining activity – Extraction and processing of granite amounts to "production" within the meaning of s. 80-I – Consequently, assessee is entitled to deduction under s. 80-I in respect of mining activity.
Sesa Goa Ltd. , CIT v/s.
(2004) 192 CTR 577 = 271 ITR 331= (2005) 142 Taxman 16 = 185 Taxation 1 (SC)

(2) Business of ship breaking – There is nothing whatsoever in the process of ship breaking activity which can be termed as manufacture or production of any article or thing – Dismantled material already exists as a component of old ship - Neither the process of extracting steel plates from nor the process of cutting extracted steel plates for convenient disposal is an activity of manufacture or production of such material - Merely because ship breaking is considered as an industry, it would not be an industry engaged in manufacture or production of any article or thing – Ship breaking activities do not result in bringing into existence any new article or thing - Assessee engaged in the business of ship breaking was not entitled to deduction under ss. 80HH and 80-I.- Appeal pending in Supreme Court – The decision is now superceded with effect from 1-4-1991 by Taxation Laws (amendment) ordinance 2003 by adding "business of ship breaking" in Expl. 1 after cl. (i)
Vijay Ship Breaking Corpn. , CIT v/s.
(2003)181CTR 134 = 261 ITR 113 = 129 Taxman 120 = 175 Taxation 233 (Guj)

(3) Conversion of chicory root into chicory powder by roasting and powdering –
Not manufacture – Assessee not entitled to special deductions.
Sacs Eagles Chicory v/s. CIT
(2002) 255 ITR 178 = 175 CTR 201 = 123 Taxman 221 (SC)

(4) Investment allowance & s. 80J – Manufacture or production – Business of bleaching, dyeing, printing and processing of grey cloth – Process carried out by the assessee amounts to manufacturing activity - Assessee entitled to investment allowance.
Kashiram Textiles Mills (P) Ltd. , CIT v/s.
(2002) 177 CTR 395 = 171 Taxation 280 (Guj)

(5) Amount received for job work, empty soda ash bardans, empty barrels and plastic wast – Qualify for deduction.
Harjivandas Juthabhai Zaveri & Anr. , Dy. CIT
(2002) 258 ITR 785 = (2003) 132 Taxman 923 (Guj)

(6) Computation of period of four assessment years u/s. 80J - Change of previous year - Assessee started its production in the year 1973-74 - There was no previous year for asst. yr. 1977-78 on account of change in previous year which was permitted by the ITO - Income for that year was subjected to tax in the asst. yr. 1978-79 - Assessee not entitled to relief under s. 80J in the asst. yr. 1978-79 - Whenever assessee is permitted to get relief for a specified number of consecutive assessment years, the assessment years should be taken in the natural sequence - Irrespective of the change of previous year the period of four years will have to be reckoned on the basis of definition of "assessment year" as contained in s.2(9)-
Nufoam Industries , CIT v/s.
(2001) 171 CTR 171 = 252 ITR 697 = 128 Taxman 571
= (2003) 128 Taxman 571 (GUJ)

(e) **PROCESSING**

(1) Manufacture or processing– Manufacture of bidies - Where the raw material is subjected to a process or processes of such a nature that it cannot be termed to be the same as the end product, and the article produced is regarded by the trade as a new and distinct article having an identity of its own and an independent market, the activity amounts to manufacture or production – Tendu leaves and tobacco which are used as inputs do not retain independent identity after bidies are rolled - Commercially, the final product is known as a distinct commodity and has a separate market – It is immaterial that the assessee gets the work done through contract workers– Therefore, assessee was entitled to reliefs under ss. 80HH and 80-I – Further, while ascertaining the monetary limit down for the purpose of determining whether a unit is a small scale industrial undertaking eligible for relief under s. 80-I, only the actual cost of plant and machinery relatable to the industrial undertaking has to be adopted and not all the assets of the business as a whole.
Prabhudas Kishordas Tobacco, CIT v/s.
(2006) 201 CTR 312 = 193 Taxation 442= 282 ITR 568-
154 Taxman 404 (Guj)

(2) Reduced rate of electricity duty – Industry engaged in processing of goods – Business of cold storage – Not an industry engaged in processing of goods – Rajasthan Electricity (Duty) Act, 1962 – Notification dated November 1, 1965.
Rajasthan Ice and Cold Storage, State of Rajasthan v/s.
(2003) 264 ITR 158=(2004) 134 Taxman 259=
178 Taxation 732(SC)

(f) **NEW INDUSTRIAL UNDERTAKING – (G) WHEN AVAILABLE – S. 80J**

(1) Condition precedent under s. 80J(4)(iv) – Employment of 20 or more workers – CIT(A) and the Tribunal have given concurrent finding that the assessee is employing more than 20 workers in its processing unit as envisaged under s. 80J(4)(iv) – Assessee entitled to relief under s. 80J.
Gordhanbhai Jethabhai Tobacco Industries (P) Ltd., CIT v/s.
(2002) 177 CTR 339 = 123 Taxman 825 = 171 Taxation 296 =
258 ITR 727(Guj)

(2) Vis-a-vis expansion of existing unit – Exemption under s. 3(2)(vii)(b) of Bombay Electricity Duty Act, 1958 – Only if a unit can be described as a new industrial undertaking it would qualify for the exemption – Cases of expansion of existing units, irrespective of extent of expansion do not qualify for being called a new industrial undertaking within the Act – Respondent admittedly using its existing crushers, cranes, raw mills, packing machines and old cement mills to complete the process of manufacture of cement in the new unit – So called new unit/undertaking is thus not totally independent of the assets of the existing unit – Physical identity with the old unit is preserved and the new unit is an expansion of the existing undertaking – Respondent, therefore not entitled to exemption.
Saurashtra Cement & Chemical Industries, State of Gujarat v/s.
(2003)180 CTR 81 = 260 ITR 181 = 175 Taxation 647 (SC)

(g) **CARRY FORWARD**

Carry forward of deficiency - Condition precedent - Assessee is entitled to avail of the benefit of carry forward and set off of deficiency in the year of profit even in the absence of computation there of in the year of loss – s. 80J.
Nufoam Industries , CIT v/s.
(2001) 171 CTR 171 = 252 ITR 697= (2003) 128 Taxman 571 (GUJ)

Also see under heading "Deductions s. 80I".

64. NON RESIDENT

BUSINESS CONNECTION

(1) Accrual – Test is of "business connection" and not "permanent establishment" – "Business connection" under Income Tax Act different from "permanent establishment" under double taxation avoidance law – Income Tax Act, 1961, s. 9(1)(vii) – Convention for Avoidance of Double Taxation and the Prevention Fiscal Evasion with Respect to Taxes on Income between India and Japan, art 5 -

Turkey project – Assessee carrying out offshore services – Fees for services – Not taxable in India merely because non resident has permanent establishment in India – Only if services are utilized in India and they are rendered in India – Income Tax Act, 1961, ss. 5(2), 9(1)(i), Expl. (a) – Convention for avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between India and Japan, arts 5, 7(1), 12(1), (2), (5) , para 6 of Protocol.

Non resident – Overseas services – Sufficient territorial nexus with India necessary – Two conditions for taxability – Must be utilized in India and must be rendered in India – Income Tax Act, 1961, s. 9(1)(vii).

Ishikawajima-Harima Heavy Industry Ltd. v/s. Director of Income Tax, Mumbai

(2007) 288 ITR 408 = 207 CTR 361=8 RC 149 = 158 Taxman 259 =198 Taxation 103 (SC)

(2) Liability to tax – only on profits earned in India – Method where a permanent establishment exists in India – Permanent establishment treated as separate profit centre – Income tax Act, 1961, ss. 4,5(2), 9 – Convention for the Avoidance of Double Taxation between India and Korea, arts. 5(2)(c), (3), 7(1).

Hyundai Heavy Industries Co. Ltd., CIT v/s.

(2007) 291 ITR 482 = 210 CTR 178 =161 Taxman 191 (SC)

(3) Business of prospecting etc. of mineral oil -Loss on account of foreign currency fluctuation – Loss accruing to assessee, a non-resident company engaged in execution of oil exploration contract awarded by the Government of India on account of foreign currency fluctuation was not a notional loss in terms of s. 42 read with the production sharing contract, hence allowable.
Enron Oil & Gas India Ltd., CIT v/s.
(2008) 218 CTR 641 = 173 Taxman 346 = 305 ITR 75-
(2009) 208 Taxation 49 = 12 DTR 186 (SC)

(4) Services rendered by a non-resident company to an Indian company out side India – No business carried on by the Indian company outside India – Whether fees payable to the non-resident consultant company fall in with the definition of fees for technical services – Held, yes – Whether the fees for technical service covered by exclusionary clause of section 9(1)(vii)(b) of the Income Tax Act – Held, No – TDS to be made at lower of the two rates prescribed in II of Schedule I of Finance Act or under DTAA.
South West Mining Ltd., Commissioner of Income Tax v/s.
(2006)190 Taxation 627(SC)

(5) Income "deemed to accrue of arise in India" – Non- resident employees working on oil rigs in India – Contract providing for "on" and "off" periods – Employees obliged to stay in U.K during "off" periods and undergo training by attending classes to update knowledge and be in readiness for offshore drilling in any part of the world – Salary payable for "off" period not income deemed to accrue or arise in India – Whether has nexus to service in India – Not proper test – Income Tax Act, 1961, s. 9(1)(ii), Expln.
Sedco Forex International Drill Inc. v. CIT
(2005)279 ITR 310 = 199 CTR 320 = 149 Taxman 352=
(2006) 192 Taxation 27 (SC)

(6) Business Connection – Foreign company – Technical adviser to Indian company – Remuneration in sterling paid to foreign company – Indian company treated as agent of foreign company – Whether part of income could be deemed to arise out of business connection to non resident – Lack of details - Lapse of long period – Not to be determined.
New Consolidated Gold Fields Ltd., CIT (Addl) v/s.
(2002) 257 ITR 770 = 125 Taxman 959 = 178 CTR 425 (SC)

65. NOT ORDINARILY RESIDENT

(1) Assessee non-resident for only 3 out of 10 years – During past 7 years staying in India for 730 days – Assessee "not ordinarily resident" – Income tax Act, 1961, ss. 5(1)I, 6(6)(a) (Law amended) by F.A 2003 w.e.f 1-4-2004 superceeding the decision.
Pradip J. Mehta v/s. CIT
(2008) 300 ITR 231 = 216 CTR 1 = 169 Taxman 454 = 206 Taxation 169 (SC)

(2) Residence – Person not ordinarily resident in India – Income earned outside India– Not chargeable in his hands in India – Income Tax Act, 1961, ss. 4, 5, 6.
Morgenstern Werner, CIT v/s.
(2003) 259 ITR 486 = 180 CTR 202 = 132 Taxman 214(SC)

(3) Conditions for being considered "not ordinarily resident" – Assessee resident in India in 8 out of 10 preceding years – Present in India for more than 730 days in preceding 7 years – Assessee not satisfying both conditions in section 6(6)(a) for "not ordinarily resident – Assessee not ordinarily resident – Law amended form 1-4-2004 in line with the decision by F.A 2003.
Pradip J. Mehta v/s. CIT
(2002) 256 ITR 647 = 175 CTR 394 = 169 Taxation 668 = 123 Taxman 1118 (Guj)
Decision reversed by Supreme Court in (2008) 300 ITR 231 – but Law amended by F.A 2003, w.e.f 1-4-2004 superceeding Supreme Court decisions.

66. OFFENCES & PROSECUTION

(1) Company – Failure to deduct tax and deposit with Central Government – Company can be prosecuted – Though substantive sentence of imprisonment cannot be imposed, fines etc. can be imposed – That penalty can be levied does not affect prosecution – Income Tax Act, 1961, ss. 200, 201, 276B, 278B.
Company - Principal officers – Prosecution for offence – No separate notice to treat them as such necessary before complaint – Sufficient if averments are made in complaint, issuance of summons – Income Tax Act, 1961, ss. 2(35), 276B.
Criminal proceedings – Application for discharge of accused – Rejected by trial magistrate and Sessions Court – High Court – Application for discharge – Rejection – High Court need not

give detailed reasons – Code of Criminal Procedure, 1973, s. 245.

Criminal proceedings – Delay – No failure, negligence or inaction on the part of prosecuting agency – Delay owning to proceedings taken and relief obtained by accused – Not ground for any leniency –

Whether reasonable cause shown for failure - Case to be decided on basis of evidence adduced before court – Not earlier at stage of application for discharge -

Madhumilan Syntex Ltd., Union of India v/s.
(2007) 290 ITR 199 = 9 RC 74 = 208 CTR 417 =
160 Taxman 71 = 199 Taxation 259 (SC)

(2) Wilful attempt to evade tax - Assessment year 1985-86 – Whether once order of penalty has been cancelled by Tribunal, finding of Tribunal is conclusive and prosecution cannot be sustained – Held, yes.

H.T Power Structure (P) Ltd. V/s. R.P Sharma
(2008) 166 Taxman 122 = 299 ITR 363 = 203 Taxation 237 =
218 CTR 170 = 1 DTR 133 (Guj)

(3) Wilful attempt to evade tax – Purchase of property – Consideration shown as far less than amount actually paid in application under section 230A – Accused charged on two counts under IPC and one count under Income tax Act – Accused in jail only for seven days - High Court – Revision – High Court confirming charges under IPC but setting aside conviction under Income tax Act since the excess amount was paid by accused's sister – Supreme Court – Appeal - Peculiar facts of case and lapse of a long time – Sentence restricted to that undergone – Matter not to be taken as precedent – Income tax Act, 1961, ss. 136, 230A(1), 276C, 277 – Indian penal Code, 1860, ss 193, 420, 511.

Soundarya (P) v/s. ITO
(2008)301 ITR 50 = 171 Taxman 110 = 5 DTR 113(SC)

(4) Offence under s. 13(2) r/w s. 13(1)(e) of Prevention of Corruption Act – Ownership of unaccounted wealth – Raid by IT authorities at the house of the accused an IAS officer, yielded huge amount of cash, gold biscuits, foreign currency, documents regarding purchase of immovable properties and FDRs – Wife of the accused has deposed that the entire unaccounted money belonged to her and that she has

amassed the wealth by running three business concerns and selling goods without bills – She has also accounted for the foreign exchange recovered from the house – Similarly, she also owned the gold ornaments and real estate – Since the premises in question was jointly shared by the wife and the husband and the wife having accepted the entire recovery at her hand, it will not be proper to hold husband guilty - Prosecution has not led evidence to establish that some of the money belonged to the accused - Explanation given by the accused has been substantiated by the evidence of his wife and other witnesses produced on his behalf – Further, the entire money has been assessed by the IT Department in the hands of the wife – Therefore, accused cannot be held guilty of offence under the Prevention of Corruption Act – Acquittal upheld.

Inbasagaran K., Dy. Superintendent of Police, Chennai v/s.
(2006)200 CTR 624=282 ITR 435 = 153 Taxman 326 (SC)

(5) Offence under ss. 276C and 277 – Quashing of proceedings - Applications filed by the appellant seeking discharge under s. 245(2) of the CrPC were dismissed by magistrate and petitions filed under s. 482 of the CrPC also dismissed by the High Court - Contention that subsequently penalty proceedings set aside by Tribunal and High Court declined reference – No opinion needs to be expressed about the effect of those orders - In case the appellant files any application for discharge before the magistrate on that ground, same is to be decided by the magistrate in accordance with law – V. Gopal v/s. Asstt. CIT (1994) 207 ITR 971 (Mad) affirmed.

Gopal (V) v/s. Asstt. Commissioner
(2005) 193 CTR 392 =142 Taxman 549 = 185 Taxation 439 = 279 ITR 510 (SC)

(6) Company or corporate body – Where imprisonment compulsory - Can be prosecuted – Punishment with fine alone permissible.

Standard Chartered Bank v/s. Directorate of Enforcement.
(2005) 274ITR 81=145 Taxman 154 =195 CTR 465= 188 Taxation 360(SC)
[but see case at No. 26 above]

(7) Delay in filing return - Complaint filed by ITO as tax liability on assessment was more than Rs. 3,000 – Liability reduced to less than Rs. 3,000 in appeal before Appellate Tribunal – Prosecution not maintainable–Income Tax Act,1961, ss. 276CC, prov. (ii)(b), 278B – Code of Criminal Procedure, 1973, s. 482.
Guru Nanak Enterprises v/s. ITO
(2005) 279 ITR 30 = 149 Taxman 565 = 199 CTR 710= (2006) 192 Taxation 855 (SC)

(8) Offence under ss. 276C and 278B – Cancellation of penalty under s. 271(1)(c)–Assessee had filed revised returns estimating higher cost of construction of flats built by it – Revised returns were accepted by the Department and the assessments were completed accordingly – Difference between the income as per original returns and the income shown in the revised returns was treated as concealed income and penalty under s. 271(1)(c) was levied in all the four years – Penalties however cancelled by giving effect to the order of the Tribunal in appeal – Levy of penalties and prosecution under s. 276C are simultaneous - Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under s. 276C is automatic – If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction – Further, the charge of conspiracy has not been proved to bring home the offence under s. 120-B, IPC – In the absence of dishonest and fraudulent intention, the question of committing offence under s. 420, IPC also does not arise.
K.C Builders v/s. Asst. CIT
(2004)186 CTR 721 =265 ITR 562 = 135 Taxman 461= 179 Taxation 418 (SC)

(9) Failure to file return "in due time" – "Due time" is that specified for furnishing return in sub-sections (1) and (2) of Section 139 – Permissibility under sub-section (4) for filing return before assessment – Does not extend time prescribed for filing return – Income Tax Act, 1961, ss. 80, 139(1), (2), (4), 276CC.
Mens Rea -Court has to presume culpable state of mind – Casus omissus – Marginal note.
Prakash Nath Khanna v/s. CIT
(2004)266 ITR 1=187 CTR 97 =135 Taxman 327 = 180 Taxation 18(SC)

(10) Settlement of cases – Complaint of offences with previous sanction – Application for settlement made prior to lodging of complaint – High Court rejecting application to have prosecution quashed - Appeal to Supreme Court – Settlement Commission accepting settlement and granting immunity from prosecution in the meantime – Proceedings quashed by Supreme Court - Income Tax Act, 1961, ss. 245C, 245D(1), 245F, 245H, 279 – Code of Criminal Procedure, 1973, s. 482.
Ashirvad Enterprises v/s. State of Bihar
(2004)266 ITR 578=187 CTR 609 =180 Taxation 319=180 Taxation 217= 137 Taxman 455 (SC)

(11) False statement in verification – Abetment of false return - Prosecution in relation to offence of misappropriation under penal code – Proceedings pending – Pardon granted to accused subject to making full and complete disclosure – Does not enure in relation to prosecution under provisions of Income Tax Act – Department not to pursue prosecution for offences under Income Tax Act until after accused had given evidence in the case of misappropriation and only if accused had not made complete disclosure in that case.
Dipesh Chandak v/s. Union of India
(2004) 270 ITR 85 = 191 CTR 145 = 140 Taxman 166=
(2005) 184 Taxation 17 (SC)

(12) Where imprisonment compulsory - Company cannot be proceeded against - Income Tax Act, 1961, ss. 276C, 277, 278, 278B - Mens Rea - Wilful attempt to evade tax – False statement in verification – Abetment of false statement - Mens Rea of person in charge of affairs - Can be attributed to company - Prosecution – Sanction of Commissioner – Nature of – Administrative – Holding enquiry before - Not necessary - Income Tax Act, 1961, s. 279 - Compounding - Not a right of accused – Income Tax Act, 1961, s. 279(2).
Velliappa Textiles Ltd., Asstt. Commissioner v/s.
(2003) 263 ITR 550= 132 Taxman 165 = 184 CTR 193 =
177 Taxation 354 (SC)

(13) Offence under s. 276DD – Omission of s. 276DD w.e.f 1st April, 1989 – Sec. 276DD stood omitted from the Act and not repealed – "Omission" of a provision is different from a 'repeal' and s. 6 of the General Clauses Act applies only to a repealed law and not to omission – Hence, prosecution under s. 276DD could not have been

launched or continued by invoking s. 6 of the General Clauses Act after its omission – Reference to larger Bench is not called for.
General Finance Co. & Anr. V/s. CIT
(2002) 176 CTR 569 = 257 ITR 338 = 124 Taxman 432 =
171 Taxation 178 (SC)

(14) Settlement of cases – Settlement Commission granting immunity from prosecution "in respect of matters arising out of settlement" – Effect – Total immunity in regard to fictitious transaction – Not confined only to specific assessment year - High Court - Not entitled to declare order granting immunity as illegal or void.
Nirmal and Navin P. Ltd. v/s. D. Ravindran
(2002) 255 ITR 514 = 175 CTR 407 = 123 Taxman 540=
(2003) 172 Taxation 473 (SC)

67. **<u>OTHER SOURCES – INTEREST</u>**

(1) Consideration for surrender of tenancy rights – AO taxed the impugned amount which was allegedly received on surrender of tenancy right as casual and non recurring receipt - Tribunal was only required to decide the issue of taxability of said receipt as income from other sources as held by the CIT(A), or non taxability of the amount as being compensation for relinquishment of tenancy rights - Tribunal, however, recorded contradictory findings as to the nature of said receipt and also restored the matter to the AO to ascertain the same – Therefore, appeal is restored to the Tribunal for fresh decision.
Sheelaben M. Patel v/s. ITO
(2006)200 CTR 646 = 193 Taxation 121=
(2007) 290 ITR 189 (Guj)

(2) Assessee, a co-operative society. Was in process of setting up its business of manufacturing filament year – Assessee in its return disclosed nil income stating that production had not yet started and loss was to be capitalized after production started - Interest income and miscellaneus income which assessee received during relevant previous year was revenue in nature required to be taxed as income other sources and these receipts were not to be treated as reduction in project cost .
Petro-Fils Co-operative Ltd., CIT v/s.
(2003) 127 Taxman 498(Guj)

(3) Income or Casual and non recurring receipt -Consideration for surrender of tenancy rights – Prior to the amendment of s. 55(2) in 1995 the settled law was that if the cost of acquisition of a capital asset could not be determined, the transfer of such capital asset would not attract capital gains tax – In the instant case Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained – Thus, even though monthly tenancy or leasehold right is admittedly a capital asset and the receipt on its surrender is a capital receipt s. 45 could not be applied for the assessment year in question as it fell in the pre-amendment period - Sec. 56 provides for the chargeability of income of every kind only if it is not chargeable to tax under any of the heads specified in s. 14 items A to E - If the income is included under any one of the heads it cannot be brought to tax under the residuary provisions of s. 56 – Consideration for surrender of tenancy would be assessable, if at all under item E of s. 14 - That being so, it cannot be treated as a casual and non recurring receipt under s. 10(3) and be subjected to tax under s. 56 – If the income cannot be taxed under s. 45, it cannot be taxed at all.

Cadell Weaving Mill Co.(P)Ltd. & Anr.,Union of India & Anr.
V/s.
(2005) 193 CTR 578 = 273 ITR 1 =142 Taxman 713(SC)

(4) Income from other source or Business Income - Assessment year 1985-86 – Assessee trust was carrying on certain business – By a partnership deed, assessee trust and one another trust became partners of a firm - As per terms and conditions of partnership deed goodwill of erstwhile business was to remain exclusively with assessee trust – Subsequent, upon retirement from partnership, assessee trust ceased to carry on business and permitted other trust to use name and good will of erstwhile business for a monthly compensation of Rs. 35,000/- Assessee Officer assessed said amount under head income from business – Since assessee had stopped doing business altogether, assets, viz name and goodwill, ceased to have character of business was assessable under head 'Income from other sources'.

Nijrang Specific Family Trust, CIT v/s.
(2006) 155 Taxman 470 = 205 CTR 144 = 287 ITR 148=
(2007) 196 Taxation 215 (Guj)

(5) Interest on securities – Other Sources – Method of computation of special deduction under section 80L – Interest on compulsory deposit – Interest cannot be set off against deficit in dividend income – Assessee entitled to special deduction under section 80L in respect of interest on compulsory deposit.
Apoorva Shantilal Shah (HUF), CIT v/s.
(2002) 255 ITR 390 = 174 CTR 612 = 169 Taxation 51 =
(2003) 128 Taxman 525 (Guj)

(6) Interest – Amount borrowed for purchase of shares – Finding that such shareholding had entirely been transferred to subsidiary company - Interest on amount borrowed not deductible .
Kalindi Investment P. Ltd. v/s. CIT
(2003) 260 ITR 261 = 129 Taxman 219(Guj)

(7) Payment to advocate for his advice on consultancy assignment – Assessee was retained by GSIC for conducting a study and rendering his opinion on separation of scooter project as a separate company - such study included tax implications and financial requirement too – Assessee paid certain amount to an advocate for his advice on tax and legal implications of the said project – Said payment fulfills all the requirements of s. 57(iii) – Hence, it is allowable as deduction.
Bhagwatilal G. Shah v/s. CIT
(2005)196 CTR 8 =146 Taxman 412 =277 ITR 277=189 Taxation 594 (Guj)

(8) Deduction under s. 57(iii) – Communication charges or discount towards share call moneys – It was a debt due to the assessee on capital account - Debt commuted by way of discount – No expenditure was incurred for the purposes of earning or making income – Therefore, commutation amount is not deductible under s. 57(iii).
Kailash Investmens (P) Ltd. v/s. CIT v/s.
(2006)200 CTR 21= 281 ITR 92 = 192 Taxation 583 (Guj)

68. OWNERSHIP

(a) OF BUSINESS

(1) Assessability of income - Assessee claimed that the firm consisting of assessee & his wife was dissolved on 19-1-1990 & the hotel business belonged to him alone – Loss from hotel business claimed for set off against the income surrendered during search taking place after 18-1-1990 – AO treated the hotel business as belonging to firm & not to the assessee – Tribunal on appreciation of facts that (i) accounts of firm were not made up (ii) during statement recorded under section 13(4) the assessee did not state about dissolution of firm treated the hotel business as belonging to assessee - Reference answered against the assessee & in favour of revenue.

Shardaben Rasiklal Acharya Wife v/s. CIT
(2008)205 Taxation 315 =218 CTR 46=305 ITR 442=
5 DTR 281(Guj)

(b) PROPERTY INCOME

Chargeable as - Assessment year 1979-80 - Assessee's accounting period for assessment year 1979-80 commenced on 1-7-1977 and ended on 30-6-1978 - Assessee had entered into an agreement for sale on 28-2-1977 whereby industrial undertaking and assessee's business were transferred to vendee - Pursuant to said agreement a deed of assignment was executed on 28-6-1977 and immovable properties which were part and parcel of industrial undertaking were transferred under duly executed registered document on 2-2-1978 - ITO was of view that as assessee was legal owner of property in question till conveyance was duly registered, proportionate property income, i.e from 1-7-1977 to 2-2-1978 should be assessed in hands of assessee - Since assessee was left merely with technical or formal ownership of property, there was no justification to tax proportionate property income in hands of assessee - Held, yes - Whether assessee could be said to be a legal owner of property till conveyance was duly registered Held, no -

Sarabhai Chemicals (P) Ltd., CIT v/s.
(2001)119 TAXMAN 611(GUJ)

69. PENALTY

(a) AMNESTY

Penalty under ss. 271(1)(a), 271(1)(c) and 273(2)(a) – Immunity under amnesty scheme -Disclosure of income after search by way of revised returns – In view of findings of fact of the Tribunal based on appreciation of evidence on record to the effect that the declaration made by the assessee was voluntary before detection by the Department because the Department was not in a position to point out any concrete material to establish concealment it was justified in canceling the penalties under ss. 271(1)(a), 271(1)(c) and 273(2)(a) by extending immunity under the amnesty scheme and the factum of mere filing of revised returns on a number of occasions cannot show that returns were not voluntary.

Taktawala, C.A, CIT v/s.

(2008) 219 CTR 529 = 14 DTR 34(Guj)

(b) CASH DEPOSITS

(1) Penalty – s. 273-B - Deposits in cash in excess of specified limit – Effect of section 273B – Reasonable explanation for such deposits – Penalty cannot be imposed - Purchase of goods – Balance due adjusted by book entries - No intention to evade tax – Penalty could not be imposed- Income Tax Act, 1961, ss. 269SS, 271D, 273B.

Bombay Conductors and Electricals Ltd., CIT v/s.

(2008)301 ITR 328 = 205 Taxation 259 = 173 Taxman 434(Guj)

(2) Deposits and loans in cash in excess of prescribed limit – Finding that amounts were mere book entries and transactions on behalf of family members - No violation of sections 269SS and 269T – Penalty could not be imposed - Income tax Act, 1961, ss. 269SS, 269T, 271D, 271E.

Natvarlal Purshottamdas Parekh, CIT v/s.

(2008)303 ITR 5 = 205 Taxation 237 = 219 CTR 509=4 DTR 37 (Guj)

(c) CONCEALMENT

(1) Concealment of income – Search and seizure – Finding that income had been concealed – Immunity from penalty – Scope of Explanation 5 to section 271(1)(c) – Sufficient if disclosure is made and tax is paid before completion of assessment – Statement need not specify manner in which income was earned – Income tax Act, 1961, s. 271(1)(c).

Mahendra C. Shah, CIT v/s.

(2008) 299 ITR 305 = 215 CTR 493 = 205 Taxation 251 =172 Taxman 58 = 3 DTR 1(Guj)

(2) Disclosure of additional income in revised returns after search and seizure – Tribunal having upheld the findings of the CIT(A) canceling the levy of penalty under s. 271(1)(c) holding that the assessments were made totally on the basis of estimated income disclosed by the assessee in the revised returns rather than on the basis of incriminating materials found during the search, High Court was precluded from entering into any discussion regarding the perversity of finding of fact recorded by the Tribunal and setting aside the same in the absence of any challenge to the findings of fact on the ground of perversity - Penalty under s. 271(1)(c) was not exigible on the facts and circumstances of the case.

Sudarshan Silks & Sarees v/s. CIT
(2008)216 CTR 12=300 ITR 205 =169 Taxman 321=
206 Taxation 195 = 5 DTR 261(SC)

(3) Whether amendment retrospective amendment - Assessment at loss – Decision in Virtual Soft Systems Ltd. V/s. CIT (2007) 207 CTR(SC) 733 : (2007) 9 SCC 665 that the amendment made by Finance Act, 2002 in Expln. 4 to s. 271(1)(c) is not retrospective and is effective from 1st April, 2003, and cannot be applied in respect of any period prior to the said date needs reconsideration.

Ramanlal C Hathi, CIT v/s.
(2008) 217 CTR 105 = 171 Taxman 479 = 7 DTR 404(SC)

(4) Dropping of proceedings - No reasons assigned by AO - having passed cryptic order dropping proceedings under s. 271C and which order was held to be erroneous and prejudicial to the interest of Revenue - No interference was called for with the order of High Court remanding the matter to the AO requiring him to pass a reasoned order.

Toyota Motor Corporation v/s. CIT
(2008)218 CTR 539 =173 Taxman 458= 306 ITR 52 = 12 DTR 106 (SC)

(5) Provision for imposing penalty even if after addition of concealed income there was no positive income – Is clarificatory and retrospective in nature – Applies with effect from April 1, 1976 – Income Tax Act, 1961, s. 271(1)(c)(iii), Expl. – Circular No. 204, dated July 24, 1976.

Gold Coin Health Food (P) Ltd., CIT v/s.
(2008) 304 ITR 308=72 Taxman 386 = 206 Taxation 147 =
218 CTR 359 = 11 DTR 185 (SC)

(6) Immunity under Amnesty Scheme - Disclosure of additional income after show cause notice - AO having detected concealment of income by the assessee before show cause notice, assessee is not entitled to benefits of the Amnesty Scheme in respect of additional income declared by in the revised return which was filed pursuant to said show cause notice and, therefore, levy of penalty under s. 271(1)(c) was justified -

Deepak Construction Company v/s. CIT
(2007)208 CTR 444 = 199 Taxation 485 = 293 ITR 285 =
= 164 Taxman 334 (Guj)

(7) Penalty under s. 271(1)(c) – Concealment - Revised return – Excise raid – Processing charges not shown in accounts – Held penalty leviable – Section 271(1)(c). Income Tax Act, 1961 – Section 271(1)(c).

Kholwadwala Dyeing & Printing Mills v/s. CIT
(2007)197 Taxation 304 =(2008) 296 ITR 475 (Guj)

(8) Wrong claim of depreciation – CIT(A) and the Tribunal having found that the assessee had no intention to conceal facts when it made incorrect claim of depreciation which was withdrawn by the assessee, penalty under s. 271(1)(c) was not leviable for making the wrong claim.

Manibhai & Bros, CIT v/s.
(2007) 209 CTR 46 =198 Taxation 175 = 294 ITR 501(Guj)

(9) Furnishing inaccurate particulars – Capital gains – Assessee enclosing registered valuer's report on support of capital gains – Valuer's report not accepted by Assessing Officer – Matter referred to District Valuation Officer – Assessment of capital gains on basis of District Valuation Officer's report - Basis of registered valuer report not shown to be wrong – Does not amount to furnishing inaccurate particulars - Penalty not leviable -Income Tax Act, 1961, ss. 55A, 271(1)(c).
Imposition not automatic – Is a matter of discretion – Assessing Officer has to be fair and objective - Income Tax Act, 1961, s. 271(1)(c).

Dilip N. Shroff v/s. Joint CIT
(2007) 291 ITR 519 = 210 CTR 228=161 Taxman 218 =
201 Taxation 53 (SC)
But see Dharmendra Textiles Case 295 ITR 244(SC)

(10) Burden of proof – Order imposing penalty being quasi – criminal in nature, burden lies on the Department to establish that assessee had concealed his income – If an explanation given by the assessee has been treated as bona fide, the question of failing to discharge the burden under Explanation to s. 271(1)(c) would not arise.
Ashok Pai, T v/s. CIT
(2007) 210 CTR 259 =161 Taxman 340 = 292 ITR 11 =
201 Taxation 390 (SC)

(11) Addition on account of change in method of accounting - Earlier method was accepted by the Department in the past – However, when the Department sought to take a different stand in the year under consideration, assessee submitted a revised return offering the said item for taxation and accepted the assessment – Assessee was entitled to hold a bona fide belief that the uncertified work-in-progress was not liable to be treated as a taxable item, and penalty under s. 271(1)(c) could not be levied for non disclosure thereof in the original return.
J.H Parabia (Transport) (P) Ltd., CIT v/s.
(2006)201 CTR 98= 284 ITR 361 =193 Taxation 358Guj)

(12) Suppression of sales – During the course of search several loose slips in the form of kachcha bills were found by the Sales tax authorities – Out of 22 kachcha bills issued only 5 bills were found – Facts and circumstances are consistent with only one hypothesis and that is that the amount in question represents the concealed income of the assessee – Tribunal was justified in confirming the penalty of Rs. 30,000 levied under s.271(1)(c).
G.S Nanjee & Sons v/s. CIT
(2006)201 CTR 393 = 284 ITR 172 =154 Taxman 40=
193 Taxation 426(Guj)

(13) Bonafides - Where assessee had bona fide belief that loss occurred as a result of destruction of assets such as plant and machinery, buildings, electrical installations, etc. and was of revenue nature on basis of advice received from its chartered accountant and claimed it by way of deduction, it would not be a case of concealment within ambit and scope of section 271(1)(c) penalty deleted-Assessee claimed an amount of Rs. 1,00,112 on account of loss of stock due to fire – Assessing Officer noted that assessee had claimed double deduction of

amount of Rs. 1,00,112 as said amount was debited to consumption of raw material account and it was also debited to profit and loss account under head "Goods lost in fire" – Assessing Officer, therefore added same to income of assessee – Assessing Officer also levied penalty under section 271(1)(c) –Tribunal cancelled penalty holding that double claim for an amount in question was made due to some bona fide mistake on part of assessee – Tribunal was justified in doing so .

BTX Chemicals (P) Ltd. v/s. CIT
(2006)155 Taxman 644 = 205 CTR 252 =
(2007) 288 ITR 196 = 196 Taxation 238(Guj)

(14) Agreed addition vis-à-vis gross or willful negligence - Assessee having persistently maintained incorrect and incomplete accounts and conceded substantial additions year after year including the relevant assessment year- If income was assessed by application of s. 145, there would be presumption that income was not properly returned & if there is repeated conduct year after year, there is inform that there is gross/wiful neglect on its part and, therefore, penalty under s. 271(1)(c) was sustainable.

Chandra Vilas Hotel, CIT v/s.
(2006) 206 CTR 214=(2007) 196 Taxation 245 =
291 ITR 202 =163 Taxman 298(Guj)

(15) Burden of proof - Concealment of income - Manufacture of salt – Loss due to cyclone and rain – Difference in estimation of loss between assessee and Assessing Officer – No concealment of income – Penalty cannot be imposed - Income Tax Act, 1961, s. 271(1)(c).

Valimkbhai H. Patel, CIT v/s.
(2006) 280 ITR 487 = 201 CTR 113 = 192 Taxation 317 (Guj)

(16) Concealment – Wrong claim for deduction – Cost of wires wrongly shown as 'consumable stores' – Tribunal found that the assessee itself offered the same for disallowance during the course of assessment proceedings before the AO had detected this fact, and accordingly accepted the bona fides of the assessee – Nothing has been brought on record by the Revenue to suggest that the finding of the Tribunal is incorrect in any manner whatsoever – Thus, assessee was not therefore liable for penalty under s. 271(1)(c).

Union Electric Corporation, CIT v/s.
(2006) 200 CTR 636 = 281 ITR 266 = 193 Taxation 125 (Guj)

(17) Concealment of income - Order of penalty must clearly state whether it is for concealment or for furnishing inaccurate particulars – Order stating penalty was for any one of the offences – Not valid.
New Sorathia Engineering Co. v/s. CIT
(2006) 282 ITR 642 = 202 CTR 188 = 155 Taxman 513 (Guj)

(18) Returned income less than 80 per cent of assessed income – Burden on assessee to prove there was no concealment of income - Tribunal considering facts and finding that burden had been discharged – Cancellation of penalty - Justified – Income Tax Act, 1961, s. 271(1)(c).
Peass Industrial Engg. Pvt. Ltd. , CIT v/s.
(2005) 274 ITR 437=195 CTR 326 = 187 Taxation 102=
147 Taxman 114 (Guj)

(19) Revenue authorities not disputing the fact that clandestine removal of goods, if any, was made by or at the behest of erstwhile management of the company – Clear finding recorded by the AO to that effect - Penalty for concealment and/or furnishing inaccurate particulars of income could not be imposed on the Official Liquidator–Tribunal justified in deleting the same.
Poly Steels (India) Ltd. , CIT v/s.
(2005) 196 CTR 20 = 277 ITR 499 =189 Taxation 393=
(2006) 152 Taxman 357 (Guj)

(20) Wrong claim for extra-shift depreciation allowance – Tribunal found from the facts on record that the claim for extra-shift allowance was made by oversight, as both before and after the claim, the returned income was nil – It was specifically pleaded by the assessee before the Tribunal that the mistake was committed due to oversight and that the assessee could not have been benefited in any way by claming higher depreciation as the total depreciation is allowable only to the extent of cost of plant and machinery – Thus, the grievance of the Revenue that such reasoning was supplied by the Tribunal on its own is factually incorrect – Even otherwise, it was the duty of the Tribunal to arrive at a decision in accordance with the scheme envisaged by the provisions – No infirmity in the impugned order of the Tribunal – Penalty under s. 271(1)(c) rightly cancelled.
Glow Tech Steels (P) Ltd., CIT v/s.
(2005) 196 CTR 177 = 148 Taxman 289 = 189 Taxation 588 =
(2006) 280 ITR 133 (Guj)

(21) Assessment year 1984-85 – During course of assessment proceedings, Assessing Officer found that assessee society had received a sum, from insurance company on withdrawal from an Group Insurance Scheme, being premium paid in earlier years and allowed as deduction in past assessments – Assessing Officer brought said amount to tax under section 41(1) – Assessing Officer also levied penalty upon assessee under section 271(1)(c) rejecting assessee's explanation that instead of routing said receipt through profit and loss account, same was directly credited to gratuity fund account and because of that bona fide mistake, while preparing return of income, amount received from insurance company was not included in total income – Whether since omission had occurred not with intention but due to oversight and there was nothing on record to show that any particular individual member of assessee society had any personal interest in committing act of omission, no penalty was exigible on assessee under section 271(1)(c) – Held, yes.

Dahod Sahakari Kharid Vechan Sangh Ltd. V/s. CIT
(2005)149 Taxman 456=(2006) 200 CTR 265=
190 Taxation 769 =282 ITR 321(Guj)

(22) Returned income less - Returned income less than 80 per cent of assessed income - Presumption of concealment of income – Finding that assessee had not been able to explain payments without sufficient cash balance – Imposition of penalty valid – Income Tax Act, 1961, s. 271(1)(c).

Usha Fertilizers v/s. CIT
(2004) 269 ITR 591(Guj)

(23) Concealment – Unexplained money – Assessee had made payments on certain dates when sufficient cash was not available with it – Addition made by ITO confirmed in appeals – Explanation of the assessee that it had borrowed certain funds and the accountant has failed to pass the necessary credit entries was not substantiated - Further, assessee kept the accountant away from the scrutiny during the course of inquiry on the pretext that he could not be produced on account of strained relations – Therefore, it failed to discharge the onus which lay on it – Assessee cannot be granted a second innings to prove its case – Penalty rightly upheld.

Usha Fertilizers v/s. CIT
(2002) 178 CTR 153 (Guj)

(24) Presumption of concealment – Bona fide belief that income had not accrued - Presumption of concealment not applicable – Penalty not to be levied.
Sarabhai Chemicals Pvt. Ltd., CIT v/s.
(2002) 257 ITR 355 = 173 CTR 193 = 121 Taxman 755 (Guj)

(25) Assessee filing returns showing negligible income – Search and seizure operation carried on assessee and assessment reopened – Assessee filing revised returns declaring higher income – Revenue imposing penalty - Tribunal while remitting penalty holding that since the burden of proving concealment not discharged by Revenue, penalty could not be levied – Penalty remitted – Revenue filing reference - Held, Tribunal justified in its decision.
Suresh Chandra Mittal , CIT v/s.
(2002) 167 Taxation 348 (SC)

(26) Concealment of income – Extent of concealment - Question of fact – Admission of assessee regarding concealment of particular amount - Tribunal justified in levying penalty with reference to such amount–
Lallubhai Jogibhai Patel v/s. CIT
(2003) 261 ITR 216 =174 Taxation 551=182 CTR 371 = 182 CTR 371 = (2004) 134 Taxman 381((Guj)

(27) Assessee a partnership firm - Internal audit detecting some mistakes in totalling of amount – AO issuing a show-cause notice to the assessee – Assessee admitting the mistakes - Matter referred by AO to CIT for applying provision of section 263 – Assessment set aside and matter remanded to AO – AO imposing penalty for concealment - Tribunal holding since assessee before levying of penalty admitting mistakes in totalling, there was no intention of the assessee to conceal income – Penalty remitted – Held, finding of the Tribunal being a finding of the fact, penalty rightly remitted.
Milex Cable Industries , CIT v/s.
(2003) 174 Taxation 58 = 261 ITR 675 = 182 CTR 442 (Guj)

(28) Excessive claim for depreciation - Valuer's report was produced during the proceedings which showed the value of land and the superstructure separately - As regards depreciation on movable assets taken over, it was claimed on the basis of price mutually agreed - It is not the case of the Revenue that the agreement was sham – ITO had sufficient material before him to decide whether to allow depreciation on WDV or to accept higher value - Thus, it cannot be said that there was any concealment of material particulars - Penalty under s. 271(1)(c) rightly deleted.
Hotel Sabar (P) Ltd., CIT v/s.
(2003) 183 CTR 573 =177 Taxation 66= 264 ITR 381 (Guj)

(29) Concealment - Year of assessment of capital gains - As the assessee did not disclose the capital gains arising on compulsory acquisition of land in the relevant assessment year under the belief that the capital gains would be liable to tax only on receipt of compensation - Capital gains were disclosed in the return of later year - On these facts, penalty under s. 271(1)(c) could not be levied and therefore CIT could not assume jurisdiction under s. 263.
Manilal Tarachand, CIT v/s.
(2001) 170 CTR 466(GUJ)

(30) Unexplained cash credits - Merely because addition has been made by invoking the provisions of s. 68 penalty under s. 272(1)(c) would not follow as a natural corollary - De hors the said provision it cannot be stated with certainly that the assessee has failed to return the correct income due to any fraud or any gross or wilful neglect on its part - Assessee has merely conceded that the entries in question may be treated as its income by virtue of provisions of s. 68 - Tribunal has recorded a finding of fact that there is no instance to show that the assessee had been earning business income outside books in the past or in the year under consideration - Penalty could not be sustained.
Jalaram Oil Mills, CIT v/s.
(2001)171 CTR 426(GUJ)

(31) Assessment year 1986-87 - Assessing Officer noticed that a demand draft and telegraphic transfer were not entered by assessee in its cash book on dates on which same were purchased or made - Assessee explained that as sufficient cash balance was not available to it on dates of transaction, it had obtained hand loans from friends and as it was expected to repay such loans within short time,

no entries were made in books of account in respect thereof - However, since assessee was unable to furnish evidence for such loans, it offered amount of transaction as additional income - Assessing Officer found explanation to be unacceptable and applying Explanation 1(B) of section 271(1)(c), imposed penalty - Whether Assessing Officer was justified in levying penalty - Held, yes - Whether no express invocation of Explanation to section 271 in notice under section 271 is necessary before provisions of Explanation therein are applied - Held, yes.
Madhusudhanan, K.P v/s. CIT
(2001) 118 TAXMAN 324 = 169 CTR 489,(SC)

(32) Revised return filed showing higher income - Assessee surrendered the income after persistent queries by AO - However, revised returns have been regularised by Revenue - Explanation of the assessee that he has declared additional income to buy peace and to come out of vexed litigation could be treated as bona fide - Penalty rightly cancelled - No interference warranted –
Surendra Chandra Mittal , CIT v/s.
(2001) 170 CTR 182(SC)

(33) Explanation - Concealment - Addition on estimate basis - Seized material has to be read and accepted as a whole and it is not permissible to make further estimates therefrom unless and until there is cogent material to undertake such an exercise - ITO made estimates at three stages after processing the seized material to make addition of estimated profit on sales outside the books of account - Explanation to s. 271(1)(c) cannot be invoked - Even if said explanation is held to be applicable on account of arithmetical difference, it can be said that the assessee has rebutted the presumption i.e discharged the burden - Further, it is categorically stated in the assessment order that the facts for the year are similar to that of earlier year - Penalty was cancelled in the earlier year - Penalty under s. 271(1)(c) not sustainable.
Navjivan Oil Mills v/s. CIT
(2001) 170 CTR 224 = 124 Taxman 392(GUJ)

(34) Expln. 1 - Concealment - Seizure of P & L a/c. - During the assessment proceedings the lower authorities as well as the Tribunal came to the conclusion that the P & L a/c seized from the residence of managing partner related to assessee firm - During the penalty procedings, Tribunal construed it as not relating to assessee firm - High Court did not answer the questions referred to it and remanded the matter to the Tribunal for fresh consideration - Approach of the High Court not correct - High Court ought to have answered the questions having regard to the facts found by the Tribunal - Reference restored to the High Court to be heard and disposed of afresh.
Kerala Liquor Corporation v/s. CIT
(2001) 170 CTR 183(SC)

(35) Non disclosure of payment of interest to partner - Assessee firm had shown that a sum was paid to one PH by way of interest on deposit - Assessee did not reveal that PH was another name of one of its partners - This was done with a view to avoid disallowance under s. 40(b) - By no stretch of imagination it can be said that the assessee firm did not know that PH was one of the partners - Question of concealment of particulars is a question pertaining to intention of the assessee - As the assessee has not clarified the said position it can be said that it has made an effort to conceal particulars of its income - Tribunal was right in uholding the penalty.
Ganesh Textile v/s. CIT v/s.
(2001) 171 CTR 167 (GUJ)

(d) **DELAY IN FILING RETURN**
Reasonable cause for delay – Question of fact – Delay due to belief that because of Supreme Court decision capital gains tax was not payable - Tribunal justified in deleting penalty for part of period – Income tax Act, 1961, s. 271(1)(a).
Kanubhai Muljibhai Patel, CIT v/s.
(2008) 306 ITR 179 = 205 Taxation 271 = 4 DTR 150(Guj)

(e) FAILURE TO DEDUCT TAX AT SOURCE
(1) Payment to contractor – Assessee not liable to deduct tax at source - Tribunal deleting penalty - Justified – Income tax Act, 1961, ss. 194C,271C.
Hindustan Lever Ltd. , CIT v/s.
(2008) 306 ITR 25(Guj)

(2) Interest/Penalty – Validity –(a) Constitutionality - Levy of penal interest and show cause notice for penalty not mentioned in draft order under s. 144B - AO could not levy penal interest or issue show cause notice for imposition of penalty while passing final order as there was no mention about the same in the draft order under.
Maharaja Exhibitors, CIT v/s.
(2001)170 CTR 107 = 251 ITR 767=(2002) 125 Taxman 278 (GUJ)

(f) FAILURE TO FILE RETURN

(1) Belated filing of return under s. 139(4) – Assessee having filed the returns under s. 139(4) beyond the extended period allowed to him, penalty under s. 271(1)(a) was leviable notwithstanding charge of interest.
Amin Chand Payarelal v/s. IAC & Ors.
(2006) 204 CTR 585 = 285 ITR 546 = 155 Taxman 633=
(2007) 196 Taxation 383 (SC)

(2) Meaning of "month " in section 271(1)(a) – Month means calendar month – Income Tax Act, 1961, s. 271(1)(a) – General Clauses Act, 1897, s. 3(35).
S.L.M Maneklal Industries Ltd., CIT v/s.
(2005) 274 ITR 485 = 196 CTR 526= 187 Taxation 584 (Guj)

(3) Levy of penalty is discretionary – Duty of Assessing Officer to consider explanation regarding delay – Failure to consider explanation – Levy of penalty not valid – Income Tax Act, 1961, s. 271(1)(a).
Scientific Chemicals , CIT v/s.
(2005) 278 ITR 199 = 198 CTR 665 (Guj)

(4) Opportunity of being heard – Non consideration of reply to show cause notices –
Concurrent findings of fact recorded by both the appellate authorities that the ITO had completed the penalty proceedings without waiting for the reply to the show cause notices issued by him – Tribunal justified in deleting the penalty.
Textile & General Engineering Co., CIT v/s.
(2002) 178 CTR 539 (Guj)

(g) **FAILURE TO GET A/C. AUDITED**

s. 271B -Assessee firm filed return of income after a survey under section 133A – Assessing Officer levied penalty under section 271B for all years as books of account were not audited – Appellate authority confirmed penalty for first assessment year, i.e 1985-86, but set aside levy of penalty for subsequent years – Whether it could be said that assessee could not comply with provisions for subsequent years because there was no audit for preceding year and as such no penalty could be imposed on assessee for subsequent years – Held, yes.

Tea King, CIT v/s.
(2002) 123 Taxman 162(Guj)

(h) FALSE ESTIMATE OF ADVANCE TAX

(1) Penalty under s. 273(2)(a) - Bona fide belief regarding accrual of income – Assessee having passed a resolution postponing the date of charging contractual interest on the deferred purchase consideration of its business undertaking and accordingly filed a 'nil' estimate of advance tax , entertained a reasonable belief that no interest had accrued to it, hence penalty under s. 273(2)(a) was not attracted.

Sarabhai Holdings (P) Ltd., CIT v/s.
(2008) 219 CTR 644 = 307 ITR 89 = 175 Taxman 82 = 11 RC 593 = 14 DTR 137 = (2009) 208 Taxation 351(SC)

(2) Penalty under s. 273 – False estimate of Advance Tax - Condition precedent – False estimate of advance tax – For invoking penal provisions, Revenue has to establish that the assessee, when it filed a particular estimate knew or had reason to believe that it was not genuine and was spurious – Assessee submitting the estimates only on the basis of budgeted financial date, believing it to be correct – No case for imposition of penalty under s. 273 made out.

S. G Chemicals & Pharmaceuticals Ltd., CIT v/s
(2003)179 CTR 605 = 173 Taxation 527 = 261 ITR 432 (Guj)

(3) Untrue estimate of advance tax – Bona fide belief as to non-applicability of s. 37(3A) – Tribunal found that the belief of the assessee that its case was governed by the provision of s. 37(3D) and not s.37(3A) was a bona fide belief as it was supported by the assessment order of the immediately preceding year - Merely because the assessee was assessed at a higher figure subsequently is not sufficient to hold that the estimate filed by it was untrue -

Assessee can be penalized only if it knew or had reasons to believe that the estimate of advance tax is untrue – Tribunal right in canceling the penalty.
Kismet (P) Ltd., CIT v/s.
(2003) 184 CTR 613 = 264 ITR 496 = 177 Taxation 714 =
(2004) 136 Taxman 198 (Guj)

(i) FOR LOSS RETURN

Concealment or furnishing inaccurate particulars – Provisions prior to amendment by Finance Act, 2002 – Where loss is returned and assessment made at reduced loss after adding amount sought to be evaded – Penalty not leviable -
Virtual Soft Systems Ltd. v/s. CIT
(2007) 289 ITR ITR 83=207 CTR 733 =159 Taxman 155=
8 RC 429 =199 = 199 Taxation 423 (SC)

(j) LATE FILING OF RETURN

(1) Meaning of "month" in section 271(1)(a) – Month means calendar month – Income Tax Act, 1961, s. 271(1)(a) – General Clauses Act, 1897, s. 3(35).
L.M Maneklal Industries Ltd., CIT v/s.
(2005) 274 ITR 485 (Guj)

(2) Treatment of RF and URF – No tax payable – Tribunal was not justified in holding that merely because on completion of assessment of the assessee in status of a registered firm a refund was due to assessment no penalty was leviable.
Textile & General Engineering Co., CIT v/s.
(2002) 178 CTR 539 = (2003)259 ITR 735 (Guj)

(3) Treatment of RF as URF – Advance tax paid in excess of assessed tax - It could not be held that penalty under s. 271(1)(a) could not be levied against the assessee firm merely because the advance tax paid by the firm exceeded the assessed tax payable by it and the assessment resulted in refund - Tribunal directed to decide as to whether assessee was prevented by reasonable cause from filing the return in time after giving necessary opportunity of hearing to the parties.
Natverlal Jivanlal, CIT v/s.
(2002) 178 CTR 542 (Guj)
&
Dipak Construction Co., CIT v/s.

(2002) 178 CTR 544 = 171 Taxation 661 = 125 Taxman 252 (Guj)

(k) **MENS REA**

(1) Under s. 11AC of Central Excise Act - Judgment in the case of Dilip N. Shroff vs. Jt. CIT (2007) 210 CTR (SC) 228 : 2007 (8) SCALE 304 is recommended for consideration by a larger bench particularly as it has ramification not only regarding the provisions of IT Act but also with regard to provisions of ss. 3A and 11AC of the Central Excise Act and r. 96ZQ(5) of Central Excise Rules.

Central Excise Act, 1944–Penalty – For short levy of duty in certain cases -Whether section 11AC, inserted by the Finance Act, 1996 with intention of imposing mandatory penalty on persons who evade payment of tax, can be read to contain mens rea as an essential ingredient and there is scope for levying penalty below prescribed minimum limit – Held, no

Dharmendra Textile Processors, Union of India v/s
(2008) 212 CTR 432 = 295 ITR 244 (SC)

(2) Excise Duty - Penalty - For short levy or non-levy – Mens rea not essential for attracting civil liability of penalty – Central Excise Act, 1944, s. 11AC – Central Excise Rules, 1944, rr. 96ZQ –

Penalty - For concealing or giving inaccurate particulars – Wilful concealment not essential for attracting civil liability of penalty – Income tax Act, 1961, ss. 271(1I, 276C.

Dharmendra Textile Processors, Union of India v/s
(2008) 306 ITR 277 = 219 CTR 617 = 166 Taxman 65 = 204 Taxation 381(SC)

(3) Strict liability – Exclusion of mens rea.

Guljag Industries v/s. Commercial Taxes Officer
(2007)293 ITR 584(SC)

70. PERQUISITES

(1) Section 17(2) of the Income Tax Act, 1961, read with rule 3 of the Income Tax Rules, 1962 – Salaries – Perquisites – Assessee were employees of company which provided them with accommodation – Rule 3 is amended revising method of computing valuation of perquisites in matter of rental accommodation provided by employers to their employees – Assessees challenged validity of amended rule 3 on ground that amended rule does not provide for giving opportunity to assessees to convince Assessing Officer that no concession is given by employer to employee in respect of

accommodation provided and, hence, rule 3/section 17(2)(ii) has no application – Rule 3, as amended by Central Board of Direct Taxes is not arbitrary, discriminatory or ultra vires Art. 14 of the Constitution nor inconsistent with provisions of section 17(2)(ii), it is in nature of "machinery-provision" and applies only to cases of 'concession' in matter of rent respecting any accommodation provided by an employer to his employees- Inspite of legal position that rule 3 intra vires, valid and is not inconsistent with provisions of parent Act under section 17(2)(ii) it is open to an assessee employee to contend that there is no concession in matter of accommodation provided by employer to employees and case is not covered by section 17(2)(ii) - Rule 3 can't be said to be arbitrary, discriminatory, unreasonable and violative of articles 14, 16 and 19 of Constitutional on ground that it gives different treatment to employees of Government and employees of Public Sector Undertakings.

Arun Kumar v/s. Union of India
(2006) 155 Taxman 659 = 286 ITR 89 = 205 CTR 193=
(2007) 196 Taxation 353 (SC)

(2) Residential accommodation provided by employer - Rule prescribing computation of value - Mandatory - Applies equally to accommodation owned by employer or only taken on lease - Actual rent paid by employer not to be taken as value of perquisite -
Sundaram (K.S) v/s. CIT
(2001) 251 ITR 781 = 170 CTR 557(SC)

71. <u>PRACTICE</u>

(1) Judicial propriety - Quoting from a specialized authority – Should be acknowledged as a matter of courtesy.
Kalyanasundaram (P.V), CIT v/s.
(2007) 294 ITR 49 = 212 CTR 97 =164 Taxman 78 = 9 RC 577=
(2008) 202 Taxation 206 (SC)

(2) Clearance from high powered committee – A dispute arose between appellant – MTNL and respondent and matter was referred to high powered committee – Committee having regard to fact that appellant was contemplating writ petition against a show cause notice, advised appellant to await appealable order and, accordingly it did not permit appellant to file writ petition in High Court – However, appellant fited writ petition and High Court passed order on merits – High powered committee has been set up

not only to conciliate between government departments but also for purposes of ensuring that frivolous disputes do not come before courts without clearance from such a committee –Even if department/public sector undertaking finds the decision of Committee unpalatable, discipline requires that they abide by it – Since decision of high powered committee merely emphasized well settled position that against a show cause notice, litigation should not be encouraged, it was an eminently fair and correct decision and no right of appellant was being affected – Therefore, in absence of clearance, proceedings could not be proceeded with by appellant and High Court was wrong in dealing with merits of matter.

Mahanagar Telephone Nigam Ltd. v/s Chairman,
Central Board, Direct Taxes
(2003) 137 Taxman 242=267 ITR 647=189 CTR 97 =
181 Taxation 394 (SC)

72. PRECEDENTS

(1) High Court – Decision of jurisdictional High Court between same parties – Binding on Department .
Mrunalinidevi Puar of Dhar , CIT v/s.
(2008) 305 ITR 263= 3 DTR 273 =13 DTR 274 (Guj)

(2) Predominant view of High Courts – Supreme Court leans in favour.
Synco Industries Ltd. V/s. Assessing Officer(Income Tax)
(2008)299 ITR 444 =215 CTR 385= 168 Taxman 224 =4 DTR 203 (SC)

(3) Judicial discipline - Lower authority bound by order passed by higher authority.
Ralson Industries Ltd., CIT v/s.
(2007) 288 ITR 322 = 207 CTR 201=158 Taxman 160 =
198 Taxation 97 (SC)

(4) Supreme Court – View of predominant majority of High Courts – Supreme Court will lean on –
Virtual Soft Systems Ltd. v/s. CIT
(2007) 290 ITR 83=207 CTR 733 =159 Taxman 155=8 RC 429=
199 Taxation 423 (SC)

(5) Effect of decision of the Supreme Court in Asst. CIT v/s. J.K Synthetics Ltd. (2001) 251 ITR 200 -
Gujarat State Co-op. Marketing Federation Ltd. CIT v/s.

(2007) 290 ITR 160 = 196 Taxation 189(Guj)

(6) Binding nature – It is open to a Court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it – This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis for whom the principle of res judicata would continue to operate – However, in tax cases relating to a subsequent year involving the same issue as in earlier year, the Court can differ from the earlier view if the case is distinguishable or per incuriam – Here also, subsequent Bench of superior strength can declare that the earlier decision does not represent the law, if it so finds, and the doctrine of res judicata would not apply.

Bharat Sanchar Nigam Ltd. & Anr. V/s. Union of India & Ors.

&

General Manager,BSNL, Asstt. Commr. Trade Tax, Asstt, Commr. Trade Tax & Ors v/s.

(2006)201 CTR 346 = 152 Taxman 135= 282 ITR 273 (SC)

(7) Effect of decisions of Supreme Court in CIT v/s. Anjuman M.H Ghaswala (2001) 252 ITR 1 and CIT v/s. Hindustan Bulk Carriers (2003) 259 ITR 449.

AOP Sanjaybhai R. Patel v/s. Assessing Officer/Asst. CIT

(2004)267 ITR 129(Guj)

(8) Binding nature – Observations vis-à-vis factual situation - Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed – Observations in a judgment must be read in the context in which they appear – Each case depends on its own facts and a close similarity between one case and another is not enough to place reliance on the other case because even a single significant detail may alter the entire aspect.

Vinay Extraction (P) Ltd. v/s. Vijay Khanna , CIT

(2004) 190 CTR 495 = 140 Taxman 67 = 271 ITR 450=

(2005) 142 Taxation 315 (Guj)

(9) Earlier vis-à-vis subsequent decision – If the views of the Supreme Court expressed in an earlier decision are explained in a subsequent decision of the Supreme Court, the explanation in the subsequent decision will have to be followed by the High Court, even if the subsequent decision is rendered by a smaller Bench of the Supreme Court.
Arunbhai Hargovandas Patel, CGT v/s.
(2003) 179 CTR 420 =173 Taxation 182(Guj)

(10) Binding nature – Jurisdictional High Court decision – Is binding on the Revenue authorities within the State – Revenue authorities within the State cannot refuse to follow the jurisdictional High Court's decision on the ground that the decision of some other High Court was pending disposal before the Supreme Court.
G.M Mittal Stainless Steel (P) Ltd., CIT v/s.
(2003) 179 CTR 553 = 263 ITR 255 = 130 Taxman 67(SC)

(11) Decision enunciating principle - Normally law from inception - Prospective overruling - Device innovated to avoid reopening of closed issues – No prospective overruling unless so specified by Supreme Court.
Murthy (M.A) v/s. State of Karnataka
(2003) 264 ITR 1 = 185 CTR 194 =(2004) 178 Taxation 397 (SC)

(12) Decision made on setting of facts of particular case–Reliance on earlier decision to be based on fitting factual situation.
Padmasundara Rao (Decd) v/s. State of Tamil Nadu
(2002) 255 ITR 147 = 176 CTR 104 = 170 Taxation 303 (SC)

(13) Doctrine of Prospective Overruling - Implications - Prospective overruling is a recognition of the principle that the Courts can mould the reliefs claimed to meet the justice, not in its logical sense but in its equitable sense - In exercise of this power Courts deny the relief claimed despite holding in the claimant's favour in order to do complete justice - By its judgment in Synthetics & Chemicals Ltd. v/s. State of U.P (1990) 1 SCC 109, the Supreme Court overruled its earlier judgment and declared the provisions for levy of vend fee on industrial alcohol by the States illegal prospectively - This meant that if the States had already collected the tax they are not liable to refund the same - At the same time States were restrained from enforcing the levy any further - States were also

prevented to recover the tax if not already realised in respect of period prior to date of judgment i.e 25th Oct., 1989 - Such an order of prospective overruling is not contrary to law - Court did not, by denying the relief, authorise or validate what had been declared to be illegal or void.

Somaiya Organics (India) Ltd. & Anr. v/s. State of Uttar Pradesh & Anr.

(2001) 170 CTR 81 (SC)

73. PRIMA FACIE - ADJUSTMENT UNDER 143(1)(a)

(1) Section 143(1)(a) – Tribunal is right that adjustment was not permissible as the issue of the deduction was debatable - High Court held there is no infirmity in Tribunal's order – Reference answered against the revenue. Income Tax Act, 1961 – Section 143(1)(a).

Mahesh Kumar A. Rathod, CIT v/s.

(2007)198 Taxation 173 (2008) 296 ITR 146 =

(2009) 176 Taxman 283 (Guj)

(2) Development Officer of LIC – Incentive bonus adjusted – Tribunal held being a debatable issue no adjustment is permissible – High Court confirms Tribunal's order – Revenue's appeal dismissed. Income-tax Act, 1961 – Section 143(1)(a).

Manubhai M. Patel, CIT v/s.

(2007)199 Taxation 491 = (2008)296 ITR 143 (Guj)

(3) Section 143(1)(a) – Whether Tribunal is right that adjustment was not permissible as the issue of the deduction was debatable ? – High Court held there is no infirmity in Tribunal's order – Reference answered against the revenue, Income –tax Act, 1961.

Mahesh Kumar A. Rathod, CIT v/s.

(2007)198 Taxation 173= (2008) 296 ITR 146 =

(2009) 176 Taxman 283 (Guj)

(4) Debatable issue – There being conflicting views at the relevant time on the question whether deduction under s. 80-O is allowable on gross income or net income, deduction under s. 80-O claimed by the assessee on gross qualifying income could not be reduced by way of prima facie adjustment under s. 143(1)(a) and consequently additional tax under s. 143(1A) could not be charged.

Kraverner John Brown Engg. (India) (P) Ltd. V/s. Asstt. CIT & Ors.

(2008)216 CTR 193 = 170 Taxman 304 = 305 ITR 103 = 207 Taxation 637 = 6 DTR 289 (SC)

(5) s.143(1)(a) – Assessment - Computation of book profit under s. 115J - Amount of unabsorbed depreciation and unabsorbed investment allowance to the extent considered for working out book profits for the purposes of s. 115J for earlier assessment years, namely asst. yr. 1988-89 and 1989-90 cannot be treated to be prima facie inadmissible on the basis of the information available in the return, accounts or documents accompanying the return for asst. yrs. 1990-91 and 1991-92 more so when the issue was highly debatable.
Gujarat Petrosynthese Ltd. & Anr. V/s. P.L Rungta & Ors.
(2008) 220 CTR 584 = 14 DTR 272(Guj)

Also see under the heading "Assessment".

74. PROCEDURE

(1) Litigation between P.S.U & Govt. - Public sector undertakings – Litigation – Ruling of Supreme Court - Necessity for obtaining clearance of High Powered Committee within one month of institution – Scope of rule – Not a rigid time framework – One month was used to indicate urgency – Mere existence of some delay in applying for clearance – Does not make action illegal.
Oriental Insurance Co. Ltd. , CIT v/s.
(2008) 304 ITR 55 = 11 RC 236 = 172 Taxman 92 = 217 CTR 593= 206 Taxation 537(SC)

(2) Mode of proof – Common law principle applicable.
Chinnnathamban K., CIT v/s.
(2007)292 ITR 682 = 211 CTR 86 = 162 Taxman 459= 201 Taxation 157 (SC)

(3) Practice - Supreme Court – Dismissal of petition for special leave to appeal from decision of one High Court – Department not appealing from decisions of other High Courts taking same view – Not allowed to appeal from decision taking same view – Constitution of India, art.136.
Mandideep Eng. & Pkg. Ind. (P) Ltd., Jt. CIT v/s.
(2007)292 ITR 1=210 CTR 614 =163 Taxman 337 =201 Taxation 388 (SC)

75. **PREVIOUS YEAR**

(1) Assessing Officer permitting change of previous year subject to condition that depreciation would not be allowed for period of five months, i.e for assessment year 1982-83 and that full depreciation would be allowed for assessment year 1983-84 – Assessee cannot be deprived of the benefit given to it under statute – That assessee did not challenge validity of order at initial stage would not deprive the assessee of its right to claim depreciation - Income Tax Act, 1961, ss. 3, 32.

Electric Control Gear Ltd., CIT v/s.

(2004)266 ITR 338 = (2003) 129 Taxman 722 = 183 CTR 540 = 176 Taxation 539(Guj)

(2) Change of - Section 3, read with section 10(3), [prior to its amendment by the Finance Act, 1972 with effect from 1-4-1972] of the Income Tax Act -Previous Year – Assessee adopting previous year ending 30th June for business receipts, received jackpot winning during 1-9-1971 to 15-2-1972 and credited it in same account in which business receipts were credited – Whether previous year for impugned receipts would be year ending 30-6-1972 and same would be taxable during assessment year 1973-74 subject to exemption only of Rs. 1,000 under amended section 10(3) – Held, no – Whether impugned receipts would, thus, be assessable in the assessment year 1972-73 – Held, yes.

Lachman Das Veerbhandas, CIT v/s.

(2002) 124 Taxman 488(SC)

76. **PRIORITY INDUSTRY – MANUFACTURE**

(1) Deduction under s. 80J - Manufacture or production - Bleaching, dyeing printing etc. of grey cloth - Produces a distinct article having distinct use - There is manufacture or production of article - Relief under s. 80J allowable -

Kashiram Textile Mills (P) Ltd. , CIT v/s.

(2001) 170 CTR 11 = 252 ITR 162(GUJ)

(2) Deductions - Profits and gains from new industrial undertakings, etc. Assessee, a new industrial unit, did not claim relief under section 80J in earlier years as there was no positive taxable income and claimed relief in assessment years 1978-79 and 1979-80 when there was profit - Whether assessee was entitled to carry forward claim of relief under section 80J relevant to years when assessee suffered loss and got relief in year in which assessee had profits - Held, yes.

Gujarat Agro Oil Enterprises, CIT v/s.
(2001) 118 TAXMAN 150 (GUJ)

Also see "80I, "New Industrial undertaking".

77. <u>PROMISSORY ESTOPPEL - SALES TAX</u>

(1) Abolition of purchase tax on milk – Chief Minister had announced that purchase tax on milk had been abolished – This was repeated by the Finance Minister in his budget speech after considering the financial implications of the grant of exemption – Circulars to that effect also issued by Sales tax authorities - State Government had the power to exempt milk as a taxable commodity – Representation to exempt milk was made by persons who had the power to implement the representation – Appellants have been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government - Thus, the plea of promissory estoppel raised by the respondents is upheld and the State Government cannot now be allowed to resile from its decision to exempt milk and demand purchase tax with retrospective effect.

Nestle India Ltd. , State of Punjab v/s.
(2004) 189 CTR 501 = 269 ITR 97= (2005) 184 Taxation 1 (SC)

(2) Discontinuance of purchase tax exemption - Rule of promissory estoppel can be invoked only if, on the basis of the representation made by the Government, an industry was established to avail of the benefit of tax exemption – Doctrine of legitimate expectation is confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken – Protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise – Basic requirement of Art. 14 is fairness in action by the State – Every State action must be informed by reason – An act uninformed by reason is, per se, arbitrary - However, a

claim based on mere legitimate expectation without anything more cannot ipso facto, give a right to invoke Art. 14 - Reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question – White taking a policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn – Though the appellants were not entitled to any opportunity of hearing before alternation or withdrawal of any benefit, State having not taken any specific stand justifying the withdrawal, principles of natural justice were applicable – High Court has recorded its findings simply on the basis of files – Further, High Court has not dealt with the issue of legality of retrospective withdrawal of benefit by an executive order – Thus, matter is remitted to the High Court for fresh consideration.

Bannari Amman sugars Ltd. v/s. CTO & Ors.
(2004) 192 CTR 492 = (2005) 186 Taxation 163 (SC)

78. <u>PROPERTY INCOME</u>

(1) Where there is no fixation of standard rent by any competent Court under Rent Control Legislation annual letting value has to be determined on basis of actual rent received by assessee and not on basis of gross rental value determined by Small Causes Court for municipal tax purpose.

Sarabhai (P) Ltd., CIT v/s.
(2009) 176 Taxman 6(Guj)

(2) Ownership – Property subject to dispute between the parties – Assessee was not in a position to exercise its right as owner of the property purchased buy it during the years under consideration on account of suits filed by the original owner and his relatives against the assessee – Income from said property rightly excluded from assessee's assessment.

Gaekwad and Co., CIT v/s.
(2006) 202 CTR 166 = 284 ITR 382 (Guj)

(3) Owner - Person purchasing property but not obtaining possession thereof - Not the owner for purposes of Income Tax Act – Income from property not includible in its total income – Income Tax Act, 1961, s. 22.
Gaekwad and Co., CIT v/s.
(2005)277 ITR 553 = 198 CTR 258 =189 Taxation 741 (Guj)

(4) Income from house property – Ownership – Transfer of properties – Income from house properties which had been transferred could not be brought to tax on notional basis.
Fabriquip (P) Ltd., CIT v/s.
(2002) 177 CTR 149 = 123 Taxman 820 = 171 Taxation 291 (Guj)

79. <u>REASSESSMENT</u>

(a) <u>AGAINST INTIMATION U/S. 143(1)(a)</u>

Reassessment – Validity - Assessment under s. 143(1) – Under s. 147, as substituted w.e.f 1st April, 1989, if the AO, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment where the case is not covered by proviso to s. 143 – Intimation under s. 143(1)(a) cannot be treated to be an order of assessment and there being no assessment under s. 143(1)(a), the question of change of opinion does not arise.
Rajesh Jhaveri Stock Brokers (P) Ltd., Asstt. CIT v/s.
(2007) 210 CTR 30 = 291 ITR 500 = 161 Taxman 316 = 201 Taxation 184 (SC)

(b) <u>AUDIT REPORT</u>

(1) Income escaping assessment - Position prior to 1-4-1989 – Assessment year 1988-89 – When Assessing Officer became aware of jurisdictional High Court's decision, he initiated reassessment proceedings under section 147 and issued notice under section 148 - Whether since Assessing Officer acted on basis of information, which he received, initiation reassessment proceeding would be upheld – Held, yes.
Saradbhai M. Lakhani, ITO v/s.
(2002) 122 Taxman 111(SC)

(2) Issue of notice for – Assessment year 1989-90 – Assessment Officer issued Impugned notice under section 148 on ground that income had escaped assessment - Reasons recorded was that certain items could not be considered while working out book profit under section 115J – High Court quashed notice as it thought that necessary condition for issuing notice under section 148 read with section 147 had not been satisfied - Whether, since both parties, before Supreme Court agreed that judgment and order of High Court should be set aside and that matter should be considered by Assessing Officer, order of High Court was to be set aside and matter should be remanded back to Assessing Officer – Held, yes.
VXL India Ltd., Asstt. CIT v/s.
(2002) 124 Taxman 494 (SC)

(3) Failure to disclose material facts necessary for assessment - Information that income has escaped assessment - Firm - Shares transferred as contribution to capital - Fact disclosed to Assessing Officer - Opinion of audit party that transaction would attract capital gains tax - Opinion of audit party would not amount to information within the meaning of section 147(b) - Reassessment not valid - Income Tax Act, 1961, s. 147.
Pankajkumar R. Shah, CIT v/s.
(2001) 252 ITR 434 = 171 CTR 421 = 165 TAXATION 749(GUJ)

(c) <u>AUTHORISATION</u>

Notice - Firm – Genuineness of transactions – Finding that entries not genuine – Power of Assessing Officer to take action even against partner in view of statements made by witness – Income Tax Act, 1961, s. 147(a) -
Gujarat Fertilizers v/s. CIT
(2007) 293 ITR 70 =196 Taxation 187 =210 CTR 594(Guj)

(d)<u>CHANGE OF OPINION</u>

(1) Reason to believe - Income had escaped assessment - Finding that allowances were not properly computed – Reassessment proceedings – Valid – Income Tax Act, 1961, s. 147.
Revision – Notice issued under section 263 – Reassessment proceedings can be initiated – Income Tax Act, 1961, ss. 147, 263.
Inductotherm (India) (P) Ltd. v/s.James Kurian, Asstt. CIT .
(2007)294 ITR 341 =212 CTR 195=(2008) 169 Taxman 240 (Guj)

(2) Different view on same facts – Reopening of assessment on the basis of finding of another AO in a later assessment year suffered from change of opinion, hence invalid.Full and true disclosure - Notice after expiry of four years – Assessments for the relevant assessment years having been framed following orders of CIT(A) in earlier years holding assessee eligible for deduction under ss. 80HH and 80-I and there being no failure on the part of assessee to make full and true disclosure, reopening of assessments after the expiry of four years from the end of the relevant assessment years was invalid.
Notice under s. 148 - Validity – Notice under s. 148(1) issued by AO other than the one who recorded reason to believe under s. 148(2) is invalid.
Hynoup Food & Oil Industries Ltd. v/s. Asstt. CIT
(2008) 219 CTR 124 = 307 ITR 115 = 207 Taxation 461 = 175 Taxman 331 (Guj)

(3) Notice under s. 148 - Block assessment - Framed under Chapter XIV-B – Once assessment has been framed under s. 158BA in relation to undisclosed income of the block period as a result of search, AO cannot issue notice under s. 148 for reopening such assessment.
Cargo Clearing Agency v/s Jt. CIT
Kapurchand Kakaram Bansal v/s. Dy. CIT
(2008)217 CTR 541= 307 ITR 1 =207 Taxation 586= 12 DTR 50= 12 DTR 50 (Guj)

13 FULL DISCLOSURE

(1) Notice after expiry of four years – Reopening after four years on the ground that as per TDS certificate the work done is shown at Rs. 20,51,903 while in the return of income the work done is shown at Rs. 1,98,800 is not permissible as TDS certificate is not concerned with work done – There was no failure or omission on the part of the assessee to disclose truly and fully all relevant particulars of income.
Ganesh Valabhai Family Trust v/s. DCIT
(2008)217 CTR 588 =205 Taxation 292 =306 ITR 221=5 DTR 317 (Guj)

(2) No non disclosure - Notice – Incorrect opinion formed by Assessing Officer – No non-disclosure of material facts for assessment by assessee – Notice issued after four years – Not valid – Income tax Act, 1961, ss. 147, 148.
Gujarat Carbon and Industrial Ltd. v/s. Jt. CIT
(2008) 307 ITR 271 = 218 CTR 537=207 Taxation 138 =

11 RC 373 = 11 DTR 329(Guj)

(3) Assessment reopened for A.Y 1992-93 on the ground that the insurance claim of Rs. 322160 in respect of loss of stock due to fire as assessed by the surveyor was not shown as accrued income as assessee was maintaining accounts on mercantile basis – High Court found that the insurance company did not settle the claim – Matter taken up before the consumer disputes redressal commission which settled the claim in next year – Assessee along with return furnished above information – Held, there was no failure to disclose fully & truly all material facts – Notice under section 148 quashed & set aside . (Reopening of assessment after four years - Disclosure of material facts – Notice under section 148.
Prahladbhai Naranbhai Patel v/s. NKC Nair
(2008) 207 Taxation 581 == 10 DTR 57= (2009) 309 ITR 45 (Guj)

(4) Full and true disclosure – Notice under s. 148 – Reason to believe – An omission on the part of assessee for asst. yr. 1997-98 even if taken to be true, cannot be a ground for reopening the assessment for asst. yr. 1996-97 in the absence of any independent reason of AO to believe that income chargeable to tax for asst.yr. 1996-97 escaped assessment on account of such omission – Nor also a belief of "possible escapement of income" can give the AO jurisdiction to reopen assessment.
Nitin P. Shah alias Modi v/s. Dy. CIT
(2005)194 CTR 306 =276 ITR 411= 146 Taxman 536 = 187 Taxation 390 (Guj)

(5) Full and true disclosure – Discovery of information vis-à-vis undisclosed investment - A diary seized from assessee revealed that a larger amount was paid towards purchase of a property than that shown in the books f account – Noting in the diary constituted sufficient information for the assessing authority to form a prima facie opinion that there was escapement of income on account of non declaration of correct price of the property – Thus, there was failure to disclose fully and truly all material facts.
Ramilaben Ratilal Shah v/s. CIT
(2005)199 CTR 340= (2006) 152 Taxman 37= 192 Taxation 351 (Guj)

(6) Retrospective amendment of law - Petitioner had claimed depreciation and investment allowance on the assets which included capitalized interest paid in connection with the acquisition of machinery for the post installation period - When the assessee had filed its return for the asst. yr. 1983-84 in 1983 it could not have assumed that a legislative amendment by way of Expln. 8 to s. 43(1) was going to be made in the year 1986 with retrospective effect from the year 1974 – Thus, it could not be said that the petitioner had failed to disclose all the material facts and hence the condition precedent for invocation of powers under s. 147 r/w ss. 148 and 149 was not fulfilled – Impugned notice quashed and set aside.
Denish Industries Ltd. v/s. ITO
(2004) 190 CTR 485 140 Taxman 456= 271 ITR 340 =
(2005) 184 Taxation 308 (Guj)

(7) Notice after expiry of four years - There was no failure or omission on the part of the assessee either to make a return or to disclose any material fact necessary for the purpose of assessment - Assessee fulfilled all the conditions laid down in sub-s. (1) of s. 32A and investment allowance was accordingly allowed – Thus, the reassessment proceedings for the asst. yrs. 1982-83 to 1985-86 are bad in law - As regards asst. yr. 1986-87, though the notice was issued within the period of four years, not only there was no omission or failure on the part of assessee, there is no material with the AO to come to the conclusion that any income had escaped assessment – Assessee has been granted investment allowance on same set of facts in the succeeding assessment year – Reopening of assessment is not permissible on a change of opinion.
Vikas Printery v/s. Asstt. CIT(Inv.) & Anr.
(2004) 190 CTR 608 = 270 ITR 68 = 183 Taxation 403 =
(2005) 142 Taxman 317 (Guj)

(8) Notice – Notice after four years - Condition precedent - Failure to disclose aterial facts necessary for assessment – Finding that fact relating to special deduction under section 80HHC were disclosed - Notice of reassessment after four years - Not valid .
Patidar Oil Cake Industries v/s. Deputy CIT
(2004)270 ITR 347 =140 Taxman 575=(2005)184 Taxation 305((Guj)

14 GENERAL

(1) Income escaping assessment - Issue of notice for – Return filed by petitioner/assessee was processed by Assessing Officer under section 143(1)(a) without making any prima facie adjustment and an intimation to that effect was issued – Thereafter, Assessing Officer noticed that assessee had made a note in return that he had received non compete fee from a company, which being a capital nature was not taxable, but there was no formation of any opinion with regard to that fee being taxable or non-taxable in assessment order passed – Assessing Officer being of view that amount of non-complete fees was taxable and same ought to have been included in total income of assessee, issued impugned notice for re-assessment under section 148 believing that income of assessee had escaped assessment within meaning of provisions of section 147 – In liberalized and simplified tax-collection regime, mere acceptance and acknowledgement of return and issuance of refund cannot be elevated to status of regular assessment and formation of opinion about incident of tax on a particular claim or item mentioned in return of income, and in absence of any formation of opinion about taxability of non-compete fees, in facts of instant case, there could be no question of change of opinion –
In view clause (c) of Explanation 2 to section 147 even where an assessment is made, but income chargeable to tax has been under assessed – Impugned notice issued by Assessing Officer proposing to re-assess income of petitioner was legal and valid .
Bharat V. Patel v/s. Union of India
(2004)134 Taxman 178 = 186 CTR 639 = 179 Taxation 498 =268 ITR 116 (Guj)

(2) Accrual of Income – Concept of real income – Mercantile system of accounting - Transfer of business by assessee company to its wholly owned subsidiary on 28-2-1977 – Agreement providing for payment of interest on unpaid purchase price - Resolution by assessee on 30-6-1978 shifting date of charge of interest to 1-8-1979 – Reason for not charging interest stated to be that it was obtaining security – No security obtained - No commercial reason for forgoing interest – Interest had accrued from 1-7-1977 to 30-6-1978 hence was taxable - Resolution found to be genuine – No interest accrued from 1-7-1978 to 30-6-1979 hence not taxable.
Sarabhai Chemicals Pvt. Ltd. , CIT v/s.
(2002) 257 ITR 355 = 173 CTR 193 = 121 Taxman 755 (Guj)

(3) Effect – Original assessment - On reassessment original assessment order stood effaced by reassessment order - Said assessment order made a fresh assessment of entire income of the assessee - In that view of the matter, the question as to dissenting views being expressed by different Benches of the Supreme Court on the scope and effect of re-opening of assessment need not be decided and is left open.
K.L Srihari (HUF) & Ors , ITO & Ors. v/s.
(2002) 176 CTR 99 = 250 ITR 193 = 118 Taxman 890(SC)

(4) Notice - Reassessment on the ground that return for 1991-92 had not been filed and that a certain income had not been disclosed – Material on record showing that return had in fact been filed – Revenue not sure whether alleged income was taxable in assessment year 1991-92 or 1992-93 – Reassessment proceedings for 1991-092 not valid – s. 147.
Sagar Enterprises v/s. Asstt. CIT
(2002)257 ITR 335=173 CTR 528 =167 Taxation 463 =124 Taxman 641 (Guj)

15 INFORMATION
Condition precedent – Reason to believe that income had escaped assessment - Audit objection to computation of loss - Assessing Officer not accepting objection – Subsequent reassessment notice based on audit objection – Notice not valid -
Rajesh Jhaveri Stock Brokers P. Ltd. v/s. Deputy CIT.
(2006)284 ITR 593(Guj)

16 INTEREST LIABILITY
Fresh assessment - Interest for delay in filing return - Interest on deficiency in advance tax payment - Liability Considered -
Srihari (K.L)(HUF), ITO v/s.
(2001) 250 ITR 193 = 118 TAXMAN 890(SC)

17 LIMITATION – NEW PROVISIONS – NO OMISSION
Issue of notice for –Assessment years 1988-89 to 1990-91 – Petitioner foreign company was engaged in business of oil exploration and providing expertise and assistance in said field – Proceeds from manning and management contracts received by petitioner were originally assessed in February, 1991 under section 143(3) treating same as business income in terms of section 44BB –

However, following Tribunal's decision rendered in case of petitioner's expatriate employee, Assessing Officer issued a notice under section 148 in November, 1998 seeking to reassess same income as fees for technical services – Law prevailing on date of issue of impugned notice would apply to instant case, and since new section147 had come into force with effect from 1-4-1989 provisions of that section were applicable – Since admittedly there was no failure on part of petitioner to make return or to disclose fully and truly all material facts necessary for assessment proviso to new section, which bars issue of notice under section 148 after expiry of four years from end of relevant assessment year, squarely applied to facts of instant case and therefore impugned notice was barred by limitation - Since notice under section 148 was without jurisdiction there was no merit in plea that petitioner was to be relegated to alternative remedy .

Time limit for completion of – Provisions of section 153 are inapplicable to issue of notice under section 148 and refer to assessment – A 'direction' or 'finding' as contemplated by section 153(3)(ii) must be a finding necessary for disposal of a particular case, that is to say, in respect of a particular assessee and in relevance to a particular assessment year - To be a direction as contemplated by section 153(3)(ii), it must be an express direction necessary for disposal of case before authority or Court – On facts stated under heading 'Income escaping assessment – Issue of notice for', it could not be said that proposed reassessment was in consequence of, or to give effect to, any finding or direction of Tribunal in case of petitioner's employee and, therefore provisions of section 153(3)(ii) would apply to facts of instant case.

Foramer France , CIT v/s.

(2003) 129 Taxman 72 = 264 ITR 566=185 CTR 512 (SC)

18 <u>NOTICE UNDER S. 148</u>

Recording of reasons – AO having not complied with the mandatory requirement of recording of reasons before issuance of notice, the impugned notice is quashed and set aside - Language of s. 148(2) does not permit recording of reasons between the date of issuance of notice and service of notice.

Rajoo Engineers Ltd. v/s. Dy. CIT

(2008)218 CTR 53 = 207 Taxation 578(Guj)

19 OMISSION

(1) Non disclosure of primary facts – Assessment years 1984-85 and 1985-86 - Machineries in respect of which investment allowance was claimed and allowed were sold within a period of eight years sometime in 1986 and original assessment order for assessment year 1984-85 was passed on 31-3-1987 – Whether since assessee failed to disclose fact of transfer before Assessing Officer during course of original assessments, he was justified in reopening assessments and withdrawing investment allowance – Held, yes.
Mamta Type Setting Works v/s. Asstt. CIT
(2004)134 Taxman 34=187 CTR 151-180 Taxation 421=
267 ITR 623(Guj)

(2) Non-disclosure of primary facts – Assessee was obliged to disclose in his income tax return factum of his marriage with his brother's widow as minors became his step-children - Since that was not done and having come to know factum of such relationship between assessee and minors, Assessing Officer was justified in reopening assessment.
Abdul Rahim Khan M. Pathan , CIT v/s.
(2003)131 Taxman 397(Guj)

(3) Non disclosure of primary facts – Reassessment proceeding were initiated and a notice was issued in Feb. 2001 at behest of internal revenue audit party pointing out that petitioner's production unit was not located in backward area and, hence, it was not eligible for deduction under sections 80HH and 80-I – Assessment was initially made under section 143(3) on 25-3-1991 allowing petitioner's claim for deduction under sections 80HH and 80-I – Thereafter, revisional proceedings were initiated under section 263, assessment was set aside and a fresh assessment was framed on 29-9-1994 withdrawing deductions allowed in original assessment– On appeal, Commissioner (Appeals) by order dated 22-7-1996, on 5-2-2001 reassessment was reopened –Facts and evidence available on record made it abundantly clear that there was no failure or omission of part of petitioner to disclose full and truly all material facts necessary for assessment – Since assessment was sought to be reopened after a period of four years and there was admittedly no omission or failure part of petitioner, Assessing Officer could not assume jurisdiction under section 147.
Sheth Bros. V/s. Jt. CIT
(2003) 130 Taxman 367(Guj)

Directed A.O to allow deduction claimed from 7-11-1995 to 31-3-1996.

(4) Reassessment after four years – Failure to disclose material facts necessary for assessment – Amalgamation of companies – Assessee holding shares in amalgamating company – Assessee allotted shares in amalgamated company and subsequently selling them – Market price of shares as on date of amalgamation shown as cost of acquisition of shares – Failure to show cost of acquisition of shares in amalgamating company in accordance with section 49(2) – Reassessment proceedings valid.
Garden Finance Ltd. v/s. Addl. CIT
(2002) 257 ITR 481= (2003) 180 CTR 145 =173 Taxation 187= 132 Taxman 543(Guj)

(5) Position after 1-4-1989 – Assessment year 1996-97 – Whether reassesment was justified where bogus claim of depreciation was made on non existent machinery and allowed – Held, yes.
Gruh Finance Ltd. v/s. Jt. CIT
(2002) 123 Taxman 196 (Guj)

(6) Position prior to 1-4-1989 – In original assessment ITO allowed assessee's claim of deduction of certain sum paid as commission to sole selling agents - ITO, subsequently discovered fresh material leading to conclusion that particulars earlier furnished by assessee were untrue – Reopening of assessment under section 147(a) was justified - Merely because case of assessee is accepted as correct in original assessment for an assessment year, it does not preclude ITO to reopen assessment of an earlier year on basis of his finding of fact made on basis of fresh materials in course of assessment of next assessment year.
Ess Ess Kay Engg. Co. (P) Ltd. v/s. CIT
(2002) 124 Taxman 491 (SC)

(7) Notice issued after four years – Failure to disclose material facts necessary for assessment – Charitable trust - Reassessment proceedings on the ground that section 13 applied to assessee – Burden on revenue to prove it – No such proof – List of persons falling under section 13 furnished by assessee – Notice of reassessment not valid – Income Tax Act, 1961, ss. 13, 147, 148 – Constitution of India, Art. 226.
Surat City Gymkhana v/s. Deputy Commissioner of Income Tax
(2002) 254 ITR 733 (Guj)

(8) Failure to disclose material facts necessary for assessment - Claim for deduction allowed by ITO but withdrawn in revision proceedings and allowed again on further appeal - No failure to disclose material facts regarding deduction - Reassessment not valid -
Sheth Brothers v/s. Joint CIT
(2001)251 ITR 270(Guj)

20 REASON TO BELIEVE

Audit objection – AO reopened the assessment at the behest of the audit department on the ground that a assessee had claimed loss on the basis of erroneous computation - Belief which is projected on paper is not the factual belief held by the AO – Despite recording reasons for reopening the assessment, the AO has lodged his objection to the proposal made by the Audit Department to reopen the assessment and the objection raised by the AO has been endorsed by the Addl. Cit – Hence, AO did not hold the belief at any point of time that income of the assessee had escaped assessment - Consequently, impugned notice under s. 148 is quashed and set aside.
Rajesh Jhaveri Stock Brokers(P) Ltd. v/s. Asstt. CIT
(2005) 196 CTR 105 = 189 Taxation 408 (Guj)

21 **WRIT**

(1) Alternative remedy – Notice under s. 148 – Decision of the Supreme Court in GKN Driveshafts (India) Ltd. v/s. ITO (2003) 179 CTR (SC) 11 : (2003) 259 ITR 19 (SC) does not purport to divest the Court of its constitutional power to issue a writ of prohibition or any other appropriate writ in a fit case to restrain the assessing authority from proceeding with the notice under s. 148 - Said case only lays down the procedure that should ordinarily be followed in such case, i.e after receiving the reasons, the assessee should first lodge his preliminary objections against the notice before the AO who should decide the objections by a speaking order and the assessee, if still aggrieved can challenge the order in a writ petition – The rigour of availing of the alternative remedy before the AO for objecting to the reassessment notice under s. 148 has been considerably softened by the apex Court in the GKN case – Therefore, writ petition challenging the impugned notice is dismissed with the clarification that if the assessee lodges its

preliminary objections before the AO with reference to the notice or in relation to reasons disclosed in the additional affidavit, the AO is to consider and decide the objections by a speaking order, and in case the order is adverse to assessee, it would be at liberty to challenge such order by filing a writ petition – Pre and post GKN case position regarding maintainability of writ explained.

Garden Finance Ltd. v/s. Asstt. CIT
(2004)188 CTR 316 = 137 Taxman 49= 268 ITR 48 =
181 Taxation 481 (Guj)

(2) Issue of notice – Whether when a notice is issued under section 148, proper course of action for notice is to file return and if he so desires, to seek reasons for issuing notice and on receipt thereof to file objections to issuance of notice – Held, yes – Whether where notices were issued under sections 143(2) and 148 and all that assessee was agitating could be submitted by filing reply to said notices, assessee was unjustified in invoking extra ordinary writ jurisdiction at notice stage itself – Held, yes.

GKN Driveshafts (India) Ltd. v/s. ITO
(2002) 125 Taxman 963 =(2003) 179 CTR 11 =
173 Taxation 50 = 259 ITR 19(SC)

80. RECOVERY

(1) Recovery of Tax – From Directors of Pvt. Co.Company – Director – Director of private company – Conditions precedent for recovery of tax due by company from director – No effective steps to effect recovery of outstanding dues from company – Revenue initiating action against directors – Not permissible – Income Tax Act, 1961, s. 133A.

Amit Suresh Bhatnagar v/s. ITO
(2009) 308 ITR 113 = 221 CTR 70 = 15 DTR 29 (Guj)

(2) Search and Seizure - Bank accounts – Restraint order on bank – Withdrawal of money from bank accounts of assessee by Department in shape of fixed deposits – Not proper – Writ petition – Challenging search – High Court – Dismissal – Appeal to Supreme Court – Direction only for completing assessments within permissible time – Income tax Act , 1961, ss. 132, 132B.

K.C.C Software Ltd. & Ors v/s. Director of I T (Investigation) & Ors.
(2008) 298 ITR 1 = 214 CTR 553 =204 Taxation 42 = 2 DTR 185 (SC)

(3) Garnishee proceedings under s. 226(3) - Units of UTI not mature for payment – Amount invested by assessee in the units of UTI having a lock-in period of five years could not be paid by the UTI to the Department in compliance of notice under s. 226(3) issued to it, when the assessee had not exercised the option of repurchase of the units – Assessee is entitled to be restituted and also entitled to dividend declared from the date of allotment.

B.M Malani & Ors., Administrator of the Specified Undertaking of Unit Trust of India v/s.
(2007)212 CTR 425 = (2008) 296 ITR 31=202 Taxation 160 (SC)

(a) <u>AUCTION SALE</u>

(1) Other modes of recovery -Assessment year 1985-86 – Appellant was a registered firm with four partners – For relevant assessment year, a total amount of Rs 12,55,150 was due from appellant towards tax, interest and penalty, for recovery of which agricultural lands owned by partners of appellant had been attached and sold in a public auction by department and sale was confirmed in favour of 'L' – Facts revealed that arrears of tax and interest had been accepted by appellant that no procedural irregularity or illegality in public auction much more than reserve price fixed by Assessing Officer which had never been challenged by appellants – On facts, High Court confirmed action of department in auctioning attached property for recovery of debts – Whether High court was justified in its view – Held, yes - Whether even otherwise, since 'L' had purchased said property in a valid auction and he was a bona fide purchaser of property for value, sale could not be disturbed – Held, yes.

Janatha Textiles v/s. Tax Recovery Officer
(2008) 216 CTR 371 = 170 Taxman 221 = 301 ITR 337 = 206 Taxation 150 (SC)

(2) Rights of Auction Purchaser - Rights of third party purchaser – In a third party auction, purchaser's interest in the auctioned property continues to be protected notwithstanding that underlying decree is subsequently set aside or otherwise.

Janatha Textiles & Ors. V/s. TRO & Anr
(2008) 216 CTR 371= 301 ITR 337 = 206 Taxation 150 = 170 Taxman 221 = 7 DTR 133(SC)

(b)PRIORITY

Company in liquidation – Priority of debts – Overriding preferential payments in favour of secured creditors and workmen – Income Tax Department cannot claim priority over such secured creditors – Income Tax Act, 1961, s. 178 – Companies Act, 1956, ss. 529A, 530-

Official Liquidator of Minal Oil and Industries Ltd.,
Assistant CIT v/s.
(2007) 290 ITR 643= 210 CTR 445 = 163 Taxman 1=
(2008) 202 CTR 51 (Guj)

(c) **STAY**

(1) Notice under section 226(3) to recover demand of above Rs. 17 crore - Stay petition & appeal pending before the Tribunal – Assessee petitioner, a Government Trust for implementation of Pradhan Mantri Gram Sarak Yojna – Tribunal advised to dispose of stay petition or appeal preferably appeal by a stipulated date – Petitioner also directed to pay demand of Rs. 50 lacs & not to seek adjournment - Notice under section 226 suspended (Notice under section 226(3) – Appeal & stay application pending).

Gujarat State Rural Road Development Agency v/s.CIT
(2009) 208 Taxation 446 = 12 DTR 328(Guj)

(2) Interim order – When should be passed when there is "undue hardship" - Interest of Revenue to be kept in view – Central Excise Act, 1944, s. 35F.

Benara Valves Ltd. v/s. Commissioner of Central Excise
(2007) 8 RC 6(SC)

(3) Appeal (CESTAT) – Dispensation of pre-deposit - For stay - Prima facie case – Petitioner having placed no material, except mere assertion, to show that the condition of pre-deposit of entire demand of service tax and penalties levied upon it would cause undue hardship to the petitioner, and the Tribunal having found that no prima facie case exists for absolute stay of demand, order passed by the Tribunal directing the petitioner to deposit only the amount of service tax is justified.

Comed Laboratories Ltd. v/s. Union of India & Anr.
(2008) 217 CTR 262 = 7 DTR 384(Guj)

(4) Customs Duty - Appeal – Deposit of duty or interest demanded – Application for waiver of pre-condition of deposit - "Undue hardship" and "safeguard interests of Revenue" to be condiered - Scope of – Customs Act, 1962, s. 129E.
Indu Nissan Oxo Chemical Ind. Ltd. v/s. Union of India
(2008)10 RC 159(SC)

(5) Stay of appeal and stay petition pending before Tribunal – In view of the facts and circumstances of the case and CBDT Instruction No. 1914 dt. 2nd Dec. 1993 stay of recovery of outstanding demand in question is granted to the petitioner till the Tribunal decides the stay application pending before it on the condition that the petitioner a State Government undertaking shall furnish bank guarantee or a letter from the State Government to the tune of Rs. Twenty crores within one week.
Gujarat Maritime Board , Asstt. CIT v/s.
(2008) 220 CTR 390 = 15 DTR 70(Guj)

(6) Stay - Sales Tax - Assessment - Appeal – Stay pending appeal – Refusal to stay – Appeal to Supreme Court – Supreme Court interferes only in special cases - Deposit of huge amount demanded – Assessee, a public sector company and in sound financial position – Supreme Court directing Assistant Commissioner to hear appeal within three months – Assessee not required to deposit any amount – Orissa Sales Tax Act, 1947.
Bharat Petroleum Corp. Ltd. v/s. Commissioner of Sales Tax
(2008) 11 RC 492(SC)

(7) Stay Pending Appeal - Nothing recoverable as tax unless permitted by law – Constitution of India, Arts. 265, 366 (28).Executive - Cannot levy tax – Cannot resort to process of interpretation for such purpose.
Indian Bank's Association v/s. Devkala Consultancy Service.
(2004)267 ITR 179=137 Taxman 69 = 189 CTR 157=
181 Taxation 43 (SC)

(8) Sick Industrial Company – Suspension of recovery proceedings against company – Proceedings under section 226(3) would amount to coercive recovery – Income Tax on purchase price to be recovered from purchasers - Sick company not required to pay – Liability to

pay Income Tax on future income would not arise at this stage - Proceedings stayed as interim relief – May be continued with consent of board for Industrial and Financial reconstruction.
Ezy Slide Fastners Ltd. v/s. Joint CIT (Assessment)
(2004)269 ITR 548 = 191 CTR 36 = 183 Taxation 399 (Guj)

(9) Section 261 of the Income Tax Act, 1961 - Supreme Court - Appeal to - Single Judge, by an interim order, granted stay of proceedings before Income Tax authorities provided appellant deposited Rs. 5 crores against tax demand of Rs. 40 crores - Whether there was any reason to interfere with said order - Held, no - Whether since only a sum of Rs. 1.20 crores remained to be deposited, appellant's undertaking to make that deposit within two weeks could be accepted, and upon that deposit being made, income tax proceedings should remain stayed - Held, yes.
Wipro Finance Ltd. v/s. Union of India
(2001) 118 ITR 825 (SC)

81. RECTIFICATION

(a) DEBATABLE ISSUE

(1) Assessment years 1990-91 and 1991-92 – For relevant assessment years unabsorbed investment allowance relatable to assessment years 1982-83 to 1989-90 was excluded by virtue of provisions of section 115J – Assessing Officer accepted return of income under section 143(1)(a) and no prima facie adjustment was made – Subsequently, orders under section 154 were framed by Assessing Officer placing reliance on section 115J(2) as well as CBDT's Circular No. 495 and unabsorbed investment allowance was disallowed to extent to which such amount was allowed to be carried forward and set off while computing income under section 115J – In view of decision in Gujarat Petrosynthese Ltd. v/s. P.L Rungta (Special Civil Application No. 1245 of 1993), Tribunal was right in law in modifying orders under section 154 – Held, yes.
Fag Precision Bearing Ltd., CIT v/s.
(2009) 176 Taxman 27(Guj)

(2) Actual cost – Depreciation - Investment allowance – Exclusion of interest component on deferred payment for machinery – Debatable issue – Rectification not permissible–Income Tax Act,1961, ss. 43(1),Expln. 8, 154.
Digvijaya Cement Co. Ltd., CIT v/s.
(2008) 305 ITR 267 = 205 Taxation 245 = 4 DTR 64 (Guj)

(3) Set off of carried forward reliefs vis-à-vis deductions for current year – AO rectified the assessment to change the order of precedence of deduction under s. 80J, development rebate, deduction under s. 80P, carried forward loss, unabsorbed depreciation, unabsorbed development rebate, etc. which according to him, were not in the correct order of priorities – Action not sustainable - Order of priority amongst different items viz, carried forward business losses, unabsorbed development rebate and depreciation of earlier years vis-à-vis reliefs relating to current year is an issue that has not been finally resolved and is not free from doubt – A decision on a debatable point of law is not a mistake apparent from record – Rectification was not permissible.

Chaltan Vibhag Udyog Khand Sahakari Mandli Ltd. , CIT v/s.
(2006) 200 CTR 86 = 282 ITR 385 = 192 Taxation 326 (Guj)

(4) Omission to apply r.2B(2)–Sub r.(2) of r.2B is mandatory in nature and WTO having committed mistake in not applying r. 2B(2), in the valuation of shares held by the assessee as stock in trade, he was justified in exercising his jurisdiction under s. 35 -

Minalben Rameshbhai Jhaveri L/H. of Smt. Manoram B. Dalal, CWT v/s.
(2006)206 CTR 412=(2007)196 Taxation 250=294 ITR 394 (Guj)

(5) Validity - Applicability of s. 155 (7A) – Provisions of s. 155(7A) were inserted with retrospective effect from 1st April, 1974 – Therefore ITO had no jurisdiction to invoke the provisions of said section for asst. yr. 1972-73 and pass the order of rectification under the provisions of s. 154 r/w s. 155(7A).

Motichand Virpal Shah, CIT v/s.
(2002) 172 CTR 734 = 121 Taxman 472(Guj)

(b) <u>GENERAL PRINCIPLES</u>

Abuse of authority - Utilising power to rectify to nullify benefit to assessee under Kar vivid samadhan scheme - Rectification order not communicated to assessee – Vitiates order rectification.

Assessment by intimation – Order of rectification deleting adjustments made – Opportunity to be heard – Not necessary.

Shaily Engineering Plastic Ltd. , CIT v/s.
(2002) 258 ITR 437 =(2003)179 CTR 14 = 126 Taxman 177 (SC)

(c) LIMITATION

(1) Change of law – Assessment made on 25th March, 1982 – Period of limitation for making rectification under the unamended provision of s. 154(7) would have expired on 24th March, 1986 – However, in the meantime amended s. 154(7) extended the time limit for passing the order of rectification whereby the period of four years is to be computed from the end of the financial year in which order sought to be amended was passed – Therefore, extended period of limitation was applicable, and the rectification made on 31st March, 1986 was not barred by limitation.

Super Cast Alloy Foundries Ltd., CIT v/s.
(2005) 194 CTR 194 =275 ITR 199 = 186 Taxation 450 =
(2006) 153 Taxman 175((Guj)

(d) POWERS

(1) Reference - Application for - Whether Tribunal entitled to rectify order passed on application – High Court upholding rectification – Supreme Court - Special leave petition from judgment relied on by High Court dismissed - Appeal dismissed – Income Tax Act, 1961, ss. 254, 256(1) .

Kerala Road Lines v/s. CIT
(2008)299 ITR 343= 215 CTR 401 =168 Taxman 308 =4 DTR 305 (SC)

(2) Appellate Tribunal - Powers of Rectification – Non consideration of Judgment of HC/SC - Assessment year 1996-97 – Whether non consideration of a decision of Jurisdictional High Court or of Supreme Court can be said to be a mistake apparent from record which can be rectified under section 254(2) – Held, yes.

Saurashtra Kutch Stock Exchange Ltd., Asstt. CIT
(2008)173 Taxman 322 =305 ITR 227 = 12 DTR 346=
(2009) 208 Taxation 90 (SC)

(3) Appeal – Tribunal – Rectification under s. 254(2) – Limitation Application for rectification under s. 254(2) having been made within

four years, the order passed by the Tribunal on the application after expiry of four year period cannot be held to be time barred.
Sree Ayyanar Spinning & Weaving Mills Ltd. V/s. CIT
(2008) 216 CTR 351 = 301 ITR 434 = 171 Taxman 498 = 7 DTR 57(SC)

(4) Appeal to Tribunal - Powers of Tribunal – Power to rectify mistakes on record – Scope of – Fundamental principle – No party appearing before Tribunal should suffer on account of mistake committed by Tribunal – Failure to consider decision of co-ordinate Bench cited by assessee – Is a mistake – Income Tax Act, 1961, ss. 43A, 154, 254.
Honda Siel Power Products Ltd. v/s. CIT
(2007)295 ITR 466 = 165 Taxman 307 = 213 CTR 425(SC)

(e) **s. 155(7A)**

(1) Debatable issue – Export market development allowance under s. 35B – AO had nowhere mentioned in the assessment order various sub-clauses of s. 35B(1)(b) under which the respective items were allowed weighted deduction – Therefore, it cannot be said one way or the other that each of the disputed items had been allowed only under sub-cls.(i) and (iii) of s. 35B(1)(b) which was not permissible – Items in question are capable of being governed by different sub-clauses of s. 35B(1)(b) – It is highly debatable issue as to which item fell under which sub-clause - Therefore, rectification to withdraw weighted deduction was not substainable.
Gujarat State Export Corpn. Ltd., CIT v/s.
(2005) 198 CTR 251 = 279 ITR 477 (Guj)

(2) Share percentage of assessee trust's beneficiaries totaling to 50 per cent of assessee's income, was to be accumulated and payment was to be deferred for a period of 19 years - In original assessment proceedings one half of income was taxed in beneficiaries' hands and other half in trustees' hands under section 161 on respective shares of each beneficiaries – Subsequently, ITO noticed that income falling under share of each beneficiary was wrongly taxed at rate applicable to share of each beneficiary instead of individual rate of tax calculated separately and applicable to total income of each beneficiary and invoked section 154 – Assessment of trustee would have to be made in same status as that of beneficiary whose interest was sought to be taxed in hands of trustees – Total income

of beneficiary, i.e share of income of trust receivable by such beneficiary under deed as well as other income of beneficiary which would make up his total income, was required to be taken into account for purpose of ascertaining rate at which total income of such beneficiary was to be taxed –Merely because payment of income which had accrued and which was credited to accounts of beneficiaries since it was receivable each year, was delayed over a period, it could not be said that income did not accrue in relevant previous year – Therefore ITO was justified in passing rectification order.

Ganesh Chhababhai Vallabhai Patel v/s CIT
(2003) 130 Taxman 163 = (2002) 175 CTR 498 =
169 Taxation 637 =258 ITR 193(Guj)

(3) Assessee claiming exemption under section 11 of the Income Tax Act – Assessee duly registered under section 12A by CIT – Exemption refused and confirmed by the Tribunal – Assessee filing Misc. Application requesting the Tribunal to recall the order since judgment of the jurisdictional High Court not considered – Tribunal recalling the order and ordering the case to be re-heard – Department challenging the action of the ITAT since, according to them, it did not amount to mistake apparent requiring rectification – Held, judgment of the jurisdictional High Court binding on the Tribunal and Tribunal right in recalling its order - Tribunal rightly held that the case be re-heard.

Saurashtra Kutch Stock Exchange Ltd., ACIT
(2003) 175 Taxation 151 262 ITR 146 = 130 Taxman 316 =
183 CTR 364 (Guj)

(4) In pursuance of an order passed by Tribunal, assessee became entitled to refund – ITO also awarded interest under section 244(1A) along with refund – Simply because Tribunal did not give any direction with regard to payment of interest, it could not be said that assessee was disentitled to amount of interest – Therefore no mistake was committed by ITO in awarding amount of interest and, as such there was no question of passing any order for rectification.

Bombay Conductors & Electrical (P). Ltd. , CIT v/s.
(2003) 131 Taxman 204 = 184 CTR 439 = 264 ITR 485 =
(2004) 178 Taxation 120 (Guj)

(5) Omission to apply Supreme Court decision – Tribunal upheld the orders of the AO and the CIT(A) that there was no genuine

conversion of the shares into stock-in-trade as claimed by the assessee before transferring the same into the partnership firm and held that the transaction in question would amount to a transfer within the meaning of s.2(47) in the light of the decision in Sunil Siddharthbhai v/s. CIT (1985) 49 CTR (SC) 172 : (1985) 156 ITR 509 (SC) – However, the Tribunal failed to record a finding in relation to the second proposition of law that such a case falls outside the scope of capital gains tax – Hence, Tribunal was justified in exercising its powers under s. 254(2).

Subodchandra S. Patel, CIT v/s.
(2003) 184 CTR 393=138 Taxman 185 =(2004) 265 ITR 445 (Guj)

(6) Assessing Officer invoking provisions of section 155(7A) - Assessment year 1972-73 - Held, provisions of section 155(7A) introduced with effect from 1st April, 1994, assessment year 1972-73 not covered by the same - Assessing Officer not justified in applying the provisions .

Motichand Virpal Shah, CIT v/s.
(2001) 165 TAXATION 255 = 252 ITR 718 = (2002) 175 CTR 159(GUJ)

82. REFERENCE

(a) POWERS

(1) Powers of court - No interference where authority has exercised discretion property.

D.M Engineering v/s. CIT
(2007) 289 ITR 517= (2006) 152 Taxman 177 =
(2005)192 Taxation 565 =199 CTR 545(Guj)

(2) Question not raised before Tribunal - High Court cannot consider it.

Silk Museum v/s. CIT
(2002) 257 ITR 22 = 175 CTR 604 = 170 Taxation 137=
(2003) 131 Taxman 491 (Guj)

(3) Question arising out of order of Tribunal - Question not raised before the Tribunal - Cannot be directed to be referred.

Abhijit Iron Processors (P) Ltd., CIT v/s.
(2002) 176 CTR 100 (SC)

(b) PROCEDURE

(1) Can refuse to answer if there is no question of law – Even if reference is on direction of High Court.
Principles – High Court – Finding of fact – What is – High Court cannot interfere with a finding of fact of the Tribunal– Question of law – What is a question of law in regard to finding of fact.
M.N Moni, Commr. of Agrl I.T v/s.
(2007) 291 ITR 387= 210 CTR 82 = 161 Taxman 207(SC)

(2) Question referred at instance of assessee – Assessee not present at the hearing before High Court – High Court would not consider question - Income Tax Act, 1961, s. 256.
Dosani (D.N), CIT v/s.
(2006) 280 ITR 275 = 200 CTR 76 = 153 Taxman 13 = 192 Taxation 594 (Guj)

(c) <u>QUESTION OF LAW</u>

(1) Question not arising out of Tribunal's order – Rectification under s. 254(2) – First order dt. 20th Aug., 1987, was recalled by the Tribunal by passing an order dt. 2nd Dec., 1987 passed on miscellaneous application - Appeals came to be disposed of by the third order dt. 26th Feb., 1988 - Therefore, if the Revenue was aggrieved, it was by the order dt. 2nd Dec. 1987 – Contention of the Revenue that order dt. 2nd Dec., 1987, is part and parcel of order dt. 26th Feb., 1988, cannot be accepted as these orders were passed in separate proceedings – Revenue has not challenged the order dt. 2nd Dec. 1987 - Question whether the Tribunal was right in recalling the order does not arise out of the impugned order dt. 26th Feb., 1988 – Question is returned unanswered.
Kashiram Textile Mills (P) Ltd., CIT v/s.
(2006) 202 CTR 293 = 284 ITR 61 = 193 Taxation 438
(2007) 160 Taxman 4 (Guj)

(2) Appeal – Question of law – Charitable trust – Exemption – Amount received from abroad in violation of foreign contribution law – Application for registration as charitable trust – Whether made before or after receipt of amount from abroad – Whether disentitles charitable trust from exemption - Substantial question of law arises.
Jag Shanti Charitable Trust, Director of Income Tax v/s.
(2006) 285 ITR 227 = 205 CTR 124 = 156 Taxman 148 (SC)

(3) Penalty under s. 273(2)(aa) – Question whether penalty proceedings under s. 273(2)(aa) can be initiated in reassessment proceedings is a question of law - Decision in Modi Industries Ltd. & Ors. Vs. CIT & Anr. (1995) 128 CTR (SC) 361 : (1995) 216 ITR 759 (SC) cannot be said to have concluded the said issue in favour of assessee - Therefore, Tribunal is directed to draw up the statement of case and refer the question to the High Court.

L.M.P Precision Engr. Co. (P) Ltd., CIT v/s.
(2005)193 CTR 592 =142 Taxman 547 =186 Taxation 632 (SC)

(4) Return of loss filed beyond prescribed time - Assessee whether entitled to carry forward of loss for set off – Is a question of law arising under the 1961 Act – Income Tax Act, 1961, ss. 139(3), 256(2) – Indian Income Tax Act, 1922, s.2.

Alok Enterprises, CIT v/s.
(2004)266 ITR 399 =137 Taxman 343 =181 Taxation 134=
190 CTR 390 (SC)

(5) Valuation of immovable property - WTO adopted average of land and building method and yield to arrive at the assessable value of cold storage as against the value determined by DVO buy land and building method – Tribunal confirmed the same and declined to refer the question – High Court also declined to call for a reference - No interference called for in the facts and circumstances of the case.

Sood A.R , CWT v/s.
(2004)187 CTR 310 = 180 Taxation 650(Guj)

(6) Question of fact – Net wealth – Assessee and other beneficiaries of the trust, assigned their interest derived from a firm in favour of BOI – Assessee claimed exclusion of such beneficial interest from his net wealth – AO rejected the claim on the ground that the creation of BOI and the assignment was a sham and bogus transaction – CWT(A) and the Tribunal found as a fact that the creation of BOI and the assignment of assets was not sham or bogus activity – High Court was right in rejecting application under s. 27(3) - No referable question arises.

Lov S. Kinariwala, CWT v/s.
(2003)179 CTR 9 = 126 Taxman 198 = 259 ITR 440 =
172 Taxation 470(SC)

(7) Question of law – Rate of tax –Concessional rate -"Industrial company" – Company producing publicity material for newspapers, periodicals, journals etc. and printing material for calendars, production of software, designs and publicity texts etc. – Is an "Industrial Company" – No question of law arises from such finding of the Appellate Tribunal-Income Tax Act, 1961, s.256–Finance Acts.
Shilpi Advertising Ltd., CIT v/s.
(2003) 263 ITR 479 = 133 Taxman 666 (SC)

(8) Charitable purpose – Exemption -Accumulation up to 25 per cent of income – Appellate Tribunal - Decision that agricultural income not to be included in total income for computing 25 per cent. of income - Question of law arises - High Court should call for a case and not decide the application on merits of question – Income Tax Act, 1961, ss. 10(1), 11(1), 256(2).
Nabhinandan Digamber Jain , CIT v/s.
(2003) 263 ITR 516 = 185 CTR 197 = 133 Taxman 663 =
(2004) 178 Taxation 393 (SC)

(9) Valuation of closing stock – Change in method of valuation – Change from cost price or market price whichever is lower to adding direct cost to material in process and finished goods – Finding by Tribunal that change bona fide - New method regularly followed in succeeding years - Reduction of income on account of changed method not includible in income of assessee - Tribunal justified in deleting additions – No question of law arises.
Atul Products Ltd. , CIT v/s.
(2002) 255 ITR 85 = 166 Taxation 209 = 125 Taxman 727=
(2001) 170 CTR 371 (Guj)

(10) Accounted receipts - Onus in respect of on money to show investment of funds – Question of law.
Abhishek Corporation, CIT v/s.
(2002) 255 ITR 45 = 124 Taxman 73 = 175 CTR 601 =
169 Taxman 521 (SC)

(11) Bad Debt – Amendment of section 36(1)(vii) by Finance Act with effect from 1-4-1989 – Effect - Assessee not required to establish that debt had become bad in previous year - Mere writing off of amount of bad debt sufficient - Genuineness of claim of assessee not in doubt - No chance for assessee to recover amount – No question of law arises for reference.
Girish Bhagwatiprasad, CIT v/s.
(2002) 256 ITR 772 (Guj)

(12) Assessee a joint sector company – Public sector companies holding 40 per cent of shareholding – Person laundering black money through Sikkim private company - Sikkim company holding shares in assessee company – Finding that addition could not be made to assessee's income on the basis of money invested in shares of assessee company – Finding of fact – No question of law arises.
Gujarat Heavy Chemicals Ltd., CIT v/s.
(2002) 256 ITR 795 = 176 CTR 487 (SC)

(13) Capital gains – Transfer by company to subsidiary – Surplus realized on sale of shares – Whether exempt - Mixed question of law and fact – Should be referred.
Leena Investment P. Ltd., CIT v/s.
(2002) 256 ITR 798(SC)

(14) Deduction under s. 80-I – Question whether interest income could be included in gross total income while computing deduction under s. 80-I is a question of law –
Abhijit Iron Processors (P) Ltd., CIT v/s.
(2002) 176 CTR 100 (SC)

(15) Deemed Wealth - Tribunal held that value of stock in trade does not require to be included in net wealth for purpose of determining wealth tax liability of assessee company – Whether any referable question of law arose from Tribunal's order – Held, yes.
London Star Diamond Co. (I) (P) Ltd., CWT v/s.
(2002) 122 Taxman 110 (SC)

(16) A part of sale proceeds in respect of sales pertaining to financial year 1981-82 was realized up to October, 1982, i.e before taking over of business by assessee – As no corresponding cash was found during course of search proceedings in May, 1983, Tribunal confirmed addition of said amount – Whether a question of law arose out of Tribunal's order – Held, yes.
Vijay Kumar Talwar v/s. CIT
(2002) 123 Taxman 668(SC)

(17) Allowable as - Tribunal held that payment on account of technical know how was allowable as revenue expenditure - Whether a referable question of law arose from Tribunal's order - Held, yes.
Krupp Industries India Ltd., CIT v/s.
(2001) 117 TAXMAN 121(SC)

(18) Additions of Income - Income of family trust of which assessee was trustee was assessed substantively in his hands and on protective basis in hands of trust on ground that said trust was not genuine and that a medical instrument, rental income from which was claimed to be that of trust, in fact, belonged to assessee - Tribunal found that statement of settlor of trust that said instrument was not sold to trust was recorded behind back of assessee and that rental income was not disproportionate to cost of instrument and same was being properly assessed separately - Whether in view of above finding of fact by Tribunal and revenue having failed to show that any material evidence was ignored or any evidence not legally admissible was taken into consideration by Tribunal and there being no claim of mis-application of legal provisions, it would be wrong to say that finding of fact of Tribunal was vitiated -
Held, yes - Whether a referable question of law arose from Tribunal's order - Held, no
Navlekar(Dr.) (U.S), CIT v/s.
(2001) 117 TAXMAN 514(GUJ)

(19) Question of Law - New Industrial Undertaking - Special deduction - Assessee other than company or co-operative society - Audit report - Not filed with return - Appellate Tribunal holding that filing audit report during assessment proceedings amounted to substantial compliance Whether Tribunal was right in law in so holding - Question of law.
Panama Chemicals Works , CIT v/s.
(2001) 250 ITR 661(SC)

(20) Question of Law - "Plant" - Question of law - Depreciation - Liquor business - Bottles used whether "plant" - Question of law –
Doongaji and Co. , CIT v/s.
(2001) 250 ITR 750 = 170 CTR 186(SC)

(21) Question of Law - Company - Subscribed capital - Increase - Tribunal finding not a device for converting black money into white with the help of investment company - No question of law arises -
Setteller Investment Ltd., CIT v/s.
(2001) 251 ITR 263 = 115 TAXMAN 99(SC)

(22) Question of Law - Search and Seizure - Law applicable - Explanation added with effect from April 1, 1989, enabling exemination of person not merely in respect of books, documents or assets found in premises searched - Whether applicable where search conducted before that date and no such books etc. found - Questions relating to scope and ambit of provision and whether explanation is merely procedural - Are questions of law - High Court - Application for calling for reference- Determination of such questions of merits - Not proper-
Sri Ramdas Motor Transport Ltd., CIT v/s.
(2001) 251 ITR 428(SC)

(23) Question of Law - Penalty u/s. 272A - Section 272A, read with section 256, of the Income Tax Act, 1961 – Penalty – For failure to answer question, sign statements, etc. - Assessee deducted tax at source within specified time and deposited said amount into Government account - However, assessee did not forward certificate under section 203 to payee under bona fide belief that same could be forwarded at end of accounting year - Whether default on assessee's part was a technical default and, hence, no penalty was leviable on assessee under section 272A(2)(g) and no question of law could be said to arise from Tribunal's order deleting penalty - Held, yes -
Harsiddh Construction (P) Ltd., CIT v/s.
(2001) 118 Taxman 760 (GUJ)

(24) Reference - Question of Law - Appeal (High Court) - Substantial question of law - Genuineness of purchases - AO treated the purchases made by assessee from G as fake on the ground that G was not a genuine party - Assessee produced all relevant materials to show the purchase of material from G and its use in production - AO has accepted the existence of G in the case of another party - Tribunal accepted the genuiness of the purchases on appreciation of evidence produced by assessee - No question of law arises.
Adinath Industries , Dy. CIT v/s.
(2001) 170 CTR 262 = 252 ITR 476 = 165 Taxation 492(GUJ)

(25) Change in method of valuation of stock - If the change is bona fide, it is not open to the Revenue to add any amount in the taxable income of the assessee, even if the taxable income is reduced on account of the changed method - Finding of fact recorded by the Tribunal that the assessee had changed the method of stock valuation with a bona fide intention in order to follow the method which was followed by all other units in the industry - New method continuously followed in the subsequent years - Revenue has not objected to the change made by the assessee in the subsequent years - Tribunal was right in confirming the order of CIT(A) deleting the addition representing the alleged under valuation of closing stock - Neither the application under s. 256(2) nor the appeal under s. 260A maintainable.
Atul Products Ltd. , CIT v/s.
(2001) 170 CTR 371= (2002) 255 ITR 85 =166 Taxation 209 = 125 Taxman 727(Guj)

(27) Firm - Registration - Firm formed in contravention of liquor rules - Whether entitled to registration - Question of law -
Laxmi Wine Merchants, CIT v/s.
(2001) 251 ITR 882 = 171 CTR 192 = 119 Taxman 1033(SC)

83. REFUND

(a) INTEREST ON REFUND

(1) Deduction of tax at source - Entitled to interest – Income tax Act, 1961, ss.214(2), 237, 243(1)(b), 244(1A), 244A(1) – Central Board of Direct Taxes Instruction No. 2 of 2007 dated 28-3-2007.
Gujarat Flourochemicals Ltd. V/s. CIT
(2008)300 ITR 328 = 15 DTR 1 = (2007) 210 CTR 587Guj)

(2) Interest under ss. 214(2), 243(1)(b) & 244(1A) - Interest on interest – Assessee was entitled to interest on refund of TDS as well as compensation by way of interest on interest for delay in payment of amounts lawfully due to the assessee which were withheld wrongly and contrary to law.
Gujarat Flourochemicals Ltd., CIT & Ors.
(2007)210 CTR 587 = 15 DTR 1 = (2007) 210 CTR 587 (Guj)

(3) Interest on interest – Assessee is entitled to interest under s. 244(1A) on the amount of refund from the date of assessment order to the date of payment of refund and also to payment of interest on interest payable on refund from the date of refund to the date on which the amount of interest is paid.
Garden Silk Mills Ltd. v/s. Dy. CIT & Ors.
(2006)204 CTR 441 =195 Taxation 618=
(2007) 164 Taxman 572 (Guj)

(4) Self assessment – Advance Tax – Assessee filing return and paying tax by self assessment - Assessment order made by Assessing Officer held void ab initio - Assessee not entitled to refund of Advance Tax paid and tax paid on self assessment - Excess tax paid by assessee out of abundant caution or owing to error or non-taxability - Has to be refunded.
Shelly Products, CIT v/s.
(2003)261 ITR 367 = 129 Taxman 271 = 181 CTR 564 =
175 Taxation 434 (SC)

(5) Delay in applying for refund – Power of CBDT to condone delay – Assessee satisfying conditions laid down for condonation of delay in circular issued by CBDT – CBDT not justified in refusing to condone delay on the ground that there was no "genuine hardship" – Phrase "genuine hardship" should be construed liberally.
Gujarat Electric Co. Ltd. v/s. CIT & Anr.
(2002) 255 ITR 396 = 172 CTR 220 = 167 Taxation 243 =
120 Taxman 733(Guj)

(6) Interest under s. 244(1A) - The case of D.J Works of Gujarat High Court is approved by Supreme Court in the case.
Narendra Doshi, CIT v/s.
(2002)254 ITR 606(SC)

See also "Interest payable to Assessee.

(b) DOCTRINE OF UNJUST ENRICHMENT - REFUND

(1) Business Profits Tax - Provisional assessment - Tax paid as determined under provisional assessment - Regular assessment - Declared as invalid owing to period of limitation – Refund of tax paid on provisional assessment - Also barred by limitation - Business Profits Tax Act, 1947, ss. 12, 13 - Business Profits Tax Rules,1947, R. 4A – Indian Income Tax Act, 1922, s. 50 - Limitation Act, 1963, Sch. Art. 137.
British India Corporation Ltd., Union of India v/s.
(2004)267 TR 481 =190 CTR 385 = 140 Taxman 357=
183 Taxation 1(SC)

(2) Writ Petition – Claim for refund of cess pursuant to decision of Supreme Court declaring levy invalid maintainable – Binding nature of Supreme Court decision – Effective even in regard to those parties who had not appealed to the Supreme Court –
U.P Pollution Control Board v/s. Kanoria Industries Ltd.
(2003)259 R 321 = 180 CTR 402 =174 Taxation 629 =
180 CTR 402(SC)

(3) Stay order on deposit of rupees one crore – Department to refund amount deposited with interest if dealer succeeds in appeal - Order of High Court made under writ jurisdiction not governed by provisions of Sales Tax Act relating to refunds - Refund should be made of amount deposited with interest from date of deposit of amount pursuant to order of High Court –
Tata Refractories Ltd. v/s. Sales Tax Officer
(2003) 260 ITR 312(SC)

(4) Levy of vend fee on industrial alcohal by State legislature - Supreme Court declared the levy invalid prospectively - Vend fee which had been levied by the appropriate State enactments but not collected by reasons of the orders of the Supreme Court of otherwise, cannot be collected after 25th Oct., 1989, as the levy has been held to be invalid prospectively by the judgment in Synthetics and Chemicals Ltd. v/s. State of U.P (1990) 1 SCC 109 - Vend fee already realised by the States is not to be refunded to the appellants - At the same time, the State cannot collect any vend fee for the period prior to 25th Oct., 1989, or thereafter, notwithstanding that notices of demand may have been issued or recovery proceedings initiated - Furnishing of a bank guarantee for all or part of the disputed duty pursuant to an order of the Court is

not equivalent to payment of the amount of the duty - Principal of unjust enrichment is not applicable in view of the direction given in the decision that no refund is to be given -

Somaiya Organics (India) Ltd. & Anr. v/s. State of Uttar Pradesh & Anr.

(2001) 170 CTR 81(SC)

(c) WHEN AVAILABLE

Application for – Rejected by Assessing Authority – Appeal to Collector (Appeals) – Appeal allowed by Collector – No further appeal by Department – Order of Collector attaining finality in 1989 – Section 11B does not apply – Judicial discipline rule applies – Department to comply with order of Collector – Cannot raise plea of unjust enrichment – Scope of retrospective operation of section 11B – Central Excise Act, 1944, s. 11B.

Triveni Chemicals Ltd. v/s. Union of India

2007) 8 RC 76(SC)

84. REHABILITATION ALLOWANCE – S.33B

Rehabilitation allowance is admissible not only on amount of deduction allowable under section 32(1)(iii) in respect of assets destroyed but also in respect of other assets extensively damaged in flood, etc. worked out on basis of same formula, as is provided for assets destroyed namely of deducting 'moneys payable', as explained in Explanation 1 to section 32(1)(iii) and scrap value, if any from written down value of damaged assets .

Klin Industrial (P) Ltd. v/s. ITO

(2003) 129 Taxman 34 = 261 ITR 338 = 174 Taxation 541

= 182 CTR 362 (Guj)

85. REMAND

(a) **SUBSEQUENT NEW SOURCES**

Appeal to Commissioner (Appeals) – Powers of Assessing Officer – Appeal with regard to particular items – Commissioner (Appeals) setting aside order of assessment and directing reframing of assessment - Not an open set aside - Assessing Officer cannot process new sources of income – Income Tax Act, 1961, s. 251.

Saheli Synthetics P. Ltd. v/s. CIT

(2008) 302 ITR 126 = 205 Taxation 297 = 3 DTR 310(Guj)

See " Appeal to CIT(A)" , "Appeal to Tribunal" & "Tribunal Powers".

86. **REMISSION**

(1) Profits chargeable to tax under s. 41(1) – Remission of unsecured loans – Admittedly, there had been no allowance or deduction of loans in any of the preceding years – Hence, the benefit arising as a result of remission of unsecured loans was not taxable under s. 41(1).
Chetan Chemicals Pvt. Ltd., CIT v/s.
(2004)188 CTR 572 =180 Taxation 244 =267 ITR 770=139 Taxman 301 (Guj)

(2) Benefit or perquisite under s. 28(iv) – Remission of unsecured loans – Assessee company not carrying on business of obtaining loans - Therefore remission of loans by the creditors of the company was not a benefit taxable under s. 28(iv).
Chetan Chemicals Pvt. Ltd., CIT v/s.
(2003)188 CTR 572 =180 Taxation 244=267 ITR 770 =
139 Taxman 301 (Guj)

(3) Business income - Profits chargeable to tax under s. 41(1) - Excess provision for bonus written back - For charging any amount under the provisions of s. 41(1) there should be either remission of the liability by the concerned creditor or there should be cessation of liability - Assessee has written back a sum which was debited as bonus payable to the workmen in the past - Workmen who were to be paid bonus have not executed any writing for remission of the liability - There is nothing on record to show that the workmen had waived their right to get the bonus - Liability of the assessee had not come to an end even otherwise - It cannot be said that there was a cessation of liability simply because the suit for recovery of said amount is barred by the law of limitation - Tribunal rightly deleted the addition.
Silver Cotton Mills Co. Ltd., CIT v/s.
(2001)170 CTR 377(GUJ)

(4) Amount received in respect of expenditure – Remission or cessation of trading Liability - Are distinct – Excise duty refunded to assessee pursuant to decision of CEGAT – Is amount received in respect of expenditure and not remission or cessation of trading liability – Has to be treated as deemed profit – Pendency of special leave petition in Supreme Court against decision of CEGAT – Not relevant.
Polyflex (India) Pvt. Ltd. v/s. CIT
(2002) 257 ITR 343 = 177 CTR 93 = 124 Taxman 373 =
171 Taxation 183 (SC)

(5) Succession to business – Business of erstwhile firm was taken over by an ex-partner (assessee) as a going concern – Assessee received sales tax refund subsequently - Identity of the assessee is changed – Provisions of s. 41(1) not applicable .
Saurashtra Packaging (P) Ltd., CIT v/s.
(2002) 178 CTR 83 =(2003) 259 ITR 520 =132 Taxman 51 (Guj)

87. <u>RETURN</u>

(1) Return of Income –- Validity - Whether question as to whether return is to be filed in a particular Form or not is to be decided by statutory authority and not by Court – Held, yes - High Court permitted assessee to file income tax returns in Form Saral 2-D instead of Forms ITR – 1 to ITR 8 due to paucity of time and non-availably of number of forms – Whether since time for filing return in prescribed Form had been extended impugned order was to be set aside and all assesses, who had already filed return in Form Saral 2-D pursuant to impugned order were directed to file return in prescribed Form till extended date.
Income Tax Bar Association, Lucknow, Union of India v/s
(2008)169 Taxman 38 = 4 DTR 173(SC)

(2) Delay – Loss - Carry forward and set off of loss – Application for extension of time to file return - Assessing Officer refusing to grant extension but not communicating order to assessee – Order not effective – Assessee filing return within time requested – Entitled to carry forward and set off loss.
Dhatu Sanskar (P) Ltd., CIT v/s.
(2007) 292 ITR 135= 209 CTR 39 = 199 Taxation 499 = 163 Taxman 684(Guj)

(3) Notification of new return forms - Validity – It cannot be accepted that the new return form are so complicated that it is impossible for a taxpayer to fill up the same – Plea for quashing Notification No. S.O 762(E), dt. 14th May, 2007, introducing the new forms is rejected – Department is however directed to accept the returns as submitted by the taxpayers, subject to genuine difficulty.

All Gujarat Federation of Tax Consultants & Ors. V/s. Union of India & Ors.

(2007)212 CTR 375 = (2008) 301 ITR 167 (Guj)

88. REVISION

(a) ERRONEOUS AND PREJUDICIAL ORDER

(1) Dropping of penalty proceedings by AO – AO having passed cryptic order dropping proceedings under s. 271C and which order was held to be erroneous and prejudicial to the interest of Revenue, no interference was called for with the order of High Court remanding the matter to the AO requiring him to pass a reasoned order.

Toyota Motor Corporation v/s. CIT

(2008)218 CTR 539 = 173 Taxman 458 = 306 ITR 52 =12 DTR 106 (SC)

(2) Order erroneous and prejudicial to Revenue - Condition precedent – Two circulars regarding commission received by LIC agent – Two Commissioners with jurisdiction in same area having conflicting views on interpretation of circulars – Order dealing with commission on basis of circulars – Not erroneous – Commissioner cannot set aside order in revision proceedings – Income tax Act, 1961, s. 263.

Pankaj Dhirajlal Dhruve, CIT v/s.

(2008) 305 ITR 332 = 4 DTR 101(Guj)

(3) Erroneous and Prejudicial Order - Alleged undervaluation of immovable property – CWT initiated action under s. 25(2) on the basis that the property was undervalued in the assessments having regard to the fact that the firm had entered into an agreement to sell the same property at a much higher price at the relevant point of time – Tribunal has found that the price at which the agreement for sale was entered into and subsequently the property was sold did not represent the fair market value of the property on the relevant valuation dates – This is a finding of fact and is not disputed by

the Revenue – Tribunal was therefore justified in canceling the order of the CWT under s. 25(2).
Patel , R.R by L/H K.R Patel, CWT v/s.
(2006)200 CTR 90 = 284 ITR 315 (Guj)

(4) Erroneous and prejudicial order – previous year vis-à-vis amalgamation of company – Assessee company assessed for asst. yr. 1985-86 for the accounting year from 1st July, 1983, to 30th June, 1984 – It ceased to exist on and from 31st Dec. 1984, on account of amalgamation with another company and the income for the six month period ending on 31st Dec. 1984 was assessed in asst. yr. 1986-87 – CIT exercised jurisdiction under s. 263 on the ground that the income of the accounting period of six months was assessable in asst. yr. 1985-86 and not asst. yr. 1986-87 – Not justified – CIT has not brought any material on record to show as to what error was committed by the AO and even if there was an error how such error was prejudicial to the interests of the Revenue – Apart from that, without disturbing the assessment for asst. yr. 1986-87, the very same income could not be taxed in asst. yr. 1985-86 – Thus, CIT committed an error in exercising jurisdiction under s. 263.
Nuthern (P) Ltd., CIT v/s.
(2006)200 CTR 649 = 192 Taxation 288 = 154 Taxman 326= 284 ITR 396 (Guj)

(5) Erroneous and prejudicial order–View taken by AO permissible view– Assessee having jointly received a sum under a declaration from a donor and invested the same, interest income was assessable in the status of BOI –Assessment could not be revised by CIT to assessee the income in the status of AOP.
Shah, S.C & Ors., CIT v/s.
(2005) 193 CTR 226=185 Taxation 335=274 ITR 217 =149 Taxman 25(Guj)

(6) Erroneous and prejudicial order – Claim for exemption under s. 10(10C) by filing revised return – Petitioner having omitted to claim exemption under s. 10(10C) owing to ignorance filed a revised return claiming exemption or Rs. 5,00,000 in respect of compensation received under voluntary retirement scheme – AO passed an order under s. 154 allowing the said claim – CIT assumed jurisdiction under s. 263 holding that the order

under s. 154 was erroneous and prejudicial to the interest of the Revenue on the ground that the revised return was invalid as it was filed out of time – Not justified - Return originally filed by the petitioner was processed under s. 143(1)(ii) – Intimation under s. 143(1) is not an order of assessment and could not be revised by CIT – Even assuming otherwise the same was admittedly issued only on 13th May, 2002 - Revised return could have been submitted on or before 31st March, 2003 and the revised return submitted on 24th Sept. 2002 was within time limit and valid - Consequently order under s. 263 is quashed and the Revenue is directed to pay the costs quantified at Rs. 5,000 along with refund to the petitioner and to recover the same from the respondent CIT.

Koshti, S.R v/s. CIT
(2005) 193 CTR 518 = 146 Taxman 335 =
187 Taxation 107 (Guj)

(7) Erroneous and prejudicial order – Lack of proper enquiry by AO – No material brought on record to justify the conclusion that there was an error or omission or failure on the part of the ITO so as to make the order erroneous and prejudicial to the interest of the Revenue – Even if there is an omission or mistake with regard to certain items, it was not proper to set aside the whole assessment – Tribunal justified in setting aside the CIT's under s. 263 – CIT v/s. Arvind Jewellers (2002) 177 CTR (Guj) 546 followed.

Buddhilal Hiralal Rana, CIT v/s.
(2004) 186 CTR 647 = (2002) 125 Taxman 455 (Guj)

(8) Erroneous and prejudicial order – Dissolution of firm vis-à-vis previous year for partners – Firm having Samvat year as its previous year and assessed as such all along came to be dissolved on and w.e.f 31st March, 1983 – Exercising discretion under s. 176(1), the AO assessed the income of the firm for Samvat year 2038 ending on 15th Nov. 1982 and also for subsequent period from 16th Nov. 1982 to 31st March, 1983 both for asst. yr. 1983-84 – Assessees being partners of the said firm were entitled to rely and invoke the provisions of s. 3(1)(f) and there was no discretion either with the partners or with the AO regarding determination of previous year in respect of assessees' share in the income of the firm - Therefore, the order passed by the AO making separate assessments of partners for the period from 16th Nov. 1982 to 31st March, 1983, for asst. yr. 1983-84 and not including such income in asst. yr. 1984-

85 was not erroneous so as to warrant interference under s. 263 – Further, there is no whisper in the order of the CIT about any prejudice having been caused to the Revenue on account of said separate assessments – Thus, Revenue cannot argue that lower rates of tax was applied to said assessments – Even otherwise, income of each of the assessees for Samvat year 2038 being higher than the income for Samvat year 2029, no prejudice was caused to the Revenue by including such income in asst. yr. 1983-84 – Order of CIT rightly cancelled.

Bhanumati & Sons Trust , CIT v/s.
(2004)187 CTR 526=268 ITR 193 =139 Taxman 286 =
182 Taxation 507 (Guj)

(9) Erroneous and prejudicial order – Valuation of closing stock on dissolution of firm when business was continued – Closing stock has to be valued at cost or market price, whichever is lower, on the basis of established principles of commerce and accountancy – Requirement to apply the market value while valuing the closing stock in case of dissolution of firm is only applicable when there is cessation of business and not otherwise - Thus, the order of the AO accepting the assessee's valuation of closing stock was not in any manner prejudicial to the interests of the Revenue, there being no error in the assessment order – Even if the stand of Revenue is considered, another view as canvassed by the assessee is also possible – CIT would not have exercised provisional jurisdiction under s. 263.

Kwality Steel Suppliers v/s. CIT
(2004) 191 CTR 94 = 271 ITR 40 = 141 Taxman 177 =
(2005) 184 Taxation 503 (Guj)

(10) Erroneous and prejudicial order – Order based on prevailing legal position – Power of the CIT under s. 263 must be exercised on the basis of the material that was available to him when he exercised the power – At that time, the issue whether power subsidy is capital receipt had been concluded against the Revenue – Fact that the Supreme Court has subsequently reversed the decision of the High Court would not justify the CIT in treating the AO's decision as erroneous.

G.M Mittal Stainless Steel (P) Ltd., CIT v/s.
(2003) 179 CTR 553 = 263 ITR 255 (SC)

(11) Erroneous and prejudicial order – Valuation of immovable properties – Tribunal dismissed the assessee's appeal for the preceding assessment year holding that the CWT was justified in directing the WTO to take into account the valuation reports of the DVO and that the assessment order passed by the WTO on the basis of the valuation report submitted by the assessee was prejudicial to the interest of the Revenue – So – called fresh or independent determination made by the WTO for the subsequent year was limited only to the renovation of the buildings and did not extend to fresh or independent determination of the base value of the properties on the date of commencement of the relevant previous year – Obviously same value was adopted by the WTO as base value – This was prejudicial to the interest of the Revenue – Tribunal erred in interfering with the order of CWT under s. 25(2).

Vinubhai H. Panchal (HUF), CWT v/s.
(2002) 177 CTR 153 = 123 Taxman 960 = 171 Taxation 267=
258 ITR 455(Guj)

(12) Erroneous and prejudicial order – Enquiry by ITO - Finding of fact given by the Tribunal that the assessee had produced relevant material and offered explanation in pursuance of the notices issued under s. 142(1) as well as s. 143 (2) – ITO has come to a definite conclusion after considering those materials and explanation – Mere fact that a different view could be taken cannot be a basis for an action under s. 263 – Tribunal was justified in setting aside the order passed by the CIT under s. 263.

Arvind Jewellers, CIT v/s.
(2002) 177 CTR 546 = 124 Taxman 615, 171 Taxation 487=
(2003) 259 ITR 502 (Guj)

(13) Erroneous and prejudicial order - Failure to initiate penalty proceedings by ITO - Assessee did not disclose the capital gains arising on compulsory acquisition of land in the relevant assessment year under the belief that the capital gains would be liable to tax only on receipt of compensation - Capital gains were disclosed in the return of a later year - On these facts, penalty under s. 271(1)(c) could not be levied and therefore CIT could not assume jurisdiction under s. 263.

Manilal Tarachand, CIT v/s.
(2001) 170 CTR 466(GUJ)

(b) S. 263 PREJUDICIAL TO REVENUE

(1) Of orders prejudicial to interest of revenue - Whether where Assessing Officer has taken a particular view of basis of evidence produced before him, it is open for Commissioner, in revisional proceedings under section 263, to take a different view of same material – Held, no – Whether on facts stated under heading Business disallowance – Excessive or unreasonable payments when Assessing Officer had duly verified all details from books and records and had made no addition in regular assessment Commissioner was justified in invoking revisional jurisdiction under section 263 – Held no.
R.K Construction Co. , CIT v/s.
(2008)175 Taxman 165 = 12 DTR 210=(2009) 221 CTR 415 (Guj)

(2) Commissioner - Revision - Revision – Scope of powers – Assessment order - Subjected to rectification by Assessing Officer subsequently – Commissioner still has jurisdiction to revise.
Ralson Industries Ltd., CIT v/s.
(2007) 289 ITR 322= 207 CTR 201=158 Taxman 160 = 198 Taxation 97(SC)

(3) Condition precedent – Order passed by Assessing Officer under section 80HHC relating to export profits deduction when two views about "profits" were prevalent – Commissioner in 1997 purporting to exercise his power of revision on ground that order was prejudicial to Revenue – Law prevailing in 1997 should be applied notwithstanding retrospective amendment in 2005 of section 80HHC – Commissioner not entitled to revise.
Max India Ltd., CIT v/s.
(2007) 295 ITR 282 = 213 CTR 266 = 9 RC 710=
(2008) 166 Taxman 188 =204 Taxation 1 (SC)

(4) Orders prejudicial to interests of revenue – Revisional powers under section 263 can be exercised in case where order was made by Assessing Officer pursuant to directions issued by IAC under section 144B(4) - Powers under section 263 cannot be invoked when order taken in revision was already subjected to appeal and appellate order was made in respect thereof – When 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 prejudicial to interest of revenue so as to exercise powers under

section 263 unless view taken by Assessing Officer is unsustainable in law.

Mehsana District Co-op. Milk Producers Union Ltd. , CIT v/s.
(2003)130 Taxman 235 = 263 ITR 645 =184 CTR 608 (Guj)

(c) GENERAL

(1) Assessing Officer - Order passed to give effect to direction by Commissioner – Effect of section 263 – Assessing Officer cannot consider items not covered by revision –.

Dosani (D.N), CIT v/s.
(2006)280 ITR 275 = 200 CTR 76 = 153 Taxman 13 = 192 Taxation 594 (Guj)

(2) Lack of proper enquiry – Value of gold ornaments not included in the taxable wealth of the assessee – Tribunal found that the gold ornaments were declared by the assessee's wife A in her wealth tax return and were included in her taxable wealth – Explanation of A that the ornaments were received on the occasion of her wedding found acceptable by the Tribunal – There existed no material to suspect the ownership of ornaments as claimed by A – Provisions of s. 25(2) cannot be invoked by the authority to confirm or remove vague suspicion as to the ownership of assets – Thus, assessment made in the case of assessee by not including the value of said ornaments cannot be held to be erroneous and prejudicial to the interest of the Revenue – Tribunal was right in setting aside the order made by the CWT under s. 25(2).

Sumankumar Ishwarlal Parekh, CWT v/s.
(2006)200CTR 633 = 282 ITR 532 = 192 Taxation 358 (Guj)

(3) Prima facie opinion of CIT – There was clear opinion of CIT – Even otherwise, when an appeal is preferred against such an order, the Tribunal is well within its jurisdiction to examine as to whether the CIT had rightly exercised jurisdiction under s. 263 – Tribunal found that there was a long gap between the date of acquisition of shares and their sale and the shares having been shown as investment in wealth tax returns right from the asst. yr. 1957-58 profits from sale of shares were chargeable as capital gains and not business income – Tribunal was correct in holding that CIT was not justified in his revisional jurisdiction under s. 263 to hold that income was assessable as business income.

Rewashanker A. Kothari, CIT v/s.
(2006)201CTR 510 = 283 ITR 338 = 193 Taxation 581 =155 Taxman 214(Guj)

(4) Jurisdiction of CIT – Summary assessment under s. 143(1)(a) – As per Circular No. RA/86-87/DI. dt. 26th Aug. 1987, no remedial action is necessary in summary case – CIT being bound by the directions of CBDT could not have exercised power under s. 263.

Vikrant Krimpers, CIT v/s.
(2006) 202 CTR 393= 282 ITR 503 = 193 Taxation 412 (Guj)

(5) Action for recovery of subsidy from the assessee by the Government initiated and effected by various orders commencing from 2nd Dec. 1998 and spreading over a period of three years - It was only by virtue of letter dt. 5th Dec., 2001, that the petitioner was informed to prefer claims on the basis of revised retention price – In such circumstances, approach of the CIT in refusing to condone the delay on the ground that there was no valid explanation for the delay was not justified.

Gujarat State Fertilizers & Chemicals Ltd. v/s. CIT
(2005)194 CTR 423 =187 Taxation 603=
(2006)283 ITR 149 (Guj)

(6) Dropping of assessment proceedings despite applicability of s. 144 – Assessee company having not filed return in response to notice under s. 139(2) or during the extended time sought for, it was mandatory for the AO to make best judgment assessment under s. 144 – Instead, AO dropped the proceedings – Action was erroneous in law – Fact that the assessee had submitted a statement of advance tax and paid the advance tax indicated that the assessee company was having positive income – Therefore, the action of the AO dropping the proceedings also caused prejudice to the interest of the Revenue – Sec. 263 empowers CIT to take up for consideration any order passed in any proceeding under the Act – Thus s. 263 would take within its sweep even the orders wherein either proceedings are dropped or proceedings are filed – Therefore, CIT was justified in exercising his revisional jurisdiction under s. 263.

New Jagat Textile Mills (P) Ltd. v/s. CIT
(2005)195 CTR 110 =189 Taxation 618
(2006) 282 ITR 399 (Guj)

(7) Lack of proper enquiry - CIT has not stated that no investigation has been carried out by the AO before granting registration to the assessee firm – In fact, there is no whisper in the entire order of the CIT that the order granting registration was erroneous in any manner – Even otherwise, the finding of fact recorded by the Tribunal that the AO had made proper investigation before granting registration has not been shown to be incorrect in any manner whatsoever – Fact that the CIT did not agree with the view of the AO, by itself, cannot constitute a valid reason for exercise of jurisdiction under s. 263.

Arvind Jewellers, CIT v/s.
(2005) 197 CTR 163 = (2006) 150 Taxman 170=
190 Taxation 719 (Guj)

(8) Grant of registration to firm – CIT treated the order of the AO granting registration to the assessee firm to be erroneous and prejudicial to the interests of the Revenue on the ground that the assessee has leased out its building along with machineries and is not carrying on any business activity – Tribunal allowed assessee's appeal holding that there was a temporary lull in the business and not cessation of business – There is no finding as to whether this is a case of initial registration or continuation of registration – Neither of the authorities have found as to what was the factual position since the date of constitution of the firm upto the year under consideration – Question cannot be answered one way or the other in the absence of these foundational facts – In case only continuation of registration is sought to be disturbed such an exercise would not be permissible, unless and until registration granted for initial year is cancelled - Question is returned unanswered to the Tribunal to adjust its decision in accordance with the provisions of law and settled legal position.

U.K Textile , CIT v/s.
(2005)198 CTR 487 (Guj)

(9) Condonation of delay – A person invoking the decision of the appellate or revisional authority beyond the prescribed period of limitation is required to show sufficient cause which include showing that the petitioner was either bona fide pursuing his remedies or was prevented by sufficient cause from pursuing such

remedies - Whether sufficient cause is made out or not is always a question of fact and has to be established on record – An application seeking condonation of delay has also to establish that there was no negligence or inaction or want of bona fides and that the right granted under the law to challenge the order was not abandoned - Rectification orders were passed for reducing the amount of depreciation by reducing the cost of assets by the amount of subsidy obtained by the petitioner assessee – In the period that followed several High Courts including the jurisdictional High Court took numerous decisions in favour of the assessee on the same controversy – However, petitioner did not make any grievance or any attempt to seek any relief before any forum for as many as 8 years – There is no explanation as to why the petitioner did not move any revision or rectification application even after the pronouncement of the jurisdictional High Court - Petitioner did not show sufficient cause for condonation of delay of more than 8 years – Thus, no interference is warranted with the order of CIT rejecting the application for condonation of delay.

Vinay Extraction (P) Ltd. v/s. Vijay Khanna , CIT
(2004)190 CTR 495 =140 Taxman 67=(2005)142 Taxation 315 (Guj)

(10) Draft assessment order - Power of Commissioner to revise – Order passed by Income Tax Officer under directions given by IAC - Can be revised by Commissioner.

T.N Civil Supplies Corporation Ltd. V/s. CIT
(2003) 260 ITR 82 = 180 CTR 307 = 129 Taxman 69(SC)

(11) Assessee received power subsidy – Assessing Officer treating the same as capital receipt – CIT cancelling the order under section 263 on the basis of the judgment of the Apex Court in the case of Sahney Steel & Papers Works Ltd., - Revenue pleading though the judgment of the jurisdictional High Court in favour of assessee, but since the judgment of Supreme Court in favour of the revenue CIT entitled to invoke provisions of section 263 – Held, since order of jurisdictional High Court in the case of CIT v/s. Dusad Industries, reported in 80 Taxation 62 was never appealed by the department, CIT not entitled to invoke provisions of section 263 – No mistake in the order of Assessing Officer who followed the order of jurisdictional High Court.

Mittal Stainless Steel (P) Ltd., CIT v/s.
(2003) 173 Taxation 363 = 130 Taxman 67(SC)

(12) Jurisdiction of CIT – Order passed by ITO under s. 143(3) r/w s. 144B – Could be revised by CIT – CIT v/s. East Marine Products (P) Ltd. & Anr. (1990) 88 CTR (AP) 156 : (1990) 181 ITR 314(AP) concurred with.
Shreyas Land Development Corpn., CIT v/s.
(2003) 184 CTR 607(Guj)

(13) Record of proceedings – Valuation report received after the assessment - Could be taken into consideration by the CWT for deciding whether the assessment was erroneous and prejudicial to the interest of the Revenue – Therefore, the CWT was justified in setting aside the assessment made by the WTO and in directing the WTO to recompute the correct net wealth and tax after considering the valuation made by the Departmental Valuer.
Lalitchandra M. Patel, CWT v/s.
(2002)177 CTR 247=123 Taxman 682 =258 ITR 232 =
171 Taxation 257(Guj)

(14) Record of proceedings - Scope - It is not necessary that the record on the basis of which the CIT can take action must be the record of the concerned assessee – CIT has power to take action under s. 263 in the case of an assessee even on the basis of the records in the case of other persons.
Arunaben Sumankumar, CIT v/s.
(2002) 177 CTR 470 = 124 Taxman 57 = 171 Taxation 492 =
(2003) 259 ITR 386 (Guj)

(15) Return of income was filed by assessee for both assessment years and ITO framed assessment determining total income – Commissioner under section 263 set aside both assessment orders and on his direction ITO framed fresh assessment – Whether Tribunal was right in law in setting aside order of Commissioner under section 263 holding that there was no error or failure in order of ITO – Held, yes – Whether even if there was an omission or mistake with regard to certain items, it was not proper as found in assessment order, to set aside whole assessment - Held, yes.
Budhilal Hiralal Rana, CIT v/s.
(2002) 125 Taxman 455 = (2004) 186 CTR 647 (Guj)

(16) During assessment proceedings, assessee was allowed weighted deduction under section 35B in respect of 3 items - Deduction was disallowed in respect of 'export freight', - Assessee filed appeal against disallowance of weighted deduction in respect of 'export freight' – On appeal, Commissioner (Appeals) confirmed ITO's order – Later on, Commissioner passed an order under section 263 directing ITO to withdraw deduction allowed by him in respect of 3 items – Whether there was merger of Assessing Officer's order in appellate order in respect of three items so as bar Commissioner's revisionary jurisdiction under section 263 – Held, no –
Panna Kinitting Industries, CIT v/s.
(2002) 123 Taxman 216 (Guj)

(d) LIMITATION

Commissioner - Revision – Period of limitation – Reassessment of items other than item sought to be revised by Commissioner – Period of limitation begins from original assessment – Not from reassessment in which the item was not dealt with – Doctrine of merger does not apply – Income Tax Act, 1961, s. 263(1), Expl. (c), (2).
Alagendran Finance Ltd. , CIT v/s.
(2007) 293 ITR 1 = 211 CTR 69 = 162 Taxman 465 = 201 Taxation 379 (SC)

(e) s. 264

(1) Order prejudicial to assessee – No order prejudicial to the interest of the assessee can be passed under s. 264 – Impugned order passed on revision application under s 264 to the extent it is adverse to the assessee cannot be sustained.
Sanghvi S.J v/s CIT & Anr.
(2008) 219 CTR 138 = 208 Taxation 629 = 10 DTR 98(Guj)

(2) Under s.264– Condonation of delay – CIT rejected the petition by holding that the revision petition was beyond the period of the year from the date of passing the order in assessee's case under s.143(1) and refused to condone the delay – Not justified-Intimation under s.143(1)isnot an order of assessment considering the scheme of the Act and hence, that could not have been a ground for refusing to condone the delay.
Koshti, S.R v/s. CIT
(2005)193 CTR 518 = 146 Taxman 335 = 187 Taxation 107 (Guj)

(3) S. 264 – Restoration application – Revision was dismissed for default and the matter was not considered on merits - Assessee company pointing out that its director looking after the income tax matters was out of station and, therefore, the matter could not be attended to – CIT should have considered the matter on merits instead of rejecting the application for restoring the revision application – CIT directed to hear the revision application on merits and dispose it of on accordance with law.
Sonam Textile (P) Ltd. v/s. Rawt, S.K.S
(2002)175 CTR 227 =170 Taxation 794=
(2003) 126 Taxman 257 (Guj)

(4) Under s. 264 - Claim for deduction under s. 80HHC - Made for the first time by way of revision application - Without going into the merits of the claim, CIT rejected the same merely on the technical ground that the income was assessed by AO as returned - Not justified - Order passed by CIT quashed and set aside and CIT directed to reconsider the revision application on merits.
Ramdev Exports v/s. CIT
(2001)169 CTR 193(GUJ)

(f) **PENALTY**
Powers of Commissioner – Commissioner cannot direct Assessing Officer to initiate proceedings – Income Tax Act, 1961, ss. 263, 271.
Suresh G. Shah, Dr. , CIT v/s.
(2007) 289 ITR 110 = 196 Taxation 196(Guj)

(g) POWERS
Powers of Commissioner – Penalty – Commissioner cannot set aside assessment and direct Assessing Officer to initiate penalty proceedings – Income Tax Act, 1961, ss. 263, 271.
Parmanand M. Patel , CIT
(2005)278 ITR 3 = 198 CTR 641=149 Taxman 403=
(2006) 190 Taxation 496 (Guj)

89. RES JUDICATA

Precedent - Binding nature – It is open to a Court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it – This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis for whom the principle of res judicata would continue to operate – However, in tax cases relating to a subsequent year involving the same issue as in earlier year, the Court can differ from the earlier view if the case is distinguishable or per incuriam – Here also, subsequent Bench of superior strength can declare that the earlier decision does not represent the law, if it so finds, and the doctrine of res judicata would not apply.

Bharat Sanchar Nigam Ltd. & Anr. V/s. Union of India & Ors.

&

General Manager,BSNL, Asstt. Commr. Trade Tax, Asstt, Commr. Trade Tax & Ors v/s.

(2006)201 CTR 346 = 152 Taxman 135= 282 ITR 273 (SC)

90. **RETROSPECTIVITY**

(1) Restrospective amendment creating liability – no liability for Interest - Extension of service tax on broadcasting – Effect of retrospective amendment by s. 148 of Finance Act, 2002 – Assessee became liable to pay service tax as a broadcaster as a result of amendment by Finance Act, 2002 – Liability was extended not by way of clarification but by way of amendment, with retrospective effect – While it is permissible for the legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively – Liability to pay interest would arise only on default – Such liability although created retrospectively could not entail punishment of payment of interest with retrospective effect .

Star India P. Ltd. v/s. CIT

(2006)201 CTR 63(SC)

(2) Amendment with retrospective effect – Amended provision should itself indicate specifically or by necessary implication that it is to operate retrospectively – Supreme Court – Reference to larger Bench – No conflict of decisions.
Varas International P. Ltd., CIT v/s.
(2006)283 ITR 484=204 CTR 120=156 Taxman 202=195 Taxation 441 (SC)

(3) Section 10(28A) - Tobacco Board - Exemptions to – By retrospective amendment of section 10(20A)(d), income of assessee – Tobacco Board became exempt from tax for any assessment year with effect from 1-4-1975 or previous year in which Board was constituted - Whether assessments already made would stand set aside with retrospective effect and assessee would be entitled to refund - Held, yes.
Tobacco Board v/s. CIT
(2002) 122 Taxman 113 (SC)

91. <u>REWARD FOR SEARCH</u>

IT authorities - Reward - Discretion of reward committee vis-a-vis search cases - Scheme formulated by CBDT for grant of reward to officers and staff of the IT Department stipulated that all cases of grant of reward would be examined and approved by competent committee constituted for this purpose and the committee's discretion shall be final - Admittedly the respondent AO was not a member of the team which had conducted the search in the case of an assessee which resulted in the assessment of substantial additional income - Assessment was made on the basis of seized material and appraisal report of the investigation wing - Committee was of the opinion that no contribution was made by the respondent and he is not entitled to grant of reward - Discretion of the committee cannot be faulted - Further, the reward amount was purely ex gratia payment and cannot be treated as a condition of service - Hence, the matter was outside the purview of the Central Administrative Tribunal.
Shyam Sundar (B), Secretary, CBDT v/s.
(2001) 170 CTR 8 = 118 TAXMAN 457(SC)

92. RULES

To be laid before Parliament - Directory -Provisions that rules should be laid before both Houses of Parliament for period of thirty days directory - Rules need not be re-laid - Formally before House in new session where period of thirty days comprised in one or more sessions.

Vineet Agrawal v/s. Union of India
(2008)146 CC 344(SC)

93. SALARIES - PERQUISITES

(1) Exemption in respect of LTC vis-à-vis evidence of actual utilization of amount – Assessee employer is under no statutory obligation to collect and examine the supporting evidence to the declaration submitted by an employee to the effect that he has actually utilized the amounts(s) paid towards leave travel concession/conveyance allowance for the purposes of TDS under s. 192.

I.T.I Ltd. , CIT v/s.
(2009)221 CTR 619 = 18 DTR 162(SC)

Larsen & Toubro Ltd., CIT v/s.
(2009) 221 CTR 620 = (2008) 11 RC 530 (SC)

(2) Whether explanation to section 17(2)(iii)I only evisages that expenditure is in relation to use of any vehicle provided by employer, there is no qualification as to nature of vehicle or as to ownership of vehicle – Whether payment made by assessee employer to its employees by way of reimbursement of conveyance expenses was tax free perquisite and therefore assessee was not required to deduct TDS in that behalf .

Reliance Industries Ltd., CIT (TDS) v/s.
(2008) 175 Taxman 367= 14 DTR 150 = (2009) 308 ITR 82
=221 CTR 175 (Guj)

(3) Salary - Profits in lieu of salary - Compensation from prospective employer after giving up earlier employment – Till the insertion of cl. (iii) in s. 17(3) w.e.f 1st April, 2002, by the Finance Act, 2001, amount received by an assessee from a person who was not his employer, either before or after the cessation of employment was not taxable under s. 173(3) as "profits in lieu of salary" – Assessee who was employed with IIM resigned as he was negotiating an assignment with M Ltd. – He received compensation from M Ltd. in consideration of making himself readily available for an assignment with that

company – Assessee was neither employed with IIM nor with the payer on the day he received the payment – Hence, said compensation was not taxable as profits in lieu of salary.

Bhagwatilal G. Shah v/s. CIT
(2005)196 CTR 8 =146 Taxman 412= 277 ITR 277 =189 Taxation 594(Guj)

94. SCIENTIFIC RESEARCH EXPENDITURE

(1) Assessment year 2001-02 – Section 35(2AB) nowhere suggests that date of approval of research and development facility will be cut off date for eligibility of weighted deduction under this section on expenses incurred from that date onwards, once facility is approved entire expenditure so incurred on development of research and development facility has to be allowed for weighted deduction .

Claris Life sciences ltd., CIT v/s.
(2008)174 Taxman 113 =16 DTR 57 (2009) 221 CTR 301 (Guj)

(2) Scope of section 35 – Not necessary that capital asset should be used for scientific research in previous year - Expenditure on construction of building for scientific research – Building not used in previous year - Not relevant – Expenditure deductible under section 35 – Exemption provision - Liberal construction.

Gujarat Aluminium Extrusions Pvt. Ltd., CIT v/s.
(2003) 263 ITR 453 = 176 Taxation 542 =184 CTR 297 =
133 Taxman 542 (Guj)

95. SEARCH AND SEIZURE

(a) AUTHORISATION UNDER s. 132(1)

Validity – Assessee being a non trading corporation possession of money, bullion, jewellery or other valuable article or thing was ruled out and there being no summons or notice which the assessee failed to respond, none of the conditions prescribed under s. 132(1) were satisfied and therefore warrant of authorization is quashed, so also consequent notice under s. 158BC.

Suvidha Association v/s. LR Meena / ADIT (Inv)
(2008) 220 CTR 382 = 207 Taxation 148 = 9 DTR 209(Guj)

(a) BLOCK ASSESSMENT

(1) Deduction under ss. 80-I and 80-IA – In the light of provisions of s. 158BB as amended by the Finance Act, 2002 retrospectively w.e.f 1st July, 1995, no fault can be found with the impugned order of the Tribunal holding that the assessment is entitled to claim deduction under s. 80-I or s. 80-IA in block assessment.
Suman Paper & Boards Ltd., CIT v/s.
(2009) 221 CTR 781(Guj)

(2) In view of the fact that the proviso to s. 113 was introduced by the Finance Act, 2002 w.e.f 1st June, 2002 i.e with prospective effect and having regard to the principles of law that the taxing statute should be construed strictly and, ordinarily, should not be held to have any retrospective effect, the question as to whether the said proviso is clarificatory and/or curative in nature and retrospective is referred to be considered by a larger bench.
Vatika Towership (P) Ltd., CIT v/s.
(2009) 221 CTR 409 = 178 Taxman 322 = 17 DTR 353(SC)

(3) Conditions precedent for making block assessment – Are mandatory and should be satisfied – Search of premises – Block assessment of person other than one whose premises were searched – Satisfaction that such other person had undisclosed income and to transmit material to Officer having jurisdiction – Failure – Assessment on other person not valid – Income Tax Act, 1961, ss. 132, 158BC, 158BD.
Manish Maheshwari v/s. Asst. CIT
Indore Construction (P) Ltd. v/s. CIT
(2007) 289 ITR 341= 208 CTR 97 = 8 RC 455 =
199 Taxation 284 = (2008) 204 Taxation 205 (SC)

(4) Assessee shareholder, partner and beneficial owner in companies and firms– Search resulting in diary being seized – Seizure of diary leading to assessment of undisclosed income as deemed dividends – Valid – Income
Tax Act, 1961, s. 158BC.
Mukundray K. Shah, CIT v/s.
(2007) 289 ITR 433 = 209 CTR 97= 160 Taxman 276 =
200 Taxation 272 (SC)

(5) Requisition – Seizure of cash by police – No satisfactory explanation regarding cash – Requisition by I.T authorities – Amount to be handed over to I.T authorities – Income Tax Act, 1961, ss. 131, 132A -

Rajiv Agrawal or his successor in office v/s. State of Gujarat.
(2007)290 ITR 449 = (2006) 202 CTR 80 = 154 Taxman 172 = 193 Taxation 414 (Guj)

(6) Search and intimation of block assessment proceedings – Gold, diamonds, jewellery and other ornaments seized – Writ petition – High Court quashing proceedings and directing Department to return items seized with interest on value of items seized – Supreme Court – Appeal by Department - Supreme Court not deciding whether interest was payable – Department directed to pay costs in lieu thereof – Income Tax Act, 1961, ss. 132, 158BC.

Diamondstar Exports Ltd., Director General of Income Tax v/s.
(2007)293 ITR 438(SC)

(7) Requisition under s. 132A - Seizure of cash by police – Applicant, Dy. Director of IT, made requisition under s. 132A claiming the seized amount on the basis that the said amount is unaccounted money - Lower Court committed error in ignoring the provisions of s. 132A and handing over the seized amount to respondent No.2 rejecting the claim of the applicant – Impugned order passed by the lower Court is quashed and set aside – Police authority is ordered to hand over the seized amount to the applicant.

Rajiv Agrawal, Dy. Director of IT, or his Successor in office v/s. State of Gujarat & Anr.
(2006) 202 CTR 80 = 154 Taxman 172 = 193 Taxation 414=
(2007) 290 ITR 449 (Guj)

(8) Section 132 of the Act – Validity of – Writ challenging the search & seizure operation – Held there was reasonable & credible information & reason to believe that income had been suppressed – Search held valid Income tax Act, 1961, Section 132.

Harvest Gold Foods (India) Pvt. Ltd. v/s. UOI & Ors.
(2006) 194 Taxation 511 (Guj)

(9) Block assessment – Proceedings under s. 158BD – AO having jurisdiction over the person searched having not recorded satisfaction that income unearthed belonged to person other than searched and having not handed over books of account etc. to the AO having jurisdiction over such other person, provisions of s. 158BD could not be invoked in respect of such other person – Reliance on ss. 158B(b) and 158BA is misplaced – Further, there being no such issue involved in original assessment proceedings, same could not be raised while making fresh assessment on remand by CIT(A).

Nitin P. Shah alias Modi v/s. Dy. CIT

(2005)194 CTR 306 =276 ITR 411=146 Taxman 536 =187 Taxation 390 (Guj)

(10) Authorization under s. 132(1) – Reason to believe – Sum of Rs. 4.5 lacs found at the time of search of the premises of p, a partner of firm JP - P explained that the amount belonged to the firm – Upon recording the facts, Addl. Director of Income Tax (Investigation) issued authorization for carrying out search at the residence of the petitioners who are also partners of the firm JP – Not justified – There was nothing to show as to why he believed that incriminating documents would be found at the residence of the petitioners – Moreover, it was open to the respondent authorities to conduct survey at the premises belonging to the firm as necessary order under s. 133A had already been passed – Condition precedent under s. 132 (1) not satisfied - Simply because a sum of Rs. 4.5 lacs was found at the residence of P and simply because he is one of the partners of JP, there was no justifiable reason to issue authorization for search at the residence of the petitioners.

Jignesh Farshubhai Kakkad v/s. Director of IT(Inv.) & Ors.

(2003) 184 CTR 220 = 176 Taxation 590 = 264 ITR 87(Guj)

(11) Block assessment - Stay – All proceedings stayed except that the AO may pass orders in regard to the block assessment as directed by the Tribunal and the CIT(A) may hear and decide the appeal filed by the assessee in respect of asst. yr. 1995-96 – Orders of the AO and the CIT(A) not to be enforced except after obtaining the orders of the Court.

Block assessment – Validity – Block assessment order passed pursuant to the interim order of the Court set aside and Tribunal directed to hear the assessee's appeal against the earlier block assessment order and dispose of the same without being influenced

by any observations made in its earlier orders and the order of the High Court – Also, CIT(A) directed to hear and dispose of assessee's appeal against the regular assessment order without taking into consideration the observations contained in the aforesaid order of the High Court.
Shaw Wallace & Co. Ltd. v/s. CIT & Ors.
(2003) 180 CTR 106(SC)

(12) Officer heading search party – Acting also as Assessing Officer and determining tax liability – That mere fact alone does not justify apprehension of blas - Assessment valid .
Vipan Kumar Jain, Union of India v/s.
(2003) 260 ITR 1 = 181 CTR 24 = 129 Taxman 59 =
174 Taxation 781 (SC)

(13) Block Assessment – Condition precedent - Valid search – Information providing reason to believe that person in possession of money or other asset will not disclose it – Mere information from CBI that cash was found in possession of individual - Not "information" for purposes of authorizing search - Search based on such information and consequent block assessment not valid.
Ajit Jain , Union of India v/s.
(2003) 260 ITR 80 = 129 Taxman 74(SC)

(14) Block assessment - Common authorization - No illegality - Authorising Officer retaining seized documents and books of account beyond period of fifteen days – Illegality does not vitiate evidence collected during search – Search operation against petitioners and notice issued under section 131(1A) – Valid – Post search – No illegality.
Madhupuri Corporation v/s. Prabha Jha
(2002) 256 ITR 498 = 166 Taxation 704 = 125 Taxman 309 (Guj)

(15) Release of accounts books – On search, books of accounts seized in January, 1999 – Assessee applying for release of books – Books not released – Held, Department to keep photocopies of the papers seized, duly authenticated both by the assessee and the Department and release the books – Assessee directed to produce the books whenever requiring by the Assessing Officer.
A to Z Gruh Vastu Bhandar v/s. Director of Income Tax (inv.)
(2002) 166 Taxation 78 (Guj)

(16) Undisclosed income - Block assessment - Material showing undisclosed income of a person other than person against whom search was conducted - Action under section 158BD justified -
Premjibhai and Sons v/s. Joint CIT
(2001) 251 ITR 625(GUJ)

(17) Notice under section 158BD - Initiation of proceedings against a person other than the person raided - Not a separate and independent proceeding - Part of search operation - No separate jurisdictional fact need be established -
Premjibhai and Sons v/s. Joint CIT
(2001) 251 ITR 625(GUJ)

(18) Undisclosed income - Material showing undisclosed income of a person other than person against whom search was conducted sufficient - No requirement that papers of "other person" should be seized - Search against two persons - Materials recovered in search disclosing assessee converting unaccounted money to legally accounted money by making bogus sales - Initiation of proceedings for block assessment of assessee - Justified -
Rushil Industries Ltd. v/s. Harsh Parekh
(2001)251 ITR 608 = 162 TAXATION 335(GUJ)

(19) Section 158BC of the Income Tax Act, 1961 read with section 64 of the Finance (No. 2) Act, 1997 - Block assessment in search cases - Procedure for - Assessment year 1997-98 - During search of residence in case of petitioner's father, revenue having come to know about a bank locker in names of petitioner, his father and other family members, passed prohibitory orders under section 132(3) in respect of materials inside locker - Subsequently, while search warrants were signed against petitioner, latter made a disclosure under VDIS 1997 of cash lying in locker - Assessing Officer, however, issued notice for block assessment in petitioner's case - High Court on ground that once prohibitory order was passed and issued in respect of amount lying in locker, search proceeding could be said to have been initiated in respect of said amount under section 132 and petitioner could not be allowed to disclose concealed income of his father or in case of any other member of his family, dismissed petitioner's prayer to quash notice under section 158BC - Whether notice issued under section 158BC should be stayed - Held, no - Whether since subject matter of writ petition was notice issued under section 158BC and not

proceedings before Settlement Commission, question of Settlement Commission being bound by observation of High Court did not arise - Held, yes.
Nilesh Hemani v/s. CIT
(2001) 117 Taxman 360(SC)

(20) Search and Seizure - Common Authorisatin -(a)Authorisation under s. 132(1) - Common authorisation for several persons - As per provisions of s. 2 of the General Clauses Act, 1987, singular includes plural - There is no prohibition against issuance of common authorisation when the competent authority has reason to believe that a number of persons are involved in interconnected transactions.
(b) Reason to believe -Authorisation under s. 132(1) - Reason to believe - Satisfaction note prepared by Dy. Director was approved by Addl. Director and Director - Petitioners were dealing with large sums of money running into crores of rupees and still had not filed any return - Thus, there was material available on the record of the respondents to arrive at a prima facie satisfaction that the petitioners had undisclosed income or property - Contention that there was non- application of mind by the authority issuing the authorisation for search against the petitioner cannot be accepted.
(c)Retention of seized books beyond 15 days - Deliver of seized books to jurisdictional AO - Retention by authorised officer for more than 15 days - No prejudice is shown to have been caused to the petitioners by retention of the documents and books of accounts for a few days beyond the period of 15 days - Even assuming that the provisions of s. 132(9A) are applicable in the instant case, retention of the documents and books of accounts by the authorised officer for 15-20 days beyond the period of 15 days stipulated in s. 132(9A) would not vitiate the notices issued by the AO under s. 131(1A) and under s. 158BC.
(d)Post search irregularity -Photocopying of seized documents - Seals were placed on the bunch of papers in such a manner that no addition or deletion from the bunch could be made but photocopying was possible without removing the seal - No irregularity was involved in taking Photostat copies of said documents for the purpose of investigation.
Madhupuri Corpn. v/s. Prabhat Jha. Dy. Director of IT(Inv.)
(2001)171 CTR 593(GUJ)

(21) Assessing Officer wanted to retain seized books of account and other material beyond prescribed period - Reasons given by Assessing Officer was that notices under section 158BC had been issued and revenue authorities had to complete assessment on or before 31-12-2001 and thereafter it required a further period of three months for completion of consequential procedures - Whether there was any logic behind retention of books of account and other material till entire block assessment was over - Held, no -
Hemant Champaklal Shah v/s. Khan (S.S)
(2001) 118 TAXMAN 500(GUJ)

(c) <u>GENERAL</u>

(1) Pursuant to a search conducted at premises of assessee, department seized certain jewellery and ornaments belonging to assessee - On writ, High Court held that search and seizure was invalid and directed department to pay interest to assessee at rate of 8 per cent per annum on value of illegally seized article as a compensation and quantified same at Rs. 84.68 lakhs – Department, however, after a long delay returned seized article but without interest on ground that assessee had made no prayer in writ petition for payment of interest - Whether even if question of payability of interest would not be examined, then also department was liable to compensate assessee at least by way of costs as search and seizure was illegal and loss suffered by assessee was further aggravated by delay caused by department in complying with High Court's decision.
Diamondstar Exports Ltd.. DCIT
(2006)156 Taxman 299 (SC)

(2) Books of account, documents, money etc. found in the possession of any person – Presumption that they belong to such person, contents are true, etc. – Nature of - Rebuttable presumption – Scope of – restricted to summary assessment for retention of sufficient assets to meet tax and penalty – Presumption does not extend to regular assessment thereafter – Income tax Act, 1961, ss. 132(4A), (5), 132B, 143, 278D – Presumptions – Different kinds of.
Metrani (P.R) v/s. CIT
(2006) 287 ITR 209 = 206 CTR 290 = 157 Taxman 325=
(2007) 197 Taxation 8 (SC)

(3) General – Whether where necessary orders to have survey of business premises of firm 'J' of which petitioners were partners had already been passed, there was no justifiable reason for having a search at residences of petitioners – Held, yes.
Farshubhai Prabhurambhai Kakkad v/s. Director of Income Tax . (2003)132 Taxman 350 =264 ITR 87=(2004)178 Taxation 138 (Guj)

(4) General - Order under section 132(5) operates in a different field and is not final and conclusive for all purposes – Approval order under section 132(5) cannot be treated as a direction and has nothing to do with an assessment order under section 143(3).
Harjivandas Juthabhai Zaveri, Dy. CIT v/s.
(2003)132 Taxman 923 = (2002) 258 ITR 785 (Guj)

(d) REASSESSMENT

Reassessment under s. 147 – Once assessment has been framed under s. 158BA in relation to undisclosed income of the block period as a result of search, AO cannot issue notice under s. 148 for reopening such assessment.
Cargo Clearing Agency v/s Jt. CIT
Kapurchand Kakaram Bansal v/s. Dy. CIT
(2008)218 CTR 541= 307 ITR 1 =207 Taxation 586= 12 DTR 50(Guj)

(e) SURCHARGE LIABILITY

Block assessment – Section 4 applies in addition to provisions in Chapter XIV-B – Provisions of section 113 as well as provisions of relevant Finance Act apply – Surcharge in addition to income tax leviable on undisclosed income – Proviso to section 113 clarificatory – Finance Act, 2001 – Income tax Act, 1961, ss. 4, 113, 132 158BA, 158BB, 158BH.
Suresh N. Gupta, CIT v/s.
(2008)297 ITR 322 = 214 CTR 274=166 Taxman 313 = =204 Taxation 20 = 1 DTR 354(SC)

96. SETTLEMENT COMMISSION

(a) ABATEMENT OF PROCEEDINGS – STAY

(1) Stay - abatement of settlement petition pending before Settlement Commission stayed by High Court till further orders.
Suraj Corporation v/s. Union of India & Ors
(2008) 217 CTR 73 = 7 DTR 156(Guj)

(2) Object of provisions – Speedy disposal – Not reduction in statutory liability – Income Tax Act, 1961, s. 245C. -

Preconditions - Voluntary and full and true disclosure of income - Order of settlement – Whether obtained by fraud or misrepresentation of facts - Proceedings for such issue need not necessarily be initiated by Settlement Commission – Department having material entitled to move commission – Bench hearing such issue – Does not review or sit in appeal over decision of earlier bench that passed settlement order – Income Tax Act, 1961, ss. 245C, 245D(4), (6), 245-I - Scope of powers - Income Tax Act, 1961, ss. 245D(4), (6), 245F.

Om Prakash Mittal, CIT v/s.

(2005) 273 ITR 326 = 143 Taxman 373 = 194 CTR 97 = 186 Taxation 177 (SC)

(3) Proceedings for settlement of cases – Whether provisions relating to charge of interest for default in furnishing return, delay in payment or deferment of Advance Tax are applicable – Supreme Court – Matter referred to larger bench – Income Tax Act, 1961, ss. 154, 234A, 234B, 234C, Ch. XIX-A.

Rectification of mistakes – Interest not levied in original proceedings – Whether Settlement Commission can resort to rectification for levying interest for default in furnishing return, delay in payment or deferment of Advance Tax – Supreme Court – Matter referred to larger bench – Income Tax Act, 1961, ss. 154, 234A, 234B, 234C.

Brij Lal v/s. CIT

(2005)279 ITR 432 =199 CTR 716=(2006) 150 Taxman 106= 192 Taxation 213 (SC)

(4) Power and procedure of —- Settlement Commission cannot issue circulars which power is vested in CBDT under section 119, but it is certainly an Income Tax Authority to confer benefit available to assessee under circular and for that purpose, section 245F is wide enough to enable Commission to rectify order and presence of provisions like section 254(2) in Chapter XIX-A, may not be considered to be indispensable – If one assumes that Settlement Commission is not an income tax authority for purpose of exercising powers under section 154, it is certainly an income tax authority to give effect to judgment of Supreme Court which says that but for circular Settlement Commission has no power to waive or reduce interest under sections 234A, 234B and 234C and if such powers are exercised by Settlement Commission within four years from

date of original order passed under section 245D, same can certainly be in accordance with provisions contained in section 154.
Sanjaybhai R. Patel v/s. Assessing Officer
(2004) 135 Taxman 210 = 187 CTR 583 =180 Taxation 429 (Guj)

(5) Return – Advance Tax – Powers of Settlement Commission – Power to rectify mistakes in its order - Reduction or waiver of interest under sections 234A, 234B and 234C by Settlement Commission – Mistake which can be rectified by Settlement Commission – Income Tax Act, 1961, ss. 116, 234A, 234B, 234C, 245D, 245F.
AOP Sanjaybhai R. Patel v/s. Assessing Officer/Asst. CIT
(2004)267 ITR 129(Guj)

(6) Chargeability and computation – Computation consequent upon settlement of case by Settlement Commission – Settlement Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application made under s. 245C and continues to have the jurisdiction till it makes an order under s. 245D – Contention that there is no requirement to pay interest under s. 234B as no points of terminus have been fixed is untenable because the levy is mandatory – Equally, the contention that no interest is chargeable for that portion of income which was determined by the Commission and was not disclosed before the AO has no substance – Interest under s. 234B has to be charged for the period beginning from the first day of April next following the relevant financial year upto the date of Settlement Commission's order under s. 245D(4) on the consolidated income i.e both disclosed and undisclosed income – There is no question of charge of interest on interest.
Damani Bros., CIT v/s. & Hindustan Bulk Carriers, CIT v/s.
(2003) 179 CTR 362 = 259 ITR 475(SC)

(7) Effect on assessment order and recovery proceedings – Jurisdiction of Settlement Commission vis-à-vis IT authorities – IT authorities are free to proceed in the prescribed manner till the Settlement Commission decides to proceed with the petition – Contention that before the Commission decides to proceed with the matter, it exercises the functions of the IT authority and after deciding to proceed with the petition it exercises dual functions as the Commission and the IT authority is not tenable – Return filed is in respect of disclosed income while the petition before the Commission is in respect of undisclosed income - Therefore, the situation is different till the Commission decides to proceed with

the matter - Fact that for the purpose of computation of taxes there is a requirement to club both the disclosed and undisclosed income does not empower the Commission to deal with the disclosed income before deciding to proceed with the petition.
Damani Bros. , CIT v/s. & Hindustan Bulk Carriers, CIT v/s. (2003) 179 CTR 362 = 259 ITR 475(SC)

(8) Power of Settlement Commission – Waiver or reduction of interest under s. 220(2) – Waiver or reduction of interest under various provisions is hedged with certain conditions – If these conditions are satisfied the Settlement Commission has the power to direct waiver or reduction – Secs. 234B, 245D(2C) and 245DA(6A) operate in different fields – Therefore, when interest is charged in respect of the said provisions it does not amount to double levy of interest, as the infractions are different - Thus, there is no scope for charging of interest on interest.
Damani Bros. , CIT v/s. & Hindustan Bulk Carriers, CIT v/s. (2003) 179 CTR 362 = 259 ITR 475(SC)

(9) Delay in furnishing return, default or deferment in paying Advance Tax – Interest mandatory – Settlement Commission – No power to waive or restrict interest – Income Tax Act, 1961, ss. 234A, 234B, 234C, 245D(4).
Sant Ram Mangat Ram Jewellers, CIT v/s. (2003) 264 ITR 564 = (2004) 186 CTR 115 =181 Taxation 1 = 134 Taxman 262 (SC)

(10) Settlement of cases – Settlement Commission granting immunity from prosecution "in respect of matters arising out of settlement" – Effect - Total immunity in regard to fictitious transaction – Not confined only to specific assessment year - High Court - Not entitled to declare order granting immunity as illegal or void.
Nirmal and Navin P. Ltd. v/s. D. Ravindran (2002) 255 ITR 514 = 175 CTR 407 = 123 Taxman 540 (SC)

(11) Order of Settlement Commission – Payment of interest – Question relating to determination of starting point in regard to payment of interest arising from the order of Settlement Commission referred to a larger Bench.
Hindustan Bulk Carriers, CIT v/s. (2002) 177 CTR 531 = 258 ITR 399 (SC)

(12) Nature of - Quasi judicial body - Not executive authority like CBDT - Jurisdiction and powers - Interest for delay in filing return - Interest for deficiency or deferment of Advance Tax - No power to reduce or waive - Waiver or reduction permissible only under circular of CBDT in cases and under conditions prescribed -
Anjum M.H Ghaswala, CIT v/s.
(2001) 252 ITR 1 = 171 CTR 1 = 119 TAXMAN 352(SC)

97. **SPECIAL AUDIT**

(1) Accounts – Assessment - Direction to get accounts audited by accountant – Notice of hearing to assessee whether necessary before making order – Supreme Court – Matter referred to larger Bench – Income Tax Act, 1961, s. 142(2A) -
Sahara India Financial Corpn Ltd. v/s. CIT
(2007) 289 ITR 473 = 209 CTR 20 =161 Taxman 216 = 199 Taxation 165 (SC)

(2) Special audit of accounts – Assessment- Scope of – Nature of Assessing Officer's and Commissioner's responsibility – Order entails civil consequences - Assessee has to be given reasonable opportunity of being heard before passing order – Income tax Act, 1961 (before and after June 1, 2007) s. 142(2A), (2B), (2C), (2D), (3).
Sahara India (Firm) v/s. CWT
(2008)300 ITR 403 =169 Taxman 328 =216 CTR 303 =
206 Taxation 180 = 7 DTR 27 (SC)

98. **STOCK EXCHANGE**

Defaulting members – Defaulters' Committee constituted in terms of bye-laws of the Bombay Stock Exchange would apply the assets other than card money belonging to the defaulting member towards the dues and payments of the members on a pro rata basis whereafter the dues of the non-member can be disbursed – While doing so, however, such claims can be determined only having regard to the cut-off date which must be prescribed by the Governing Board in terms of cl. 7 of bye-law 343 – Card money must be disbursed having regard to the priority clause contained in r. 16 in which event, upon discharge of the dues of the Exchange and the clearing house, the same has to be distributed to the dues of the members and non-members - There does not exist any distinction between a member and a non member in terms of r. 16 and if the card money available at the hands of Exchange is not sufficient to satisfy all the claims, the same has to be distributed on

a pro rata basis - In the instant case, Exchange has taken varying stands as regards the sufficiency of the amount in its hands wherefrom the claim of the respondents could be satisfied - Cut off date for entertaining the claims of the members and non-members not disclosed – Matter restored to the High Court to consider the claims of the respondents afresh.
Bombay Stock Exchange v/s. Jaya I. Shah & Anr.
(2003) 185 CTR 36(SC)

99. **SUIT - WITHOUT NOTICE**

Search & Seizure - Suit against public officer in respect of act done under warrant of authorisation - Requirement as to notice mandatory - Urgent and immediate relief sought against action of public officer - Opportunity to be heard to be granted to public officer before granting relief - Provisions in section 80, C.P.C, Mandatory - Suits filed without notice - Bar of suits against proceedings under Income Tax Act - Suits not maintainable - injunctions granted without giving opportunity to be heard - Liable to be quashed -
Natwerlal M. Badiani , Union of India v/s.
(2001) 250 ITR 641(GUJ)

100. **SUPREME COURT – DECLARATION OF LAW ART.** 141

(1) Binding nature - Has to be founded on reasons – Dismissal of appeal on technical ground that necessary party not impleaded – Has no effect on merits of matter decided by High Court – Constitution of India, art. 141.
Shamugavel Nadar (S) v/s State of Tamil Nadu
(2003)263 ITR 658 = 185 CTR 593 =(2004) 179 Taxation 409 (SC)

(2) Review - Supreme Court entertaining review petition and delivering judgment – Effect - Earlier judgment erased – There are no two judgments – The earlier judgment cannot be applied for earlier period after judgment rendered on review.
Murthy (M.A) v/s. State of Karnataka
(2003) 264 ITR 1= 185 CTR 194 = (2004) 178 Taxation 397 (SC)

101 **SUR TAX**

Company – Computation of capital – Assessee acquiring other companies – Consideration less than book value of assets – Difference treated as other reserves – No intangible asset or revaluation of asset – Amount is "reserve" and includible in capital – Companies (Profits) Surtax Act , 1964, Sch. II, R. 2, Expl. 2.

George Williamson (Assam) Ltd. V.s, CIT
(2005) = 278 ITR 102 =198 CTR 106 = 148 Taxman 252= (2006) 191 Taxation 4 (SC)

102 **TAX**

COMPUTATION PROVISION FAILS

Where computing provision fails tax itself fails.

R & B Falcon (A) Pvt. Ltd. V/s. CIT
(2008) 301 ITR 309 = 216 CTR 289 = 169 Taxman 515 = 206 Taxation 241 = 6 DTR 313 (SC)

PRIORITY

Precedence over other liabilities – Offences relating to transactions in securities – Special Court – Discharge of tax liabilities of notified person – Scope of powers – Principles relating to – Special Court (Trail of Offences Relating to Transactions in Securities) Act, 1992, s. 11(2)(a).

State Bank of India, Dy. CIT
(2009)308 ITR 1 =176 Taxman 116 =221 CTR 14 = 209 Taxation 1= (2008) 16 DTR 163(SC)

103 **TAX OR FEE**

Imposition of administrative charges – Is tax and not fee.

Gupta Modern Breweries v/s. State of Jammu and Kashmir.
(2007) 8 RC 688(SC)

(104) **TAX AVOIDANCE**

(1) Creation of trusts – Question regarding colourable device having not beenreferred, contention as to tax avoidance could not be allowed to be raised.

Sinivali Trust , CIT v/s.
(2004) 187 CTR 619 = 267 ITR 165=180 Taxation 100 (Guj)

(2) Charge of tax – Tax avoidance – Not only is principle in IRC v. Duka of Westminster 1936 AC 1 alive and kicking in England , but it also seems to have acquired judicial benediction of the Constitutional Bench in India, notwithstanding the temporary turbulence created in wake of McDowell & Co. Ltd. V/ CTO (1985) 154 ITR 148/22 Taxman 11(SC) – Observations of Shah, J., in CIT v. A. Raman & Co. (1968) 67 ITR 11(SC) are very much relevant even today – In McDowell's case (supra) Court has neither dissented from nor overruled decision of Privy Council in Bank of Chettinad Ltd. V. CIT (1940) 8 ITR 522 – From Duke of Westminister's case (supra) to Bank of Chettinad's case (supra) to Mathuram Agrawal v. State of Madhya Pradesh (1998) 8 SCC 667, despite hiccups of McDowell, law had remained same – If Court finds that notwithstanding a series of legal steps taken by an assessee, intended legal result has not been achieved, Court might be justified in overlooking intermediate steps, but it would not be permissible for Court to treat intervening legal steps as non est based upon some hypothetical assessment of 'real motive' of assessee.

Azadi Bachao Andolan, Union of India v/s.
(2003) 132 Taxman 373 =263 ITR 706 =184 CTR 450 =
177 Taxation 775 (SC)

105. <u>TAX CLEARANCE CERTIFICATE</u>

Existing liability-Issuance of Income Tax clearance certificate could not be with - held only on the ground that some liability may be fixed on the petitioner in future - Petitioner's property placed under provisional attachment under s. 281B and it has already offered its another property having substantial value for provisional attachment in lieu of former property - Respondents directed to issue Income Tax clearance certificate after releasing the provisional attachment over the former property.

Ahmedabad South Indian Association Charitable Trust v/s. DY. CIT
(2001) 170 CTR 128 = 117 Taxman 413(Guj)

106. TAX DEDUCTION AT SOURCE

(1) Challenge to show cause notice vis-à-vis accrual of capital gains in India in respect of transaction carried out abroad – In the absence of relevant agreements on record question regarding the jurisdiction to issue the show cause notice to the assessee treating it as an assessee in default for failure to deduct tax at source in respect of acquisition of shares of Indian company by assessee non resident company directed to be determined by the authority concerned as a preliminary issue.

Vodafone International Holdings B.V v/s. Union of India & Anr.
(2009) 221 CTR 617 = 18 DTR 234(SC)

(2) Interest – Duty to deduct tax at time of payment – Company – Loans taken in individual capacities by directors - Cheques taken by them in name of company and transferred to their accounts on same day – Repayment of loan and interest routed through company – Company bound to deduct tax at source – Income tax Act, 1961, ss. 194A(1), 201(1A) -

Century Building Industries P. Ltd., CIT v/s.
(2007)293 ITR 194 = 163 Taxman 188= 211 CTR 292=
(2008) 202 Taxation 190 (SC)

(3) Rent - Warehousing charges – Assessee deducting tax at 2 per cent. Treating them as contractual payments – Assessing Officer holding that payment was rent and passing order for recovery of difference in tax and interest – Payee paying full tax on warehousing charges – Appellate Tribunal – Decision that assessee has only to pay interest – Valid – Income Tax Act, 1961, ss. 194C, 194-I, 201(1A) – Circular No. 275/201/95 – IT(B) dated January 29, 1997.

Hindustan Coca Cola Beverage P. Ltd. v/s. CIT
(2007) 293 ITR 226 = 163 Taxman 355 = 211 CTR 545=
(2008) 202 Taxation 210 (SC)

(4) Stock option not "perquisite" - Salary – Failure to deduct tax – Law before April 1, 2000 – Assessee creating trust for benefit of employees and transferring non transferable shares to trust – Stock options to employees subject to conditions – Lock-in period – Stock option not "perquisite" – Only notional benefit - Not taxable as perquisite – Income tax Act, 1961, ss. 17(1), (2)(iii), (iiia), 192, 201(1), (1A).

Infosys Technologies Ltd., CIT v/s.
(2008)297 ITR 167 =166 Taxman 204=214 CTR 293 =

204 Taxation 13 = 1 DTR 330(SC)

(5) Lottery – Definition – Prize by draw of lots – Included in lottery with effect from 1-4-2002 – Assessee distributing prize by draw of lots prior to amendment - No liability to deduct tax at source – Income tax Act, 1961, ss. 2(24)(ix0, 194B, 201(1).
Jhaveri Industries , CIT v/s.
(2008)300 ITR 300(Guj)

(6) Payment to contractor - Assessee placing orders for supply of printed materials – Suppliers not exclusively supplying such goods to assessee - Outright purchase – Not a contract for work - Assessee not liable to deduct tax at source – Income tax Act, 1961, s. 194C.
Girnar Food and Beverage P. Ltd. , CIT v/s.
(2008)306 TR 23(Guj)

(7) Payment to contractors – Tribunal deleting demand under section 201(1), (1A) – Justified – Income tax Act, 1961, s. 201(1), (1A).
Tribunal considering supply of printing and packaging materials as contract for sale and not a service/works contract – Finding of fact – Income tax Act, 1961, s. 194C.
Hindustan Lever Ltd. , CIT v/s.
(2008) 306 ITR 25(Guj)

(8) Deduction of tax at source – Finding by Tribunal that lucky draw scheme of assessee not a case of lottery – No liability deduct tax on prize – Income Tax Act 1961, s. 194B.
Patel Gruh Nirman Flat Yojna, CIT v/s.
(2008)303 ITR 479(Guj)

(9) Section 194A of the Income Tax Act, 1961 – Deduction of tax at source – Interest other than interest on securities – Motor Accidents Claims Tribunal had passed a decree against petitioner insurance company – In ensuing execution proceeding, petitioner contended that it was not liable to deposit entire amount of outstanding dues since it had deducted an amount as tax deducted at source from amount of interest payable by it – However, Tribunal directed petitioner to deposit entire outstanding dues as awarded to claimants - In view of specific provision contained in section 194A

(3)(ix), petitioner was duty bound to deduct amount of Income Tax from amount of interest payable by it.
United India Insurance Co. Ltd. v/s. Mitaben Dharmeshbhai Shah
(2004) 136 Taxman 565 = 189 CTR 329 = 181 Taxation 474 (Guj)

(10) Assessee to pay interest on borrowings from different parties – Assessee debiting interest payable to P & L Account but neither paying to parties nor crediting to their account - No tax deducted at source – AO holding since tax not deducted at source, assessee liable to pay interest under section 201 (1A) – Held, the law at that time did not require payment of tax unless the amount of interest credited to parties account or interest paid – Interest rightly remitted.
Koshalya Investment P. Ltd., CIT v/s
(2003)177 Taxation 77(Guj)

(11) Commission or brokerage – Meaning of commission or brokerage – Element of agency essential – Difference between agency and sale – Stamp vendors – Purchase of stamp papers at discount – Restriction on sale and provision in Gujarat Stamps supply and sales rules, 1987 for surrender of stamp papers to Government – Provisions would not render stamp vendors agents – Transaction amounts to sale – Discount on sale of stamp paper does not attract section 194H.
Ahmedabad Stamp Vendors Association v/s. Union of India
(2002) 257 ITR 202 = 176 CTR 193 = 124 Taxman 516 =170 Taxation 677 (Guj)

(12) Section 201, read with section 194C, of the Income Tax Act, 1961 – Deduction of tax at source - Consequence of failure to deduct or pay - Assessment years 1974-75 to 1977-78 - Assessee failed to deduct amount of tax from amount paid to contractor, which it was required to deduct under provisions of section 194C - However, contractor had paid sufficient advance tax and also tax on self assessment on due date - Whether where no loss having been caused to revenue on account of non deduction of tax at source by assessee, no interest could be levied under section 201(1A) on assessee on account of tax which was required to be deducted at source by assessee - Held, yes -
Rishikesh Apartments Co-op. Housing Society Ltd. , CIT v/s.
(2001) 119 Taxman 239 = 171 CTR 288(Guj)

107. TRANSFER OF CASE

(a) BLOCK ASSESSMENT

(1) Transfer of block assessment case – Warrant of authorization for search proceedings having been found to be bad in law, there remained no occasion to continue with the block assessment hence even if order of transfer could be upheld, same would not be operative.

Suvidha Association v/s. LR Meena / ADIT (Inv)
(2008) 220 CTR 382 = 207 Taxation 148 = 9 DTR 209(Guj)

(2) Block assessment cases - Scope of application of provision – Applies also to block assessments – Income tax Act, 1961, ss. 120, 127, 158B(a), 158BH.

Mohammed Salim (K.P) v/s. CIT
(2008) 300 ITR 302 = 216 CTR 97 = 169 Taxman 465 = 207 Taxation 81 = 6 DTR 179 (SC)

(b) TRANSFER OF ASSETS

(1) Irrevocable transfer of assets – Assessee partner of firm - Part of share in firm transferred to trust for benefit of children of assessee – Gift complete by way of delivery and acceptance – Transfer subject to gift tax – Section 60 not applicable – Income from share in firm received by trust – Not includible in total income of assessee – Income Tax Act, 1961, s. 60.

Jayantilal D. Patel, CIT v/s.
(2007) 295 ITR 386 = 162 Taxman 385 = 212 CTR 271= (2008) 203 Taxation 241 (Guj)

(2) Transfer of assets – For benefit of spouse, etc. – Assessee's brother expired in 1966, his widow was taken as partner and his two minor sons were admitted to benefits of partnership – She remarried assessee in February 1970 and retired from partnership in assessment year 1972-73 – But both minors were again admitted to benefits of partnership – In view of clear dictionary meaning of expression 'step-child', two minors became step children of assessee – Provisions of section 64(1)(iii) were, therefore attracted and since definition of 'child' included step child with effect from 1-4-1976, share income of minors had to be clubbed with income of assessee from assessment year 1976-77.

Abdul Rahim Khan M. Pathan , CIT v/s.
(2003)131 Taxman 397(Guj)

(3) Section 64 of the Income Tax Act, 1961 - Transfer of assets - For benefit of spouse etc. - Assessment years 1979-80 and 1980-81 - Assessee had taken out a policy on his life for benefit of his wife - Premia amounts were paid by assessee - His wife received certain amounts on maturity and earned interest thereon after making investment - ITO added interest income to assessee's total income under section 64(1)(iv) but Commissioner (Appeals) deleted addition on ground that obligation to pay premium being under a contract, premia amounts could not be said to be assets transferred by assessee for immediate or deferred benefit of his wife - Whether interest income earned by wife by deposit/investment of maturity value of insurance policy was income which arose directly from cash asset transferred by assessee in shape of premia to his wife, and therefore Tribunal was justified in including full amount of interest so derived by wife as assessee's income under section 64(1)(iv) - Held, yes -

Damodar K. Shah v/s. CIT

(2001)119 Taxman 882 = 252 ITR 235(Guj)

(c) TRANSFER PRICING

International Transaction - Transfer price – Arm's length price – Must take into account all risk-taking functions of multi-national enterprise – Income Tax Act, 1961, ss. 92A, 92B, 92C, 92F(iiia) – Income Tax Rules, 1961, r. 10B.

Morgan Stanley & Co. Inc. v/s. Director of IT

(2007) 292 ITR 416 = 210 CTR 419= 162 Taxman 165 = 201 Taxation 160(SC)

108. TRIBUNAL

(1) Duty of Tribunal - Reasoned order – Order of the Tribunal is supposed to reflect not only the facts and contentions of the rival parties, but also the issues which arise for its consideration and the reasons for deciding the issues one way or the other - Impugned order of the Tribunal stating certain facts contrary to that on record – Further, it is not a reasoned and speaking order and is incoherent and vague – Also, it does not deal with all the grounds raised before the Tribunal – Therefore, the impugned order suffers from the vice of perversity – Tribunal deprecated for its cursory manner of working and making slipshod orders.

Gautam Harilal Gotecha v/s. Dy. CIT

(2006) 200 CTR 139= 281 ITR 283 = 192 Taxation 292 (Guj)

(2) Additional evidence – Admissibility – Assessee did not produce any evidence of trust before the AO despite being called upon to do so – No document was placed on record even in the appeals before the first appellate authority – Though appeals were filed before the Tribunal on 6th Dec., 1989, assessee filed an affidavit for the first time on 16th Aug., 1993 seeking to produce a trust deed dt. 4th April, 1977 – Statement of facts filed before the CIT(A) referred to a different trust deed executed by some other settlor – Thus, Tribunal was right in holding that this was not a case of additional evidence but was a case of fresh evidence before the Tribunal for the first time – That apart, no evidence was adduced as to why the document was not produced either before the assessing authority or the appellate authority – Therefore, Tribunal was justified in refusing to admit the trust deed in evidence which was filed before it for the first time – Though not categorically recorded that the said document is not relevant, in essence, that is the finding of the Tribunal.

N.B Surti Family Trust v/s. CIT
(2006)200 CTR 145 =153 Taxman 31 =192 Taxation 600 =
(2007) 288 ITR 523 (Guj)

(3) Disallowance under s. 43B – Liability to pay luxury tax – While determining the tax liability of the assessee all the relevant provisions of the Act have to be applied by the authority concerned - Appeal being continuation of original proceedings and the Tribunal being the last fact finding authority is required to determine the assessee's liability under the Act – Therefore, Tribunal was justified in applying s. 43B to the facts of the assessee's case although the said section was neither invoked by the lower authorities nor was a ground urged in appeal.

Express Hotel (P) Ltd., CIT v/s.
(2006)200 CTR 476 = 281 ITR 160 = 192 Taxation 308 =
153 Taxman 156 (Guj)

(4) Orders of – Assessment year 1993-94 – Order of Tribunal should reflect not only its conclusion, but decision making process also – Therefore, Tribunal could not have passed order on basis of written submissions filed by department without assigning independent reason so as to reflect application of mind by Tribunal.

SJ & S.P Family Trust v/s. Dy. CIT (Assessment)
(2006)152 Taxman 234 =(2005) 308 ITR 82 =
221 CTR 175 (Guj)

(5) Reasoned order – While following the earlier judgments of the Tribunal or of any Court, the Tribunal is required to record the facts of the cases and then come to a reasoned conclusion that on the given set of the facts, the earlier judgment would hold the field and cover the lis pending before it -

Minalben Rameshbhai Jhaveri L/H. of Smt. Manoram B. Dalal, CWT v/s.

(2006) 206 CTR 412 =(2007) 196 Taxation 250 = 294 ITR 394 (Guj)

(6) Duty of Tribunal – Duty to give reasons for decision – Order without giving reasons – Order merely reproducing arguments of counsel and agreeing – Not valid – Income Tax Act, 1961, s. 254.

S.J and S.P Family Trust v/d. Deputy CIT

(2005)277 ITR 557 = 198 CTR 255 = 189 Taxation 591= (2006)152 Taxman 234 (Guj)

(7) Petitioner was silent director of a company – Based on documents seized during search and seizure operations, addition was made on protective basis in hands of petitioner and on substantive basis in case of company – While deciding appeal of company, Tribunal, without hearing petitioner, passed an order that entire figure of profit mentioned on seized papers should be assessed in hands of petitioner, as concerned papers were seized from his custody – Tribunal had recorded finding that Assessing Officer had not caused necessary enquiries to find out real nature of seized papers and also not established with evidence, to whom papers actually belonged – Tribunal's order was not only contradictory but also showed non-application of mind and apparent perversity and, hence was liable to be set aside – Tribunal should be directed to hear appeals of both petitioner and company together and decide issue afresh .

Mansukhlal Nanjibhai Patel v/s. Dy. CIT

(2003)128 Taxman 444(Guj)

(8) Powers of – Commissioner (Appeals) set aside order of Assessing Officer disallowing construction expenses debited by assessee as part of disclosure of unaccounted expenditure – Tribunal set aside order of Commissioner (Appeals) – Since Tribunal committed an error in exercise of its jurisdiction in setting aside appellate order of Commissioner (Appeals) without taking into consideration reasons for which that order was made, impugned order of Tribunal could not be sustained and Tribunal should be directed to reconsider matter on merits in accordance with law.
Ramesh Chandra M. Luthra v/s. Asstt. CIT
(2003)128 Taxman 765 =(2002) 257 ITR 460= 176 CTR 39= 169 Taxation 662 (Guj)

Also see "Appeal to Tribunal".

109. TRUST OR EXECUTORS

(1) Inclusions – Firm constituted by assessee and his mother – Will by mother bequeathing certain assets for benefit of her minor grandchildren – Will appointing assessee's wife and another as guardians and trustees – Profit income from firm to be divided in equal share and deposited in accounts of each minor – On facts no trust was created – Executor representing interest of minors and depositing business income in each minor's account – Not in capacity of trustee but as executor of will – Explanation 2A of section 64(1)(iii) not applicable – Income Tax Act, 1961, s. 64(1)(iii), Expln. 2A.
Abdul Gafur A. Mistri, CIT v/s.
(2007) 292 ITR 515= 196 Taxation 255 = 212 CTR 171 = 164 Taxman 71 (Guj)

(2) Trust - Whether specific or discretionary - Depends upon interpretation of trust deed in terms of Explanation 1 to section 164 – Tribunal not considering whether Explanation 1(ii) to section 164 applicable to trust or not – Matter remanded – Income tax Act, 1961,s. 164(1).
Sanjiv Family Trust v/s. CIT
(2007)292 ITR 156 = (2006) 205 CTR 264(Guj)

(a) ASSESSMENT

(1) Direct assessment of beneficiary vis-à-vis non receipt of income – Unless and until the trustee exercises the discretion and distributes the income in favour of the beneficiary, income of the trust cannot be said to be received by the beneficiary and same cannot be taxed under s. 166 – Trustee having not exercised his discretion to distribute the income of the trusts, there is neither accrual nor receipt of income and same cannot be taxed in the hands of the assessee beneficiary – It could not be taxed also for the reason that the trustee had paid tax on such income in UK.

H.H Maharaja Shri Jyotindrasinhji v/s. Asstt. CIT
(2008) 220 CTR 485(Guj)

(2) Remand for fresh consideration when no appeal filed by respondent – As per provisions of Order 41, r. 33 of CPC the appellate Court can pass appropriate orders and the appellate powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection against the order giving rise to the appeal - Apart from the fact that the provisions of s. 254(a) confer very wide powers on the Tribunal, there is nothing in the provisions of the IT Act which would have the effect of nullifying the provisions of Order 41, r. 33 of CPC or the principle underlying the said provision - AAC granted partial relief to the assessee in the appeals against estimated income – Revenue went in appeal before the Tribunal – Tribunal having found that there was no warrant for assessing the income at the amounts at which the assessee was assessed in the respective assessment years, it rightly set aside the orders passed by AAC and remanded the matter to the AAC even though the assessee had not filed any appeal against the additions sustained by the AAC.

P.B Corporation , CIT v/s.
(2004) 187 CTR 212 = 266 ITR 548 = 180 Taxation 80 =138 Taxman 167 (Guj)

(3) Section 255, read with sections 252 and 254, of the Income Tax Act, 1961 – Appellate Tribunal – Procedure of – Respondent No. 2 directed President of Tribunal that they would thenceforth submit all proposals for postings and transfer of its members to Ministry of Finance for its prior approval and that Ministry may also issue order for posting and transfer of Members when it consider necessary – Having regard to provisions contained in subsections (1) and (5) of section 255, President of Tribunal has requisite power of transfer

and posting of its members – Since in impugned order passed by Government source of power had not been traced from provisions of Act but to Delegation of Financial Powers Rules, 1958 which have not nexus therewith, Central Government cannot confer upon it such statutory power of transfer and posting of Members of Tribunal.

Ajay Gandhi v/s. Singh (B)

(2004)134 Taxman 537 = 265 ITR 451=186 CTR 506= 179 Taxation 433 (SC)

(4) Share percentage of assessee trust's beneficiaries totaling to 50 per cent of assessee's income, was to be accumulated and payment was to be deferred for a period of 19 years - In original assessment proceedings one half of income was taxed in beneficiaries' hands and other half in trustees' hands under section 161 on respective shares of each beneficiaries – Subsequently, ITO noticed that income falling under share of each beneficiary was wrongly taxed at rate applicable to share of each beneficiary instead of individual rate of tax calculated separately and applicable to total income of each beneficiary and invoked section 154 – Assessment of trustee would have to be made in same status as that of beneficiary whose interest was sought to be taxed in hands of trustees – Total income of beneficiary, i.e share of income of trust receivable by such beneficiary under deed as well as other income of beneficiary which would make up his total income, was required to be taken into account for purpose of ascertaining rate at which total income of such beneficiary was to be taxed – Merely because payment of income which had accrued and which was credited to accounts of beneficiaries since it was receivable each year, was delayed over a period, it could not be said that income did not accrue in relevant previous year – Therefore ITO was justified in passing rectification order.

Ganesh Chhababhai Vallabhai Patel v/s CIT

(2003) 130 Taxman 163 = (2002) 175 CTR 498 =169 Taxation 637 258 ITR 193 (Guj)

(5) Assessment on trustees u/s. 161 - Tax avoidance device - ITO treated the trustees as an AOP giving a finding that the assessee trust was a device for avoiding payment of tax - Tribunal did not at all go into correctness or otherwise of finding regarding tax avoidance - In view of the Supreme Court decision, even for the period prior to amendment of s. 161 w.e.f 1st April, 1984 it was

open to the tax authorities and the Tribunal to examine the plea of a device to avoid payment of taxes - Revenue has certainly made out a case for remanding matter to Tribunal for examining controvery afresh - Matter remanded to Tribunal.

Sona Family Trust, CIT v/s.

(2001)171 CTR 555(Guj)

(b) **DIRECT ASSESSMENT OR RECOVERY NOT BARRED**

Assessment years 1984-85 to 189-90 – Whether section 166 can be invoked only when income is received by assessee – Held yes – One 'V' being father of assessee had executed two trust deeds in UK for benefit of settlor and members of his family – Both trusts were discretionary trusts and income therefrom was being shown in returns of income of "V" during his life time and thereafter in returns of assessee – For relevant assessment years, assessee had not shown income from said trusts in his returns of income contending that no remittance was received by him from U.K and net income for those years had been retained by said trusts – Assssing Officer, however made an addition of income from said trusts in hands of assessee - Whether when income had been retained by trustees and it had not been distributed nor it had been received by assessee and no evidence had been brought by department to show that same had been received by assessee in India, such income could be taxed in hands of assessee under section 116.

Maharaja Shri Jyotindrasinhji (H.H) v/s. Asst. CIT

(2008) 174 Taxman 605 = 16 DTR 3(Guj)

(c) TRUST BY WILL

Exemption under s. 5(1)(i) - Property held under trust – Public charitable trust created by will – Execution of a will by the author of the trust is one of the valid and permissible modes of creating a trust – Once the author of the will has indicated an intention to create a trust, the purpose of the trust, the beneficiary and the trust property, the moment the testator expires, the trust would come into being – Formal transfer of trust property to trustee is not required to be made where the trust is declared by will - Trustees were entitled to exemption under s. 5(1)(i) even in the absence of trust deed.

Devar Kavasji T. Modi Executors & Trustees of Late Dr. T.D Edel Behram, CWT v/s.

(2004)187 CTR 148= 136 Taxman 541=180 Taxation 426 = 268 ITR 175 (Guj)

(d) **ASSESSMENT OF DISCRETIONARY TRUST**

(1) Discretionary trust – Assessee, a discretionary trust, passed a resolution whereby it decided to disburse the income of the relevant year only to one of the beneficiaries – By virtue of the said resolution, an effort was made to convert the nature of the trust from discretionary to specific – It was not open to it to do so – Income of the assessee rightly taxed in the hands of the trust itself under s. 164 – There being nothing on record to show that the said income of the trust has already been taxed in the hands of the beneficiary it was not proper for the Court to look at the record which is not before it or which was not before the Tribunal.
Ambalal Sarabhai D. Trust, CIT v/s.
(2004) 187 CTR 155 = 137 Taxman 503 (Guj)

(2) Applicability of s. 164(1) - Formation of main trust found to be genuine and its income was allocated amongst its 20 beneficiaries, assessee trust being one of them, each having 5 per cent share – Each of the beneficiary trusts allocated its income to its beneficiaries in any other trust and the income of such individual beneficiaries did not exceed the maximum amount not chargeable to tax – In such circumstances, the proviso to s. 164(1) was applicable and not the substantive part of s. 164(1) – Accordingly, Tribunal was right in directing the AO to charge the tax at normal rate instead of maximum marginal rate – Question regarding colourable device having not been referred, contention as to tax avoidance could not be allowed to be raised.
Sinivali Trust , CIT v/s.
(2004) 187 CTR 619= 267 ITR 165 = 180 Taxation 100(Guj)

(e) **TRUST OR A.O.P**

(1) Assessment as AOP – Assessee trust having forty five beneficiaries, all trusts said to have been formed for the ultimate benefit of grand children of the settlor – On appreciation of evidence on record, Tribunal found that the assessee cannot be said to be a genuine trust but is a device for avoiding payment of tax – There is no infirmity in finding of fact recorded by the Tribunal - However, in the absence of any finding that the grand children had combined in a joint enterprise to produce income, assessment could not be made in the status of AOP at the maximum marginal rate under s. 167A – Tribunal is directed to determine as to who is the

correct person in whose hands the income in question is liable to be taxed.
Ganesh Chhababhai Family Trust v/s. CIT
(2005)199 CTR 563 =(2006) 252 Taxman 382 (Guj)

(2) Assessing creating a trust – Trust carrying on business – Revenue taxing income of the assessee amounting to Rs. 12, 27,975 holding it to be A.O.P – Assessee claiming income to be taxed in the hands of the beneficiaries – Held, Tribunal not considering whether creation of a trust a colourable device and formed for avoidance of payment of tax – Case remanded back to Tribunal – Judgment of Apex Court in the case of CIT v/s. KT Doctor 210 ITR 744 relied upon.
Sona Family Trust, CIT v/s.
(2002) 166 Taxation 97 =(2003) 126 Taxman 284 (Guj)

110. <u>UNEXPLAINED INVESTMENT</u>

(1) Scope of section 69A – No reasonable explanation regarding investment – Addition to income justified – Income Tax Act, 1961, s. 69A.
B.I Investment (P) Ltd. v/s. CIT
(2007)289 ITR 172 = 207 CTR 227 =196 Taxation 238 =163 Taxman 757 (Guj)

(2) Section 69A of the I.T Act and to Valuation Cell – Estimated profit on unexplained investment – Tribunal deleting the addition – High Court remarked that unexplained investment would increase the cost of construction there would be zero effect on income – Further the High Court held that reference to V.O not valid – Reference answered in favour of the assessee & against the revenue. Income Tax Act, 1961 – Section 69A.
Star Builders, CIT v/s.
(2007) 198 Taxation 180 = 294 ITR 338(Guj)

(3) Assessee to give explanation relating to nature and source of acquisition of money, gold, etc. – Value of gold ornaments outside books found in raid in February, 1987 – Assessee admitting gold ornaments belonged to him from undisclosed sources – Value of gold ornaments added as income for assessment year 1986-87 – Tribunal finding income assessable in 1988-89 instead of 1987-88 as accounting period would be Diwali 1986-87 – Order of Tribunal maintained – Income Tax Act, 1961, s. 69A.
Baroda Chain Works, CIT v/s.
(2007) 293 ITR 176 = 199 Taxation 506 (Guj)

(4) Cost of construction – Reference can not be made to Valuation Officer to find out cost – Income Tax Act, 1961, ss. 69, 69A.
Star Builders, CIT v/s.
(2007) 294 ITR 338 = 198 Taxation 180 (Guj)

(5) During assessment proceedings it was revealed that assessee firm had paid certain amount by way of 'pagri' for acquiring shop premises on rent – 'B' , who was partner of firm which was previously in possession of said property, admitted that an amount had been paid by assessee to his wife 'V' in lieu of handing over possession of premises in question - Landlord also admitted to receive an amount by way of pagri - Income tax inspector prepared a report and ITO added amounts paid by assessee to 'V' and landlord as unaccounted income of assessee – Affidavit of 'V' denying receipt of pagri which was belatedly produced by assessee was obviously an afterthought to bolster up assessee's case and could not dislodge reliable version of 'B' – Therefore addition was to be sustained.
Silk Museum v/s. CIT
(2003) 131 Taxman 491 = (2002) 257 ITR 22= 175 CTR 604 =
170 Taxation 137(Guj)

(6) Firm obtaining tenancy of premises – Finding by Tribunal based on evidence that substantial amounts had been paid to evict erstwhile tenants – Amount assessable as unexplained investment.
Silk Museum v/s. CIT
(2002) 257 ITR 22 = 175 CTR 604 = 170 Taxation 137(Guj)

(7) Amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales – During survey it was found that assessee had not disclosed certain sales in books of account – Tribunal was jusfied in holding that unless there was a finding that investment by way of incurring cost in acquiring goods which had been sold, had been made by assessee and that had also not been disclosed, only net profits embedded in sales and not wholesale proceeds itself , would be treated as undisclosed income of assessee.

President Industries, CIT v/s.
(2002) 124 Taxman 654 (Guj)

111. VALUATION

(a) CLOSING STOCK

(1) Authorised to gather information and assess value himself – Provision of act do not impose restriction that Assessing Officer and Officer gathering information should not be the same –

Vipan Kumar Jain, Union of India v/s.
(2003)260 ITR 1 =181 CTR 24 = 181 CTR 24 =129 Taxman 59 = 171 Taxation 781(SC)

(2) Net method - Valuing raw materials at purchase price minus modvat credit - Valuing unconsumed raw material and work in progress at end of year at net method - Proper - Adopting "gross method" for purchases and net method for unconsumed stock at end of year - Not permissible.

Indo Nippon Chemical Co. Ltd., CIT v/s.
(2003)261 ITR 275= 182 CTR 291 = 130 Taxman 179 = 176 Taxation 1 (SC)

(3) Proper Practice - To value closing stock at cost or market price whichever is lower - Firm – Dissolution on death of one partner - Reconstituted with remaining partners without discontinuance of business - Closing stock of firm - To be valued at cost or market price whichever is lower.

Sakthi Trading co. v/s. CIT
(2001) 250 ITR 871(SC)

(4) Section 145, read with section 147, of the Income Tax Act, 1961 - Method of accounting - Valuation of closing stock - Assessment year 1971-72 - Assessee firm was a building contractor - It

constructed flats and sold them - It treated transaction of hire purchase of certain flats as part of sale and declared amount received during accounting period as profits relatable to sale transaction during assessment year 1971-72 - Assessment was, however, reopened on ground that assessee had suppressed closing stock of aforesaid flats in assessment year 1971-72 as same were sold in subsequent assessment year i.e 1972-73 - Accordingly, addition was made - However, it was found that no sales had taken place of those flats in subsequent years and thus entire basis on which action of ITO was founded disappeared - Whether addition was justified when closing stock had been properly vlaued on basis of market price - Held, no

Sadhuram Gordhandas v/s. CIT
(2001) 119 Taxman 603(GUJ)

(5) Reference to Valuation Officer – Assessment years 1982-83 and 1983-84 – A valuation officer appointed under Wealth Tax Act can neither be called upon nor he would have jurisdiction to give a report either to Assessing Officer under Income Tax Act except when a reference is made under and in terms of section 55A, or to a competent authority except under section 269L – In income tax returns assessee disclosed certain amounts which she had invested in construction of a house – These were not accepted by Assessing Officer, who referred question of construction cost of house to Valuation Officer - Assessing Officer reopened assessment and made addition of excess amount as undisclosed income – Assessing Officer could not refer matter to Valuation Officer for estimating cost of construction – Reassessment was bad.

Amiya Bala Paul (Smt) v/s. CIT
(2003)130 Taxman 511=182 CTR 489 = 262 ITR 407=
176 Taxation 221 (SC)

112. <u>VOLUNTARY DISCLOSURE OF SCHEME</u>

(1) Refund of tax – Assessee having paid tax on income declared under VDIS, 1997 partly within time and partly beyond time allowed under the Scheme, Department was justified in accepting amount relatable to the amount of tax paid within time only and issuing certificate to that extent – As regards the balance of tax and interest paid by the assessee, the same was required to be refunded or adjusted.

Hakimchand D. Chotal v/s. CIT
(2009) 221 CTR 589 = (2008) 10 DTR 23(Guj)

(2) Voluntary Disclosure of Income Scheme, 1997 - Maintainability of declaration – Benefit of VDIS, 1997, could not be allowed to the firm on the basis of purported disclosure made by it in relation to the same amount which was disclosed by a partner thereof during the search carried out at the premises of the firm on the strength of search warrant issued in the name of the partner.
Tanna & Modi v/s. CIT
(2007) 210 CTR 273 = 161 Taxman 329 =
201 Taxation 194 (SC)

(3) Declaration of income not earlier disclosed – Time for payment of tax – Is rigid - No scope for equitable consideration for extending time.
Hemalatha Gargya v/s. CIT
(2003) 259 ITR 1 = 128 Taxman 190 = 182 CTR 107 =
174 Taxation 758 (SC)

(4) Whether income disclosed by assessee's creditor could be said to be explanation of cash credit found in assessee's books – Held, no – Whether, where Tribunal had ordered that cash credit in assessee's book stood explained in view of disclosure made by creditors under section 24, order of Tribunal was vitiated in view of provisions of section 68 of the Income Tax Act, 1961 – Held, yes.
United Trading & Construction Co. , CIT v/s.
(2002) 124 Taxman 493(SC)

(5) See also heading "Accounts" and "Method of Accounting".

113. WEALTH TAX ACT

(a) AGRICULTURAL LAND

Land used for agricultural purposes – Intention of the assessee was to keep the land in the condition in which it was and it was not intended to be converted into non agricultural land – Tribunal held that the fact that the land was surrounded by buildings sites, etc. was not within the control of the assessee and these factors would not change the character of the land

– It also found that the land has the history of agricultural use even after the relevant valuation dates and that the land was shown as agricultural land in the revenue records – Therefore, there is no infirmity in the order of the Tribunal holding that the land is agricultural land.

Shashiben, CWT v/s.

(2005) 193 CTR 140 =186 Taxation 52 (Guj)

(b) <u>ASSETS</u>

(1) Compensation for acquisition of HUF property - Assessee who had thrown certain immovable property in the common hotchpot of HUF was allotted 1/9th share of that property on partial partition – Land acquisition proceedings taken in relation to said property – Assessee received only 1/9th share of the compensation – Assessee was not even in possession of 8/9th share on the valuation date – Compensation money having been received, the right to receive compensation stood extinguished and there was no right in existence insofar as assessee was concerned - Therefore, tax cannot be levied on the assessee in respect of portion of the compensation in excess of 1/9th share received by her.

Chanchalben , CWT v/s.

(2006)200 CTR 423 = 281 ITR 15 = 192 Taxation 295 = 153 Taxman 468 (Guj)

(2) Non inclusion of Income Tax refund and lease rent in net wealth erroneous and prejudicial order – Though lease rent and Income Tax refund had accrued to the assessee, these amounts were not included in her net wealth - CWT was justified in directing the WTO under s. 25(2) to include the said assets in the net wealth of the assessee – Any debt which is owed by anybody to the assessee would be a property of the assessee and has to be included in the assets of the assessee irrespective of the system of accounting followed by the assessee.

Vijaykunverba , CWT v/s.

(2003) 184 CTR 397

(c) AOP

Clubbing of wealth under s. 4(7) - Member of AOP - Open plot of land belonging to co-operative housing society allotted/leased to member - Not includible in the net wealth of the assessee member.

Kishore B. Setalvad v/s. CWT

(2001) 171 CTR 89 = (2002) 256 ITR 637=166 Taxation 303 = (2003) 128 Taxman 560 (GUJ)

(d) W.T - CLUBBING OF ASSETS

Net wealth – Whether assets of the family Trust to be clubbed in the hands of the assessee – Held, no – Reference answered against the revenue & in favour of the assessee , Wealth Tax Act, 1957 – Section 4.

Mahendrabhai D. Parmar, CWT v/s.

(2007)196 Taxation 213(Guj)

(e) COMPULSORY DEPOSIT

Chargeability – Compulsory deposit with interest thereon - Amount standing to the credit of the assessee as compulsory deposits including the accrued interest is not liable to W.T.

Indukumar C. Patel , CWT

(2003) 183 CTR 572 = (2002) 125 Taxman 173(Guj)

(f) **EXEMPTION**

(1) Exemption under s. 40(3)(vi) of Finance Act, 1983 – Business asset Building under construction – Building under construction admittedly not used by assessee for purposes of business would not fall in the exception clause provided in s. 40(3)(vi) of the Finance Act, 1983, hence could not be excluded from the ambit of chargeable asset under that section.

Cadmach Machinery Co.(P) Ltd., CWT v/s.

(2007) 212 CTR 285 = 295 ITR 307(Guj)

(2) Wealth Tax Act, 1957 – Residential house used for residential purpose – Muff Villa, & Queen Villa used for office held to be used exclusively for residential purpose for valuation under section 7(4) of the Wealth Tax Act.
S.D Jadeja , CWT v/s.
(2006)192 Taxation 321 (Guj)

(3) Exemption under s. 5(1)(iv) – Allowability - Life interest in house property - Life interest in a palace inherited by assessee from her husband, an ex-ruler, is an asset includible in her net wealth and hence assessee is entitled to exemption under s. 5(1)(iv) in respect of the same.
Dilherkunverba C. Jadeja, CWT v/s.
(2006) 205 CTR 301(Guj)

(4) Allowability - Qualifying shares held as a dealer – Tribunal found that the assessee has placed on record certificates from the ITO having jurisdiction over the companies to establish the fact that the shares held by her formed part of the initial issue and as such, qualify for exemption – It also found that the condition laid down in s. 5(3) namely holding the shares for the specified period is satisfied by the assessee – As regards applicability of s. 7 Tribunal has rightly held that the said section is merely a machinery provision and it cannot govern the allowability of exemption under s. 5 – Thus, there is no infirmity in the order of the Tribunal allowing exemption under s. 5(1)(xxa) in respect of shares held by assessee even as a dealer.
Laxmidevi, C.D.R, CWT v/s.
(2005)193 CTR 222=185 Taxation 341=274 ITR 257=144 Taxman 600 (Guj)

(5) Wealth Tax Act - Exemption under s. 5(1)(i) - Property held under trust – Public charitable trust created by will – Execution of a will by the author of the trust is one of the valid and permissible modes of creating a trust – Once the author of the will has indicated an intention to create a trust, the purpose of the trust, the beneficiary and the trust property, the moment the testator expires, the trust would come into being – Formal transfer of trust property to trustee is not required to be made where the trust is declared by will -

Trustees were entitled to exemption under s. 5(1)(i) even in the absence of trust deed.
Devar Kavasji T. Modi Executors & Trustees of Late Dr. T.D Edel Behram, CWT v/s.
(2004)187 CTR 148= 136 Taxman 541=180 Taxation 426 = 268 ITR 175 (Guj)

(6) Position prior to 1-4-1993 – Whether when trustees are subjected to levy of wealth tax as if trust property is held by trustees as individuals, revenue cannot deny exemption to trust or trustees on ground that they are not individuals – Held, yes.
Parwatibai Trust, CWT v/s.
(2004) 136 Taxman 184 = 180 Taxation 88 = 268 ITR 365 =
(2006) 154 Taxman 161 (Guj)

(7) Expression 'building or a part thereof' in section 4(7) would not include open plot of land – Therefore, a member's interest in an open plot of land belonging to a co-operative housing society and allotted or let out to member, is exempt from liability to wealth tax.
Kishore B. Setalvad v/s. CWT
(2003) 128 Taxman 560(Guj)

(8) Exemption under s. 5(1)(iii) - Property held under trust – Public Charitable Trust vis-à-vis individual property - It has been accepted in the income tax reference that the assessee is a public charitable trust and the properties in question are the properties of the trust – Assessee trust entitled to exemption under 5(1)(i) – Said properties could not be held to be belonging to the individual, the Sajjadnashin of the trust.
Hazarat Pir Shah – E – Alam, CWT v/s.
(2002) 175 CTR 523 = 123 Taxman 657 = 170 Taxation 134 (Guj)

(9) Official residence of ex-ruler – Reconstructed palace – Assessee was in possession of a palace which was exempted for taxation purposes under the notification issued under Part B States (Taxation Concessions) Order, 1950 – Said palace was declared as the official residence of the ex-Ruler of Vadia – It was demolished and the scrap was partly sold and partly utilized for construction of a new building – Assessee being a successor of the ex-ruler recognized by the President prior to the commencement of the Constitution (Twenty sixth Amendment) Act, 1971 was entitled to the benefit of s.

5(1)(iii) in respect of the said building notwithstanding the fact that it was reconstructed after demolishing the dilapidated palace.
Virawala Suragwala (D.S), CWT v/s.
(2002) 175 CTR 512 = 122 Taxman 782 = 170 Taxation 51 =
(2003) 259 ITR 405 (Guj)

(10) s. 5(1)(xxvi) – Deposit with banking company - Deposit under Compulsory Deposit (IT Payers) Scheme, 1974, provides that the compulsory deposit is to be deemd to be a deposit with a banking company for the purposes of exemption under s. 5 of the W.T Act, 1957 – Thus, the amount standing to the credit of the assessee as compulsory deposits was not liable to wealth tax.
Avaniben Ajaybhai (Smt) , CWT v/s.
(2002) 177 CTR 279 = 123 Taxman 999 = 171 Taxation 282 =
258 ITR 542(Guj)

(11) s. 40(3)(vi) of Finance Act, 1983 - Business assets – Residential property used as guest house – Held to be used for business in the income tax proceedings – Could not be treated differently in the Wealth Tax proceedings - It was exempt under s. 40(3)(vi).
Bombay Conductors & Electrical Ltd., CWT v/s.
(2002) 177 CTR 338 = 123 Taxman 1002 = 171 Taxation 278 =
258 ITR 667 = (2008) 3 DTR 200(Guj)

(12) Interest of partner in an industrial undertaking – Assessee HUF was a partner in a partnership firm – Assessee claimed exemption under section 5(1)(xxxii) in respect of its capital interest in said partnership firm, which was rejected by wTO but accepted by AAC and Tribunal – Whether were processing of goods was done by an outside agency which was in no way connected with business of firm, then assessee could not be said to have interest in a firm which was engaged in business of manufacture of goods and, therefore, it was not entitled to claim benefit of exemption under section 5(1)(xxxii) in respect of its share in value of its assets – Held, yes.
Dilip Ratilal (HUF), CWT v/s.
(2002) 125 Taxman 458 (2003) 260 ITR 306= 184 CTR 136 (Guj)

(13) s. 5(1)(iv) – House property – Finding of fact – After considering all the necessary facts and circumstances of the case as well as after appreciation of the evidence led by the parties, the Tribunal found as a matter of fact that the assessee has not claimed exemption under s. 5(1)(iv) in respect of any other house and that the property

in question was to be treated as a house used for the purpose of residence – This is a finding of fact, which is not to be disturbed – No question of law arises – Answer to question declined.
Chinubhai Lalbhai (HUF, CWT v/s.
(2002) 177 CTR 157 = 123 Taxman 834 = 171 Taxation 271 (Guj)

(14) Co-operative Society – Member – Building or a part thereof allotted to member – Does not include open plot of land - Open plots of land beloning to a co-operative society and allotted / let out to its members - Not includible in net wealth of member.
Kishore B. Setalvad v/s. CWT
(2002) 256 ITR 637 = 166 Taxation 303 (Guj)

(15) Assessee claiming exemption of investment upto Rs. 1,50,000 made in industrial concern – Firm getting work done by agency – Held, assessee not entiled to claim exemption.
Chandrakant Ratilal, CWT v/s.
(2002) 171 Taxation 502 = 124 Taxman 65(Guj)

(16) Where amount of compulsory deposit is deposited in a banking company to which the Banking Regulations Act, 1949 applies, said amount of compulsory deposits with interest would not be liable for Wealth Tax.
Indukumar C. Patel v/s. CWT
(2002) 125 Taxman 173 = (2003) 183 CTR 572 Guj)

(17) Assessee brought into India by NRI – Assessment years 1977-78 to 1979-80 – Assessee, who came to India in February, 1973 with intention of permanently staying here, claimed exemption under section 5(1)(xxxiii) which came into force with effect from 1-4-1977 – Tribunal held that when exemption came into effect, fact that assessee had come to India did remain a fact and that was only requirement of provision, and therefore period of seven years would begin to run from assessment year next following date on which person returned to India – Thus, according to Tribunal assessee would lose exemption for assessment years 1973-74 to 1976-77 but would be entitled to exemption for assessment years 1977-78 to 1979-80 – Whether it could be said that Tribunal had committed any error in coming to above conclusion – Held, no.
Rajivbhai Panchanbhai Patel, CWT v/s.
(2002) 125 Taxman 134 = 166 Taxation 217 = 10 DTR 173 (Guj)

(18) Association registered under Bombay Public Trusts Act - Granted certificate under section 80G of Income Tax Act as established for charitable purposes and under section 10(23) that its income was exempt - Not assessable entity under Wealth Tax Act - Notice to bring to tax Wealth escaping assessment - Invalid.
Bombay Cricket Association , CWT v/s.
(2001) 250 ITR 663(SC)

(19) Assets brought into India by NRI - Law applicable - Effect of provision brought into force with effect from 1-4-1977 granting exemption to assets brought into India by NRI intending to stay in India permanently - Exemption for seven successive assessment years - NRI who returned to India in 1973 - Entitled to exemption in assessment years 1977-78, 1978-79 and 1979-80 .
Ravjibhai Panchanbhai Patel , CIT v/s.
(2001) 253 ITR 184 = 171 CTR 298(GUJ)

(20) Open plots of land belonging to co-operative housing society allotted/leased to member - While granting exemption to members of co-operative housing societies w.e.f 1st April, 1972 the legislature inserted some words in s.4(1)(b) to ensure that each and every interest of such member is not included in the net wealth - Sec. 4(7) only covers a building or a part thereof belonging to a co-operative housing society and allotted or leased to a member of the society - Submission that the expression "building or a part thereof would also include open plot of land cannot be accepted - Legislature in its wisdom did not use the expression "property" which is an expression of wide amplitude - When the legislature has granted exemption under s. 5(1) (xxviii) in respect of shares in a co-operative housing society, it implies that it intends to grant exemption in favour of all rights flowing from such shares except those contemplated by s. 4(7) - Therefore, member's interest in an open plot of land is exempt from tax - Further, assessee member was not bound by concession made by him before the Tribunal offering the deposit with the co-operative housing society to tax since such deposit was exempt under cl. (xxix) of s.5(1).
Kishore B. Setalvad v/s. CWT
(2001) 171 CTR 89(GUJ)

(g) **LEGAL REPRESENTATIVES**

Assesment years 1968-69, 1970-71, 1971-72, 1983-84 and 1984-85 – Whether in order to make legal representative of deceased assessee liable for penalty under section 19(1), it is not enough that penalty proceedings should be initiated during life time of deceased but it is also necessary that such penalty proceedings must result into penalty orders during his life time.

Gaekwad (F.P), Asstt. CIT v/s.
(2008)174 Taxman 551(Guj)

(h) LIFE INTEREST

Whether an asset is eligible for exemption under section 5(1)(iv) of the WT Act – Held, yes – Whether the jewellery misappropriated includible in net wealth – Held, this matter is question of pure finding of fact & no question of law is involved – Reference answered against the revenue & in favour of the assessee- Wealth Tax Act, 1957 – Section 5(1)(iv).

Jadeja D.C, CWT v/s.
(2007) 197 Taxation 309(Guj)

(i) W.T - NET WEALTH

(1) Wealth Tax– Part of income of assessee appropriated to trust – Assessee one of beneficiaries under trust – No power of disposition of assessee – Sum appropriated not includible in net wealth of assessee – Wealth Tax Act, 1957.

Mahendrabhai D. Parmar, CWT v/s.
(2007) 292 ITR 622= 196 Taxation 213(Guj)

(2) W.T - Net Wealth - Chargeability -Jewellery misappropriated by third person – Jewellary which is found to have been misappropriated by a third person cannot be included in the net wealth of the assessee -

Dilherkunverba C. Jadeja, CWT v/s.
(2006) 205 CTR 301(Guj)

(j) W. T- PENALTY UNDER S. 18(1)(C) - CONCEALMENT

(1) Levy of penalty under ss. 15B, 18(1)(a) and 18(1)(c) – Penalty proceedings under ss. 15B, 18(1)9a) and 18(1)(c0 initiated against the deceased assessee but penalty not levied during his lifetime could not be levied on the legal representative after his death.

Late Shrimant F.P Gaekwad Through L/H
Mrinalini Puar, Asstt. CIT v/s.
(2009) 221 CTR 423(Guj)

(2) Penalty under s. 18(1)(a) - Reasonable cause – Delay in furnishing of Income Tax return – Filing of Wealth Tax return is dependent on the filing of Income Tax return or at least the provisions of IT Act have some bearing on the determination of wealth tax liability - Therefore, penalty under s. 18(1)(a) was not to be levied upto the date of fixing of Income Tax return.

Maharaja Daljit Singhji, CWT v/s.
(2005) 193 CTR 137 =185 Taxation 345 = 274 ITR 524 (GUJ)

(3) Revised return before completion of assessment - Low value shown for property - Correct valuation of the property as arrived at by the approved valuer stated in the revised return - It cannot be said that the assessee had furnished inaccurate particulars of the property - Dy. CWT(A) has come to a conclusion that the assessee had no intention to furnish inaccurate particulars - Said finding confirmed by the Tribunal - Penalty rightly cancelled.

Hasmukhlal Gandalal, CWT v/s.
(2003) 184 CTR 23 = 264 ITR 42 =(2004) 134 Taxman 507 (Guj)

(4) Undervaluation of building in original return – In pursuance of direction given by WTO, assessee got the building valued by an approved valuer and upon knowing that the value of the building on the valuation date was more, the assessee filed a revised return for both the years showing the value as ascertained by the approved valuer – Revised returns were filed within the prescribed time limit before the assessment was completed – It cannot be said that the assessee had furnished inaccurate particulars of the building – Both the appellate authorities have arrived at a finding that the assessee had no intention to furnish inaccurate particulars of the

asset in question – Tribunal justified in confirming the cancellation of penalties.
Chandkant Gandalal, CWT v/s.
(2003) 184 CTR 517(Guj)

(k) RECTIFICATION

Mistake apparent - Assessment of trust under s. 161 vis-à-vis income of trustees – Specific trust with 23 beneficiaries – Total income of each beneficiary i.e the share of income of the trust receivable by such beneficiary under the the trust deed as well as other income of the beneficiary which would make up his total income was required to be taken into account for the purpose of ascertaining the rate at which the toal income of such beneficiary was to be taxed under s. 161(1) – Instead of acting as per the above settled position ITO resorted to a rate of tax which was relatable only to the share of the beneficiary in the income of the trust receiable by him – Thus, a mistake crept in while assessing the trustee which required rectification – Circular F. No. 45/78/66-ITJ(S), dt. 24th Feb., 1967, has no application to the facts of the case – Merely by referring to an irrelevant circular, one cannot make a simple issue a debatable one - Contention that the income receivable by the beneficiaries under the trust deed was to be paid to them after nineteen years and that therefore, it was not taxable in the relevant year was not raised at the time of assessment – Same could not be raised in rectification proceedings – Rectification justified.
Ganesh Chhababhai Vallabhai Patel v/s. CIT
(2002) 175 CTR 498 = 169 Taxation 637 = 258 ITR 193 =
(2003) 130 Taxman 163 (Guj)

(l) RESIDENTIAL HOUSE

(1) Applicability of s. 7(4) –Expression "exclusively used by him for residential purposes" means that the property should not be put to any non-residential use i.e to generate income - Admittedly, property in question i.e, Queen Villa is used by the assessee for office purposes and is not put to any commercial use – Finding of the Tribunal that Queen Villa and the self occupied house property of the assessee are contiguous, existing in same compound within common boundaries not challenged – Thus, both the buildings constituted a house

belonging to the assessee and exclusively used by him for residential purpose within the meaning of s. 7(4).
Jadeja, S.D, CWT v/s.
(2005) 199 CTR 503= (2007) 197 Taxation 309 =
(2006)152 Taxman 202 =283 ITR 45 (Guj)

(2) Residential house – House property retained for residential purposes – Though the assessee did not actually stay in the house property in question, he kept it reserved for his residential purposes and did not let out the property to anyone – Person using a house for his residential purpose does not cease to use the same for such purpose when he is away from the house – Use of a house for residential purpose does not require compulsory residence in that house – So long as he intends to use his house and retains it exclusively for his residential purposes, the house would be said to be exclusively used by him for his residential purposes – Thus, the house property in question was used for residential purpose and assessee was entitled to benefit of s. 7(4).
Anilkumar M. Virani, CWT v/s.
(2002)175 R 412 =123 Taxman 586 =169 Taxation 652 =
258 ITR 81 (Guj)

(m)REVISION

Section 25(2) of the Wealth Tax Act – 12% share in property included at Rs. 21.641 –Subsequently agreement for sale of the property for Rs. 11,25,000 for 31-3-1981 - Commissioner of Wealth Tax passed order under section 25(2) of the Wealth Tax Act – Tribunal cancelled order under section 25(2) – Hon'ble High Court confirmed Tribunal's order.
R.R Patel Through L/R Shri. K.R Patel, CWT v/s.
(2006) 192 Taxation 345 = 284 ITR 315(Guj)

(n) TRUST

s. 21(4) - Assessment of trust - Applicability of s. 21(4) - Tribunal holding that s. 21(4) was not applicable on the analogy of its decision in the income tax proceedings wherein it was held that though the trust was governed by s. 164(1) of the IT Act the rate applicable to such trust under s. 164 was not applicable in view of cl. (i) of the proviso to s. 164(1) - Not justified - No provision exists under proviso to s. 164(1) of the IT Act - Tribunal erred in not noticing this apparent difference in the provisions under the two Acts - Provisions of s. 21(4) applicable.

G.R Employees Welfare Trst, CWT v/s.

(2001) 169 CTR 343(Guj)

(o)VALUATION

(1) Immovable property -Property let out for non-residential purposes – Admittedly, r. 1BB applies only to a house which is wholly or mainly used for residential purposes – However, since the WT Rules do not contain any specific rule for valuation of a house which is let out for non residential purposes, the AO has to follow rational principles for valuation of such house as well, and repairs and rent collection charges are to be treated as legitimate deductions even for determining value of a house let out for business purposes – Therefore, 1/6th deduction towards repairs is allowable irrespective of the fact whether the assessee has incurred any expenditure on repairs – As regards collection charges, AAC found that the amount expended by the assessee was less than 4 per cent of gross rent – Any sums spent to collect the rent from the house, not exceeding six per cent, is deductible in determining the net maintainable rent by virtue of sub-cl. (iii) of cl. (c) of r. 1BB(2) – Therefore, collection charges as shown by the assessees were also deductible.

Abdulsaeed Abdulhamid Patel, CWT v/s.

(2006) 200 CTR 276 = 181 ITR 132 = 192 Taxation 206 = 283 ITR 97(Guj)

(2) Immovable property – Assessment years 1979-80 and 1981-82 – Assessee HUF in respect of a house belonging to HUF and exclusively used for residential purposes, claimed benefit under section 7(4) – In past years, assessee claimed and availed exemption in respect of said house under section 5(1)(ivb) – Whether such exemption availed of in respect of said house would not preclude assessee from exercising its option under section 7(4) –Held, yes–Whether assessee, even though was an HUF, was entitled to benefit of section 7(4) in respect of said house–Held, yes.
Ashok Raje Gaekwad, CWT v/s.
(2004)135 Taxman 272= 188 CTR 14 = 267 ITR 54=180 Taxation 203 (Guj)

(3) Shares - Whether rule 1D for determining break-up value of shares of private limited companies shall be applied in light of principles laid down by Apex Court in case of Bharat hari Singhania v/s. CWT (1994) 207 ITR 1/73 Taxman 3 – Held, yes.
Indukumar C. Patel v/s. CWT
(2002) 125 Taxman 173 = (2003) 183 CTR 572 (Guj)

(4) Unquoted equity shares – Computation under r. 1D – Gross amount of provision for taxation was not deductible as a liability while applying r. 1D for determination the break up value of shares.
Indukumar C. Patel , CWT
(2003) 183 CTR 572(Guj)

(5) Immovable property – Reversionary value of land – Reversionary value of land could not be included while working out the valuation of the property when the property was rented out.
Chinubhai Haridas (HUF), CWT v/s.
(2003) 179 CTR 162(Guj)

(6) Remainderman's interest in trust property - Estate duty payable on the death of life tenant - On the death of the holder of the life interest the provisions of ED Act would be applicable and the estate duty determined in terms of sub-s. (2) of s. 74 of that Act would be first charge on such interest - Potential estate duty being 'encumbrance' is a relevant factor for determining the market value of the remainderman's interest in trust properties - Thus, the risk or hazard of the estate duty liability will have direct impact on

the purchaser of the remainder interest and is a relevant factor for the purpose of determination of valuation of the interest to be held by the remainderman.
Trustees of HEH, CWT v/s.
(2003) 181 CTR 385 = 129 Taxman 485 = 261 ITR 690 =
174 Taxation 770 (SC)

(7) Land in question being covered under the Urban Land (Ceiling and Regulation) Act, 1976, it was not open to assessee to sell it in open market - Therefore value of land could not be more than what Government was to offer to assessee under provisions of Ceiling Act.
G.S Krishnavati Vahuji Maharajkalyanraiji Temple, CIT v/s.
(2003) 131 Taxman 339 = 264 ITR 517 = 185 CTR 503=
(2004) 179 Taxation 241 (Guj)

(8) Assessment years involved are 1973-74 to 1979-80 – Assessee filling report of registered valuer – AO referring matter to DVO and adopting value as per his report – Being aggrieved, assesseee filing an appeal before CIT(Appeals) – CIT (Appeals) passed order than in computation of gross annual rental income deductions on account of collection, management charges, bad debts, vacancies, maintenance and repairs and the effect of the order of Rent Control Act and Urban Land Ceiling Act be given – Tribunal confirming order – Held, Tribunal justified in upholding CIT(A)'s order.
Harshad Kumar S. Mehta v/s. CWT
(2003) 178 Taxation 503(Guj)

(9) Unquoted equity shares – Applicability or r. 1D – Valuation has to be done in
accordance with r. 1D – Tribunal was not justified in confirming the order of CIT(A) directing the WTO to value the unquoted shares of private limited companies in accordance with the principles laid down in the case of.
Chinubhai Lalbhai (HUF), CWT v/s.
(2002) 177 CTR 157 = 123 Taxman 834 = 171 Taxation 271(Guj)

(10) Residential house – House property retained for residential purposes – Though the assessee did not actually stay in the house property in question, he kept it reserved for his residential purposes and did not let out the property to anyone – Person using a house for his residential purpose does not cease to use the same for such purpose

when he is away from the house – Use of a house for residential purpose does not require compulsory residence in that house – So long as he intends to use his house and retains it exclusively for his residential purposes, the house would be said to be exclusively used by him for his residential purposes – Thus, the house property in question was used for residential purpose and assessee was entitled to benefit of s. 7(4).
Anilkumar M. Virani, CWT v/s.
(2002) 175 CTR 412 = 123 Taxman 586 = 169 Taxation 652 =258 ITR 81 (Guj)

(11) Life interest in trust – Applicability of r. 1B – Life interest of the assessee in the
trust in question had to be valued only by applying the provisions of r. 1B and not by actuarial method of valuation.
Chhayaben Suhashbhai v/s. CWT
(2002) 177 CTR 358 = 171 Taxation 286 = 258 ITR 624 =
124 Taxman 5 (Guj)

(12) House property - Relevant considerations – WTO completed the assessment by adopting the valuation made by the DVO – In appeal, AAC adopted his own value after examining the valuation adopted by the registered valuer as well as the DVO – Tribunal confirmed AAC's order – Findings arrived at by the authorities are based on facts which were correctly appreciated by the authorities – No interference warranted.
Harshadkumar S. Mehta v/s. CWT
(2002) 177 CTR 472 = 124 Taxman 183 (Guj)

(13) Section 7 of Wealth Tax Act, 1957, read with rule 1D of the Wealth Tax Rules, 1957 – Valuation of asset – Unquoted shares – Whether value of shares is to be computed under rule 1D as interpreted by Supreme Court in case of Bharat Hari Singhania v/s. CWT (1994) 207 ITR 1/73, Taxman 3 – Held, yes.
Rajendra K. Parikh, CWT v/s.
(2002) 125 Taxman 378 = 174 CTR 442 (Guj)

(14) Unquoted equity shares – Yield or break-up method – Break-up method prescribed under r. 1D was applicable for valuation of unquoted equity shares.
Chandrakala Kasturbhai, CWT v/s.
(2002) 178 CTR 232 = 125 Taxman 170(2003) 172 Taxation 13 (Guj)

(15) Immovable Property – Whether probable estate duty payable on death of life tenant has to be taken into account and value of property will be diminished by that for charge of wealth tax in hands of remainder man - In view of conflicting decisions by two Benches of Surpeme Court matter was to be placed before Chief Justice for appropriate orders, Held, yes.
Trustees of Hch. Etc., CWT v/s.
(2002) 125 Taxman 653 = 258 ITR 508 = 178 CTR 473 (SC)

114. <u>WORDS AND PHRASES</u>

(1)"Actually paid " meaning of
Mugat Dyeing & Printing Mills v/s. Asstt. CIT
(2007) 290 ITR 282 = 207 CTR 606 = 198 Taxation 439 (Guj)

(2) "Amount" "Wrongfully", meaning of
Sandvik Asia Ltd. v/s. CIT
(2006)280 ITR 643= 200 CTR 505 = 150 Taxman 591= 193 Taxation 163 (SC)

(3) 'Any' meaning of
Mohammed Salim (K.P) v/s. CIT
(2008) 300 ITR 302 = 216 CTR 97 = 169 Taxman 465 = 207 Taxation 81 (SC)

(4) "Any other object of general public utility", "charitable purpose, meanings of
Gujarat Maritime Board , CIT v/s.
(2007) 295 ITR 561 =(2008) 214 CTR 81=166 Taxman 58 = 203 Taxation 263 = 1 DTR 1 = (2007) 295 ITR 561(SC)

(5) "Assessee offers no explanation" meaning of
P. Mohanakala, CIT v/s
(2007) 291 ITR 278 = 210 CTR 20 = 161 Taxman 162 = 201 Taxation 349 (SC)

(6) "Business", meaning of
G.K Choksi & Co. v/s. CIT
(2007) 295 ITR 241 =165 Taxman 299 = 213 CTR 425 (SC)

(7) "Business connection", "permanent establishment", meanings of– different.
Ishikawajima-Harima Heavy Industry Ltd. v/s. Director of Income Tax, Mumbai
(2007) 288 ITR 408 = 207 CTR 361= 8 RC 149 = 158 Taxman 259 =198 Taxation 103 (SC)

(8) 'Business' as occurring in section 32(1)(iv) of the Income Tax Act, 1961 does not include "profession".
G.K Choksi & Co. v/s. CIT
(2003) 127 Taxman 109 = 175 Taxation 222 (Guj)

(9) "Business of export"
Prabhakar (P.R) v/s. CIT
(2006) 284 ITR 548 = 154 Taxman 503 = 204 CTR 27 195 Taxation 221(SC)

(10) "Commitment charges" , meaning of
Gujarat Alkalies & Chemicals Ltd., Dy. CIT v/s.
(2008) 299 ITR 85 = 167 Taxman 203 = 215 CTR 10 = 204 Taxation 51 = 3 DTR 58 (SC)

(11) "Concealment of income", "inaccurate", "furnishing inaccurate particulars", meaning of
Dilip N. Shroff v/s. Joint CIT
(2007) 291 ITR 519 = 210 CTR 228 =161 Taxman 218 = 201 Taxation 53 (SC)

(12) "Concession" as occurring in section 17(2)(ii) of the Income Tax Act, 1961.
Arun Kumar v/s. Union of India
(2006) 155 Taxman 659 = 286 ITR 89 = 205 CTR 193 (SC)

(13) "Current repairs", meaning of
Saravana Spinning Mills P. Ltd., CIT v/s.
(2007) 293 ITR 201=163 Taxman 201= 211 CTR 281 = 9 RC 422= (2008) 202 Taxation 196 (SC)

(14) "Due" , "receivable", "payable", meanings of.
Upanishad Investment P. Ltd., CIT v/s.
(2003) 260 ITR 532 = 131 Taxman 20 = (2002) 177 CTR 176= 171 Taxation 669 (Guj)

(15) "Employ", Meaning of
Prithviraj Bhoorchand, CIT v/s.
(2006) 280 ITR 94 = 200 CTR 82 = 152 Taxman 372 = 192 axation 301 (Guj)

(16) "Founder of the Institution", Meaning of.
Bharat Diamond Bourse, Director of I.T v/s.
(2003) 259 ITR 280 = 179 CTR 225 = 126 Taxman 365 = 173xation 1(SC)

(17) "Genuine Hardship", meaning of
Malani B.M v/s. CIT
(2008)219 CTR 313=174 Taxman 363 = 306 ITR 196= 13 DTR 186(SC)

(18) "Gross total income ", meaning of
Synco Industries Ltd. V/s. Assessing Officer(Income Tax)
(2008) 299 ITR 444 = 215 CTR 385 = 168 Taxman 224 =4 DTR 203(SC)

(19) "In due time" , meaning of
Prakash Nath Khanna v/s. CIT
(2004)266 ITR 1 = 187 CTR 97 =135 Taxman 327= 180 Taxation 18(SC)

(20) "Levy", "collection", meaning of
Peekay Re-rolling Mills P. Ltd. v/s. Assistant Commissioner.
(2007) 8 RC 532(SC)

(21) "Manufacture", meaning of -
Kumar Motors v/s. Commissioner of Sales Tax
(2007) 8 RC 312(SC)

(22) **"**Manufacture", "Prima Facie" means.
Tara Agencies, CIT v/s.
(2007)292 ITR 444 = 210 CTR 454 = 162 Taxman 337 = 201 Taxation 359(SC)

(23) "Mistake", "rectification", meanings of -
Honda Siel Power Products Ltd. v/s. CIT
(2007)295 ITR 466 = 165 Taxman 307 = 213 CTR 425(SC)

(24) "Month", meaning of
S.L.M Maneklal Industries Ltd., CIT v/s.
(2005) 274 ITR 485 196 CTR 526=187 Taxation 584 =

(2007)158 Taxman 158 (Guj)

(25) "Motor Lorry" meaning of–Income Tax–General principles–Evidence – Fact of which Court can take judicial notice need not be proved - Mobile crane is motor lorry.
Gujco Carriers v/s. CIT
(2002) 256 ITR 50 = 174 CTR 324 = 122 Taxman 206 (Guj)

(26) 'Not ordinarily resident', meaning of
Pradip J. Mehta v/s. CIT
(2008) 300 ITR 231 = 216 CTR 12 = 169 Taxman 454 =
206 Taxation 169(SC)

(27) "Office premises", menaing of.
Statronics & Enterprises (P) Ltd., CIT v/s.
(2007)288 ITR 455 = 207 CTR 96 = 196 Taxation 198 =
165 Taxman 153 = (2008) 3 DTR 343 (Guj)

(28) "Order passed by the Income Tax Officer" scope of.
T.N Civil Supplies Corporation Ltd. V/s. CIT
(2003) 260 ITR 82 = 180 CTR 307 = 129 Taxman 69(SC)

(29) Central Excise – Assessable value – Other Taxes - Excise duty, Sales Tax and "other taxes" to be excluded – "Tax" includes administrative charges recovered on molasses sold or supplied by occupier of sugar factory - Administrative charges to be excluded from assessable value.
Kisan Sahkari Chini Millis Ltd., Commissioner of Central Excise,
Meerut V/s.
(2002) 255 ITR 57 (SC)

(30) "Otherwise transferred" as occurring in section 32A(5)(a) of the Income Tax Act, 1961.
Nipa Twisting Works, CIT v/s.
(2003) 130 Taxman 649 = 183 CTR 465 =263 ITR 697 =
177 Taxation 573 (Guj)

(31) "Pending", meaning of
Shatrusailya Digvijaysingh Jadeja, CIT v/s.
(2005) 277 ITR 435= 197 VTR 590 = 147 Taxman 566=
(2006) 190 Taxation 3 (SC)

(32) "Perquisite" , meaning of
Infosys Technologies Ltd., CIT v/s.
(2008) 297 ITR 167 =166 Taxman 204 =214 CTR 293 =

204 Taxation 13 = 1 DTR 330 (SC)

(33) " Plant", meaning of
Hoogly Mills Co. Ltd. , CIT v/s.
(2006) 287 ITR 333 = 206 CTR 301= 157 Taxman 347=
(2007) 196 Taxation 734 (SC)

(34) "Possession", meaning of - Has to be conscious possession.
Gopaldas Udhavdas Ahuja v/s. Union of India
(2004) 268 ITR 273 = 190 CTR 1 (SC)

(35) "Processing of Goods", meaning of
Rajasthan Ice and Cold Storage, State of Rajasthan v/s.
(2003) 264 ITR 158 =(2004) 134 Taxman 259 (SC)
178 Taxation 732 (SC)

(36) "Profit " meaning of
IPCA Laboratory Ltd. v/s. Dy. CIT
(2004) 266 ITR 521 = 135 Taxman 594 = 187 CTR 513 =
181 Taxation 2 (SC)

(37) "Profit", meaning of
Moosa (A.M) v/s. CIT
(2007) 294 ITR 1 = 163 Taxman 741 = 212 CTR 89 (SC)

(38) 'Profits' as occurring in section 80HHC of Income Tax Act, 1961, does not include "loss",.
Induflex Products (P) Ltd., ITO v/s.
(2005) 149 Taxman 687 =199 CTR 712 (SC)

(39) "Raw material", meaning of -
Rajasthan Taxchem Ltd., Commercial Taxation Officer v/s.
(2007) 8 RC 312(SC)

(40) **"**Tax sought to be evaded", "in addition to any tax payable", meaning of.
Virtual Soft Systems Ltd. v/s. CIT
(2007) 291 ITR 83=207 CTR 733 = 159 Taxman 155 =
8 RC 429 = 199 Taxation 423 (SC)

(41) "Total turnover", meaning of
Lakshmi Machine Works, CIT v/s.
(2007) 290 ITR 667 = 160 Taxman 404 = 210 CTR 1 =
199 Taxation 254 (SC)

(42) Excise duty, Sales Tax and "Other taxes" – Tax has to be levied by 200 Central or State legislature or statutory authority - Steel plants – Committee for regulating prices – Element of price comprising addition for constituting fund for modernisation, research and development etc. in production of iron and steel – Not "Tax" – Is part of price - Not deductible in ascertaining excisable value.

Tata Iron and Steel Co. Ltd. v/s. Collector of Central Excise.
(2003) 263 ITR 466 = (2004)178 Taxation 719((SC)

(43) "Taxes due", meaning of

State Bank of India, Dy. CIT
(2009)308 ITR 1 = 176 Taxman 116 = 221 CTR 14=209 Taxation 1= (2008) 16 DTR 163 (SC)

115. <u>WRIT</u>

(1) Decision of a single judge – Whether appeal lies to a Division Bench – Not to be decided on the basis of nomenclature given in writ petition – Petition containing prayer for quashing assessment order of Assistant Commissioner, Commercial Tax – Writ petition is one in effect under article 226 – Appeal lies to a Division Bench – Constitution of India, arts. 226, 227 – M.P Uchcha nyayalay (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, s. 2(1).

M.M.T.C Ltd. v/s. Commissioner of Commercial Tax
(2008) 307 ITR 276 = 11 RC 638=177 Taxman 251 (SC)

(2) Maintainability - Clearance from Committee on Disputes – No approval of Committee on Disputes is required in case the dispute is between a State Government and the Central Government or their undertakings.

Gujarat Maritime Board , Asstt. CIT v/s.
(2008) 220 CTR 390 = 15 DTR 70 (Guj)

(3) Writ petition – Validity of notice questioned – Maintainability – Revisional authority issuing notice beyond five years – Statute not providing period of limitation – Dealer challenging notice on ground of limitation – Revisional authority cannot decide period of limitation – Petition maintainable – Constitution of India, art. 226.

Action to be taken – No period of limitation specified in statute – Action has to be taken within a reasonable period – Reasonable period depends on nature of statute, rights and liabilities and other factors.
Batinda District Co-op. Milk Producers Union Ltd.,
State of Punjab v/s.
(2007) 9 RC 637(SC)

(4) Writ under Article 32 of the Constitution - Highlighting the root of corruption – Direction for prosecuting Shri Mulayam Singh Yadav the Chief Minister & others under the Prevention of Corruption Act 1988 for amassing assets more than known sources of income by misusing the power & authority – Writ claimed by the respondents as politically motivated – The Supreme Court observing that the facts stated by the petitioner are disputed & the voluminous documents comprising inter alia the IT & WT records have to be meticulously scrutinized & statements of the concerned have to be recorded, require expertise in the field of accounting & valuation - The Supreme Court directed the CBI to enquire into the alleged acquisition of wealth with the held of Cas, engineers & certified valuers & submit a report to the Union of India which may take further steps – Writ petition disposed of accordingly – Constitution of India – Art. 32. Prevention of Corruption Act, 1988.
Vishwanath Chaturvedi v/s. UOI & Ors.
(2007) 199 Taxation 292(SC)

(5) Writ by third party - Maintainability - Competence of the States to levy sales tax on telecommunication services – This is not an issue which could have been raised and decided by the assessing authorities – If the State legislatures are incompetent to levy the tax, it would not only be an arbitrary exercise of power by the State authorities in violation of Art. 14, it would also constitute an unreasonable restriction upon the right of the service provides to carry on trade under Art. 19(1)(g) – Writ petitions maintainable.

Bharat Sanchar Nigam Ltd. & Anr. V/s. Union of India & Ors.
&
General Manager,BSNL, Asstt. Commr. Trade Tax, Asstt, Commr. Trade Tax & Ors v/s.
(2006)201 CTR 346 = 152 Taxman 135=282 ITR 273 = 194 Taxation 1 (SC)

(6) Maintainability of writ by third party - Petitioners cannot seek any remedy of writ of mandamus in public interest litigation directing the Revenue Department to file appeal under s. 260A against the orders of the Tribunal in the case of third parties.

Rajiv Ranjan Singh 'Lalan' & Anr. V/s. Union of India & Ors.
(2006) 205 CTR 53 = 156 Taxman 512 (SC)

(7) Maintainability – Oral prayer - No grievance or prayer made in the petition for refund of tax – Oral prayer for refund not maintainable.

B & Brothers Engineering Works & Anr. V/s. Union of India.
(2005) 197CTR 306 = (2006) 190 Taxation 779 = 282 R 474 = 153 Taxman 405 (Guj)

(8) Alternative remedy – Notice under s. 148 – Decision of the Supreme Court in GKN Driveshafts (India) Ltd. v/s. ITO (2003) 179 CTR (SC) 11 : (2003) 259 ITR 19 (SC) does not purport to divest the Court of its constitutional power to issue a writ of prohibition or any other appropriate writ in a fit case to restrain the assessing authority from proceeding with the notice under s. 148 - Said case only lays down the proceeding with the notice under s. 148 – Said case only lays down the procedure that should ordinarily be followed in such case, i.e after receiving the reasons, the assessee should first lodge his preliminary objections against the notice before the AO who should decide the objections by a speaking order and the

assessee, if still aggrieved can challenge the order in a writ petition – The rigour of availing of the alternative remedy before the AO for objecting to the reassessment notice under s. 148 has been considerably softened by the apex Court in the GKN case – Therefore, writ petition challenging the impugned notice is dismissed with the clarification that if the assessee lodges its preliminary objections before the AO with reference to the notice or in relation to reasons disclosed in the additional affidavit, the AO is to consider and decide the objections by a speaking order, and in case the order is adverse to assessee, it would be at liberty to challenge such order by filing a writ petition – Pre and post GKN case position regarding maintainability of writ explained.
Garden Finance Ltd. v/s. Asstt. CIT
(2004) 188 CTR 316 = 137 Taxman 49=268 ITR 48 =
181xation 481 (Guj)

(9) High Court to consider limitation before granting relief .
British India Corporation Ltd., Union of India v/s.
(2004)267 ITR 481(SC)

(10) Territorial jurisdiction – Person assessed regularly in Delhi – Search in Chennai - Survey operations and block assessment in Delhi – High Court in Delhi – Has jurisdiction – Availability of alternative remedy – No bar when action complained of is wholly without jurisdiction –
Ajit Jain , Union of India v/s.
(2003) 260 ITR 80 = 129 Taxman 74 = 260 ITR 80 (SC)

(11) Stay order on deposit of rupees one crore – Department to refund amount deposited with interest if dealer succeeds in appeal - Order of High Court made under writ jurisdiction not governed by provisions of Sales Tax Act relating to refunds - Refund should be made of amount deposited with interest from date of deposit of amount pursuant to order of High Court –
Tata Refractories Ltd. v/s. Sales Tax Officer
(2003) 260 ITR 312(SC)

(12) Issue of notice – Whether when a notice is issued under section 148, proper course of action for notice is to file return and if he so desires, to seek reasons for issuing notice and on receipt thereof to file objections to issuance of notice – Held, yes – Whether where notices were issued under sections 143 (2) and 148 and all that assessee was agitating could be submitted by filing reply to said notices, assessee was unjustified in invoking extra ordinary writ jurisdiction at notice stage itself – Held, yes.

GKN Driveshafts (India) Ltd. v/s. ITO
(2002) 125 Taxman 963 =(2003) 179 CTR 11 =
173xation 50 = 259 ITR 19 (SC)

(13) Delay in applying for writ – Assessee waiting for supply of reasons for initiation of reassessment proceedings – No delay in application – Constitution of India, Art. 226.

Surat City Gymkhana v/s. Deputy Commissioner of Income Tax
(2002) 254 ITR 733 (Guj)

(14) Existence of alternate remedy - Not an absolute bar for issue of writ – Participation of petitioner in proceedings not a bar for issue of writ – Constitution of India, Art. 226.

Surat City Gymkhana v/s. Deputy Commissioner of Income Tax
(2002) 254 ITR 733 (Guj)

(15) Writ – Alternative Remedy - Selection of case for assessment under s. 143(3) - Petitioner challenging its assessment under s. 143(3) on the ground that selection of petitioner's case for scrutiny was contrary to guidelines issued by the CBDT for selection of cases and that the additions made by AO are contrary to binding decisions of the first appellate authority rendered in earlier years - Order under s. 143(3) is subject matter of challenge before the appellate authority - Relief to set aside the said order cannot be granted by the Court in a petition under Art. 226 of the Constitution - Said contention can very well be agitated by the petitioner before the appellate authority.

Setalvad Bros. v/s. Meerani (M.K) Addl CIT
(2001) 170 CTR 119 = 117 TAXMAN 426(GUJ)

xxxxxxxxxxx

ADDENDA
HC & SC DIGEST
UPTO MARCH, 2009

P - 2

METHOD OF ACCOUNTING

Change in method of accounting - Accounts maintained on mercantile system - Difficulty in getting commission due to deterioration in financial position of textile mills - Change to cash system - Bona fide change to be accepted by income tax authorities - Income Tax Act, 1961.
Echke Ltd. V/s. CIT
(2009) 310 ITR 44(Guj)

P – 23

APPEAL TO TRIBUNAL - LOW TAX EFFECT

Maintainability - Small tax effect - Tribunal was right in law and on facts in dismissing the appeal filed by the Revenue on the ground of low tax effect.
Chandulal Alias Vallabhdas Damji, CIT v/s.
(2008) 15 DTR 219(Guj)

P – 25

APPEAL TO HIGH COURT - SUBSTANTIAL QUESTION OF LAW

(1) Assessment year 1996-97 – Assessing Officer had made certain addition to assessee's income under section 68 – Commissioner (Appeals) as well as Tribunal deleted said addition – Since it was apparent that genuineness of transactions and identify of depositors had been established and nothing had been brought on record to contradict findings of fact recorded both by Commissioner (Appeals) as well as by Tribunal, no substantial question of law arose from impugned order of Tribunal – Held, yes.
Micro Melt (P) LTd., CIT v/s.
(2009)177 Taxman 35(Guj)

(2) Substanitial question of law - Allowance of expenditure on know how - Transfer of technology and know-how - Royalty paid as percentage of net sale price - Whether capital or revenue - Substantial question of law - Income Tax Act, 1961, ss. 35AB, 260A.
Swaraj Engines Ltd., CIT v/s
(2009) 309 ITR 443(SC)

(3) Substantial question of law - Whether Tribunal was right in cancelling penalty on ground of benefit of amnesty scheme, though assessee had revised its returns even after search operations on a number of occassions - Income Tax Act, 1961, s. 260A, 271(1)(a), 273(2)(a).
Taktawala (C.A) , CIT v/s.
(2009) 309 ITR 340 = (2008)4 DTR 187(SC)

(4) Substantial question of law - Questions whether on revaluation of assets of firm after conversion to company - There is no transfer and whether there is no capital gains - Are substantial questions of law - Income Tax Act, 1961, s.260A.
Well Pack Packaging , CIT v/s.
(2009)309 ITR 338(SC)

(5) Allowance of expenditure on know how - Transfer of technology and know-how - Royalty paid as percentage of net sale price - Whether capital or revenue - Substantial question of law - Income Tax Act, 1961, ss. 35AB, 260A.
Swaraj Engines Ltd., CIT v/s
(2009) 309 ITR 443(SC)

(6) Assessment year 1996-97 – Assessing Officer had made certain addition to assessee's income under section 68 – Commissioner (Appeals) as well as Tribunal deleted said addition – Since it was apparent that genuineness of transactions and identify of depositors had been established and nothing had been brought on record to contradict findings of fact recorded both by Commissioner (Appeals) as well as by Tribunal, no substantial question of law arose from impugned order of Tribunal – Held, yes.
Micro Melt (P) LTd., CIT v/s.
(2009)177 Taxman 35(Guj)

P – 35

APPEAL TO TRIBUNAL - DECISION OF C0-ORDINATE BENCH

Decision of Co-ordinate Bench - Once the Tribunal comes to the conclusion that the fact situation in the case before it is identical to the one obtaining in an earlier matter decided by Tribunal it has no right or jurisdiction to record a decision entirely contrary to one reached by another Co-ordinate Bench on the same set of facts and circumstances.
Affection Investments Ltd. v/s. Asstt. CIT
(2009) 222 CTR 387 = 19 DTR 325(Guj)

P – 35

APPEAL TO TRIBUNAL

Scope of powers - Depreciation - Allowed earlier - Appellate Tribunal cannot affect adversely on fresh consideration - Income Tax Act, 1961, ss. 32, 254(1).

Mcorp Global P. Ltd. v/s. CIT

(2009)309 ITR 434 = 178 Taxman 347 = 19 DTR 153(SC)

P – 40

ASSESSMENT – ADDITIONS

(1) Estimation of income - Tribunal having estimated the income of the assessee on the basis of yield vis-à-vis actual consumption disregarding the figures of assessee's sales and GP rate relating to past as well as subsequent years and the comparable instances cited by the assessee it cannot be said that the Tribunal has correctly decided the issue raised before it - Order of the Tribunal is set aside and the matter is remanded to the Tribunal for reconsideration of the whole issue.

Sukhadia Jamnadas Maganlal v/s. ITO

(2008) 13 DTR 113(Guj)

(2) Income derived as trader vis-à-vis commission agent - Assessing authority having accepted the claim of the assessee that he is acting as a commission agent in the prEceeding year and five of the ten traders to whom summons were issued having appeared before the assessing authority and given evidence in favour of the assessee, no adverse inference could be drawn against the assessee and it could not be treated as a trader in transactions involving the remaining five traders simply because they could not be served with the summons.

Anis Ahmad & Sons v/s. CIT & Anr.

(2008) 2 DTR 81(SC)

P – 48

BUSINESS EXPENDITURE - ACCRUAL OF LIABILITY

(1) Liability for damages arising under arbitration award - Liability to pay damages was incurred by the assessee on 28th May, 1987 when the Trade Association made an award for damages for breach of contract and therefore deduction is allowable in asstt. yr. 1988-89 notwithstanding the fact that the award was challenged in appeal by the assessee.

Navjivan Roller Flour & Pulse Mills Ltd. V/s. Dy. CIT

(2009) 20 DTR 290(Guj)

(2) Salary and wages payable under award - Salary and wages payable under the award is an admissible deduction, though the said amount was neither paid to the employees nor it was debited in the accounts.
Ahmedabad Mfg. & Calico Printing Co. Ltd.,CIT v/s.
(2008) 3 DTR 48(Guj)

P - 50
BUSINESS EXPENDITURE - DISALLOWANCE u/s. 40A(3)
Interest payment in cash to minor daughter of partner - Assessee firm paying interest in the sum of Rs. 5.15 lakhs in cash on a deposit of Rs. 10 lakhs for four months to the minor daughter of a partner, same was rightly disallowed by AO under s. 40A(3) in the facts and circumstances of the case.
Parasram Karamchand, CIT v/s
(2008) 9 DTR 24(Guj)

P – 54
BUSINESS EXPENDITURE - CAPITAL OR REVENUE S. 35E
Expenditure on prospecting etc. for minerals - Applicability of s. 35E vid-a-vis s. 37(1) - High Court having disallowed the claim for deduction of development and prospecting charges by applying the provisions of s. 37(1) without considering the claim for deduction in the light of s. 35E, the impugned judgment is set aside and the matter is remitted to the High Court for considering the appeal afresh on merit.
Rajasthan State Mines & Minerals Ltd. v/s. CIT
(2008) 12 DTR 225(SC)

P - 62
BUSINESS EXPENDITURE - DISALLOWANCE U/S. 43B

(1) Interest on excise duty refund - Refund of excise duty having been received by assessee under a decree of Trial Court and liability to repay the amount of refund along with interest having accrued as a result of appellate decree of High Court such interest liability could not be said to be a statutory liability hence could not be disallowed under s. 43B - CIT was therefore not justified in invoking s. 43B in exercise of his revisional jurisdiction.
Dinesh Mills Ltd. , CIT v/s.
(2008) 3 DTR 235(Guj)

(2) Electricity duty - Electricity duty is amenable to s. 43B as an inadmissible item.
Gujarat Urja Vikas Nigam Ltd., CIT v/s.
(2008) 3 DTR 129(Guj)

(3) Royalty - Royalty not being tax provisions of s. 43B were not attracted in respect of unpaid royalty.
Kutch Minerals, CIT v/s.
(2008) 3 DTR 11(Guj)

P - 69
BUSINESS EXPENDITURE - PROVISION FOR GRATUITY
Provision for gratuity was rightly allowed by the Tribunal considering the provisions of s. 36(1)(v).
Lok Prakashan Ltd., CIT v/s.
(2008) 2 DTR 360(Guj)

P – 71
BUSINESS EXPENDITURE - INTEREST ON BORROWED CAPITAL
Amount borrowed for expansion of business - Proviso to s. 36(1)(iii) inserted w.e.f 1st April, 2004 being amendatory and not clarificatory in nature is operative prospectively and therefore the same could not be applied to deny the claim for deduction of interest paid by the assessee in the relevant asst. yr. 1989-90.
L.K Trust v/s. CIT
(2009) 222 CTR 214 = 19 DTR 284(SC)

P – 78
BUSINESS EXPENDITURE - RESERVE FUND
Transfer to Reserve Fund - Assessment year 1988-89 – In view of decision in assessee's own cae in ITR No. 65 of 1997 dated 10-3-2008, Tribunal was right in holding that transfer to reserve fund could not be treated as a business expenditure – Held, yes.
Mehsana Districit Co-op. Milk Producers' Union Ltd. v/s. CIT
(2009) 177 Taxman 70(Guj)

P – 78

BUSINESS EXPENSE – ROYALTY

Allowance of expenditure on know-how - Transfer of technology and know-how - Royalty paid as percentage of net sale price - Whether capital or revenue - Substantial question of law.

Swaraj Engines Ltd., CIT v/s
(2009) 309 ITR 443(SC)

P – 93

CAPITAL GAINS - TRANSACTION NOT REGARDED AS TRANSFER UNDER S. 47(iv)

Transfer of shares to subsidiary company - Question whether the amount in question represented capital gains and the said capital gains was exempt under s. 47(iv) having been finally concluded by the High Court decision in favour of one assessee in another case, and no distinguishing features being pointed out the same requires to be answered in favour of assessee.

Shahibaug Enterprises (P) Ltd., CIT v/s.
(2008) 2 DTR 251(Guj)

P – 94

CAPITAL GAINS - CAPITAL LOSS

(1) Sale / transfer of right to receive convertible debentures - Depreciation in the value of shares held by the assessee as a result of the right issue constituted the cost of acquisition of the entitlement to receive convertible debentures and therefore, assessee was entitled to claim short-term capital loss on renunciation of the rights.

Acropolish Investments Ltd. & Ors., Asstt. CIT v/s
(2009) 222 CTR 383 = 19 DTR 321(Guj)

(2) Sale / renunciation of right shares - Depreciation in the market value of shares as a result of right offer has to be regarded as cost of acquisition of right - Loss 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 is allowable.

Affection Investments Ltd. v/s. Asstt. CIT
(2009) 222 CTR 387 = 19 DTR 325(Guj)

P - 97

CAPITAL GAINS

Reference to Valuation Officer - Value estimated by Valuation Officer less than fair market value shown by assessee as on 1-4-1981 - Estimate by registered valuer - Reference under section 55A not valid - Reference to Valuation Officer can be made only after Assessing Officer records opinion that value had been underestimated by assessee - Reference before filing of return by assessee - Not valid - Income Tax Act, 1961, s. 55A.

Hiaben Jayantilal Shah v/s. ITO

(2009) 310 ITR 31= 6 DTR 203(Guj)

P – 112

COMPANY

Company in which public are substantially interested - Definition - Conditions to be fulfilled - Two parts of sub-clause (c) are separate and independent of each other - Income Tax Act, 1961, s. 2(18)(b)(B)(c).

Emtici Engineering Ltd., CIT v/s.

(2009)310 ITR 266(Guj)

P – 123

DEDUCTIONS-s. 80HH

(1) Assessment year 1994-95 - In order to constitute an industrial undertaking be it under section 32A or under section 80HH, important criterion to be applied by Assessing Officer is to identify item in question, process undertaken by it and resultant output - During relevant assessment year, assessee hospital having made investment in plant and machinery, claimed deduction under section 80HH - Assessing Officer rejected assessee's claim holding that it was not an industrial undertaking - Commissioner (Appeals) as well as Tribunal allowed assessee's claim - Since there was no identification of items installed in hospital by Tribunal it was not possible to express any opinion as to whether assessee was entitled to deduction under section 80HH - Therefore matter was to be remitted to Tribunal for deciding case de novo in accordance with law.

Down Town Hospital Ltd v/s. CIT

(2009) 178 Taxman 221 = 222 CTR 4(SC)

(2) Conditions required to be satisfied - Assessee a processor of cashew kernels - Particulars regarding activity undertaken by assessee - activity outsourced to sister concerns and whether sister concerns are located in backward areas not given - Assessee not entitled to claim deduction in respect of profits from processing of cashew - Income Tax Act, 1961, s. 80HH.
Pratap (R) , CIT v/s.
(2009) 310 ITR 405(SC)

P – 129
DEDUCTION -s. 80HHC

(1) Special deduction - Profits from computation - Sales made through export houses - Can be included if disclaimer certificate produced - No factual finding - Fresh computation to be made - Supreme Court - Matter remanded - Income Tax Act, 1961, s. 80HHC.
Janatha Cashew Exporting Co. V/s. CIT
(2009)309 ITR 440 = (2008) 1 DTR 46(SC)

(2) Transfer of right of exploitation of films outside India - Telecasting rights of movies recorded on beta-cam tapes being articles of trade and commerce fall in the category of merchandise and "lease" is included in the meaning of word "sale" under rr. 9A and 9B and therefore foreign exchange earned by transferring the right of exploitation of the films outside India by way of lease is entitled to deduction under s. 890HHC.
Suresh B., CIT v/s.
(2009) 222 CTR 513 = 20 DTR 93 = 178 Taxman 457(SC)

(3) Interest income - In the absence of any finding as to whether the profits of business of the assessee computed under the head "Profits and gains of business or profession" include interest on FDRs received by the assessee, the question as to whether the interest of FDRs is to be reduced by the interest paid on borrowings relatable to the business of exports for the purpose of computation of deduction under s. 80HHC is returned unanswered .
Themis Chemicals Ltd., CIT v/s.
(2008) 6 DTR 172(Guj)

P – 138

DEDUCTION - s. 80-I

(1) Special deduction under section 80-I - Employment of specified number of employees - Finding in assessee's own case that workers were employees for purposes of section 80-I - Dedction to be allowed - Income tax Act, 1961, s. 80 -I.
Prithviraj Bhoorchand, CIT (Asst.) v/s.
(2009)310 ITR 88(Guj)

(2) Interest income - Interest earned on securities kept with the Electricity Department and interest earned on FDRs kept with bank as margin money for obtaining letters of credit for procurement of raw materials are not includible in the profits and gains derived from the industrial undertaking for the purpose of computation of deduction u/s. 80-I.
Arat Electro Chemicals Ltd., Dy. CIT v/s.
(2009) 17 DTR 255 (Guj)

(3) Service Charges - Whether qualify for deduction - Assessee manufacturing urea and ammonia - Supplying ammonia gas to heavy water plant located in its premises and receiving service charges - Ammonia gas returned to assessee after extracting deuterium - Whether there was interdependence - Appellate Tribunal rejecting claim for allowance owing to paucity of facts - Supreme Court - Matter remanded to Appellate Tribunal for reconsideration after permitting to produce relevant evidence - Income Tax Act, 1961, s. 80-I.
Krishak Bharati C-operative Ltd. v/s. Jt.CIT
(2009) 310 ITR 400(SC)

(4) Adjustment of deduction under s. 32AB - Deduction under s. 32AB has to be allowed before computing deduction under ss. 80HHA and 80-I - Adjustment of losses of another unit - Claim under ss. 80HHA and 80-I is not allowable from the profits of Unit 1 without considering the loss of Unit II, without ascertaining as to whether the two units are separate - Tribunal directed to ascertain the facts of the present case and adjust its decision in tight of the observations as well as in light of the decision in the case of CIT v/s. Canara Workshops (P) Ltd. (1986) 58 CTR 108 : (1986) 161 ITR 320(SC).
Madhu Silk Textiles, CIT v/s.
(2008) 12 DTR 307(Guj)

(5) Allowability - Small scale industrial undertaking - Tribunal having not considered the amended provisions of cl. (b) of the Explanation to s. 80HHA and the appropriate notification of the Government of India under s. 11B of the Industrial (Development and Regulations) Act, 1951 for the purpose of determining whether the industrial undertaking of the assessee fulfilled the requisite conditions for being treated as a small scale industrial undertaking for the purpose of s. 80-I the question whether assessee is eligible for deduction under s. 80-I is left unanswered.
Vikshra Trading & Investments Ltd.,CIT v/s.
(2008) 7 DTR 257(Guj)

(6) Machineries previously used vis-à-vis taken on lease - Tribunal having recorded categorical finding that the machineries and plant installed in the assessees' unit had been earlier used by the lessor company and the lease of said machineries by the latter amounts to transfer from that company to the assessee company the conditions laid down in sub. s. (2) of s. 80-I were not fulfilled and, therefore the assessee company was not entitled to deduction under s. 80-I.
Himson Fadis Machinery (P) Ltd. v/s. CIT
(2008) 6 DTR 284(Guj)

P – 139
DEDUCTION u/s. 80J - CAPITAL COMPUTATION
Amount of work in progress - Tribunal was right in law in directing AO to allow deduction u/s. 80J on the amount of work in progress.
Ahmedabad Mfg. & Calico Printing Co. Ltd.,CIT v/s.
(2008) 3 DTR 48(Guj)

P – 141
DEDUCTION U/s. 80P(2)(I)
Allowability - Providing credit facilities to members - High Court having decided the matter under confusion resulting from mixing up facts of some other case impugned order of High Court set aside and matter remanded to High Court for fresh consideration in the light of Madras Auto Rickshaw Drivers v/s. CIT (2002) 173 CTR (SC) 77, (2001) 10 SCC 175.
Modern Engineers Construction Co-operative Society Ltd., Cit v/s.
(2008)12 DTR 198(SC)

P – 146

DEPRECIATION – ALLOWANCE

Issue came up for consideration before High Court was as to whether Tribunal was right in holding that depreciation on plant and machinery was not allowable on ground that assessee had not manufactured goods during relevant previous year - Assessee's case was that despite suspension of its business operation, it was still entitled to claim depreciation on ground of passive user - High Court however, without going into said aspect dismissed assessee's appeal - On facts impugned order was to be set aside and matter was to be remitted back to High Court for a fresh decision in accordance with law.

Nirma Credit & Capital Ltd. v/s. Asstt. CIT

(2009) 177 Taxman 416(SC)

P – 154

DEPRECIATION

(p) WRITTEN DOWN VALUE

Assessment years 1988-89 to 1991-92 – Words 'depreciation actually allowed' as occurring in section 43(6)(b) would mean depreciation actually deducted in arriving at taxable income of assessee – Therefore in context of composite income depreciation deducted in arriving at taxable income alone can be taken into account and not depreciation deducted for arriving at composite income – Since in case where rule 8 applies income which is brought to tax as business income is only 40 per cent of composite income only 40 per cent of depreciation allowed at prescribed rate is required to be taken into account because that is depreciation 'actually allowed'.

Doom Dooma India Ltd., CIT v/s.

(2009) 178 Taxman 261= 222 CTR 105 = 19 DTR 177 = 310 ITR 392(SC)

P – 162

DIVERSION BY OVER-RIDING TITLE

Share of partially partitioned members in income of HUF business - In view of partial partition of HUF consisting of Karta, his wife and minor son recognised under s. 171 giving one-third share to each member, even after the business became proprietary concern of HUF after dissolution of partnership 2/3rd of income from business shall divert to the wife and son by overriding title and karta, in his individual status, was liable to to be assessed in respect of 1/3rd share only.

Thakar P.V v/s. CIT

(2008) 11 DTR 31(Guj)

P – 163

DOUBLE TAXATION RELIEF - AGREEMENT WITH FOREIGN COUNTRY

(1) Liability to tax vis-à-vis payment of tax - For allowability of relief under DTAA with foreign country it is not necessary for the assessee to furnish proof for payment of tax - Liability to tax is not the same as payment of tax.
Heinrich Wetting, CIT v/s.
(2009) 222 CTR 83(Guj)

(2) Payment of tax aboard - Relief under DTAA between India and U.K was rightly granted to the assessee by the Tribunal based on assessment order made by AO for asst. yr. 1984-85 after verification of claim made by the assessee regarding deduction of tax at source.
Peter Max Washylik, CIT v/s.
(2009) 222 CTR 85 = 19 DTR 199(Guj)

P – 192

INCOME FROM UNDISCLOSED SOURCES – ADDITION

(1) Bogus purchases - Department having accepted purchases made by assessee could not have assumed that the assessee had inflated purchases and made addition more so when the incriminating statement of a third party on which addition was based was not put to assessee.
Coronation Flour Mills v/s Asstt. CIT
(2009) 20 DTR 312(Guj)

(2) Cost of construction - Addition under s. 69B was rightly made in the hands of assessee firm in relation to the difference in cost of construction as recorded in the books of account and determined by Department Valuer notwithstandng the fact that the partners had disclosed the entire difference in their hands under the Amnesty Scheme after difference was estimated by the Departmental Valuer.
Ambica Corpn. , CIT v/s.
(2008) 6 DTR 115(Guj)

(3) Cash credits in account of person from whom assessee made purchases - Amount by cash credits would be an allowable deduction under section 37 - Proviso to section 69C inserted with effect from of April 1, 1999 - Proviso not applicable to assessment year 1987-88 - Amount covered by credits not assessable as income of assessee – Income Tax Act, 1961, s. 69C.
Krishna Textiles v/s. CIT
(2009)310 ITR 227(Guj)

P – 199
INTEREST TAX
Chargeable interest - Interest on loans and advances -Interest on Government securities - Interest earned by the assessee bank on Government securities is not liable to be assessed under s. 2(7) of the Interest tax Act - Matter is remanded to the Tribunal to examine the factual position as to whether the interest involved in the present case is on Government securities.
ICICI Bank Ltd., CIT v/s. - (2008) 14 DTR 246(SC)
Industrial Development Bank of India Ltd CIT v/s. - (2008) 14 DTR 244(SC)
The Ratnakar Bank Ltd., CIT v/s. -(2008) 14 DTR 241(SC)

P – 203
INTEREST U/S. 234A AND 234B – CHARGEABILITY
Waiver or reduction - Returns having been filed only after notice under s. 148 waiver of interest was rightly denied - Matter remitted to AO to ascertain whether assessee was co-owner of the acquired land for which compensation along with interest was received and if so whether the interest received needed apportionment among co-owners.
Sendhaji Amraji Thakore v/s. Chief CIT & Anr.
(2009) 20 DTR 97(Guj)

P – 203
INTEREST u/s. 234B & 234C
Chargeability - Positive income - Assessee having admittedly returned positive income in the relevant year, Tribunal was not correct in deleting the interest under ss. 234B and 234C merely by relying on the facts of an earlier year ignoring the fact that the assessee suffered a loss and was not required to pay advance tax in the said earlier year.
Vikshra Trading & Investments Ltd.,CIT v/s.
(2008) 7 DTR 257(Guj)

P – 222

K V S S

(1) Belated filing of revision application and appeals without pre-payment of taxes - Designated Authority under KVSS, 1998, had no jurisdiction to go into the question of validity of appeals/revision and as appeals / revision whether valid or invalid were actually pending on the date of filing declaration, same had to be entertained. **Apurv R. Hathi v/s. J.G Arora or Successor Designated Authority (2008)11 DTR 342(Guj)**

(2) Maintainability of declaration - Order under s. 245D(4) in the case of firm and pendency of appeal - Embargo provided for in s. 95(I)(b) of Finance (No. 2) Act, 1998, is only with regard to the share of income from the firm in which the order under s. 245D(4) is passed and it does not preclude any of the partners from approaching the Designated Authority for settlement of their other disputes - Once petition is filed and it is pending before the Court, the petitioner cannot be prevented from approaching the Designated Authority under KVSS simply because the Court has not issued rule. **Murlidhar Thakurmal v/s. L.K Koolwal or His Successor in Office (2008) 11 DTR 308**

(3) (3) Order under s. 245D(4) in the case of firm - AO having given effect to the order of Settlement Commission under s. 245D(4) in the case of firm by rectifying under s. 155 on 18th Sept. 1998 the assessment of partner there were no tax arrears in the case of partner as on 31st March, 1998 and therefore declaration of partner under KVSS, 1998 was rightly rejected by the Designated Authority under s. 95(i)(b) of the Finance (No.2) Act, 1998. **Manilal Kunvarji Shah v/s. J.G Arora, Designated Authority & Anr. (2008)11 DTR 326Guj)**

P – 233

LOSS - CARRY FORWARD AND SET OFF

Extension of time - Assessee was entitled to presume that the applications filed for extension of time for filing return have been accepted in the absence of any order either accepting or rejecting such applications and, therefore assessee having filed the return within the period for which extension was sought is entitled to carry forward the business loss. **Gandhinagar Bottling (P) Ltd., CIT v/s.**
(2008) 2 DTR 367(Guj)

P – 255

PENALTY - CONCEALMENT OF INCOME

(1) Amnesty scheme - Search and seizure - Effect of order of CBDT dated 14-2-1986 and Circular No. 451 dated 17-2-1986 - Search operations - No evidence of undisclosed income - Revised return disclosing additional income filed voulntarily and taxes paid for assessment years 1982-83 to 1985-86 - Nore than one revised return could be filed - Penalty could not be imposed.
Taktawala (C.A) , CIT v/s
(2009) 309 ITR 417(Guj)

(2) Amount assessed in hands of third person - Relevant in determining concealment-Matter remanded - Income Tax Act, 1961, s.271(1) (c).
Patel Chemicals Works v/s. Assessing Officer
(2009) 309 ITR 450(Guj)

(3) Assessment at nil income - Explanation 4 to s. 271(1)(c) is clarificatory and applicable retrospectively and therefore penalty could be levied for asst. yr 1996-97 even though there was no positive assessed income - Regarding penalty for concealment matter remitted to Tribunal.
Moser Baer India Ltd., CIT v/s.
(2009) 222 CTR 213 = 19 DTR 283(SC)

(4) Disclosure of additional income in revised return - Assessee having made a disclosure of Rs. 54,71,463 only after the statement of its chairman and managing director was recorded by Dy. Director of IT (Inv) followed by another disclosure of Rs. 54 lacs dividing it into three segments of Rs. 18 lacs each in the three relevant assessment years and filed yet another revised return by way of a letter declaring a further sum of Rs. 78,56,613 it cannot be accepted that the revised returns for all the three years were filed voluntarily in good faith and therefore there was concealment of income and levy of penalty under s. 271(1)(c) was justified.
LMP Precision Engg. Co. Ltd. v/s. Dy. CIT
(2009)20 DTR 294(Guj)

P – 255

PENALTY u/s.271D & 271E - CONTRAVENTION OF ss. 269SS & 269T

Transactions between sister concerns - Tribunal having deleted penalty under ss. 271D and 271E observing that transactions between sister concerns are not covered by either provisions of s. 269SS or s. 269T and that the default if any was of venial nature, no interference is called for.
Shree Ambica Flour Mills Corpn., CIT v/s.
(2008) 6 DTR 169(Guj)

P – 265

RETURN OF INCOME

Default in furnishing return – Interest – Nature of – Not in the nature of penalty – Interest is to compensate Revenue when tax not deposited by due date – Income Tax Act, 1961, s. 234A.
Pranoy Roy, CIT v/s. &
India Meters Ltd., CIT v/s
(2009) 309 ITR 231 = 222 CTR 6 = 19 DTR 102(SC)

P – 267

PENALTY u/s.271B - DELAY IN FILING AUDIT REPORT

Reasonable cause - Tribunal was justified in deleting penalty under s. 271B on the ground that for asst. yr. 1985-86, the first year of requirement of tax audit under s. 44AB, a liberal approach was to be adopted.
Kashiram Textiles Mills (P) Ltd., CIT v/s.
(2008) 2 DTR 389(Guj)

P – 269

PERQUISITES

Rule 3 as amended by Income Tax (Twenty second Amendment) Rules, 2001 is in line and consistent with provision of section 17(2)(ii) and is also not ultra vires article 14 of Constitution of India.
BHEL Works Union v/s. Union of India
(2009) 178 Taxman 1(SC)

P - 270

PRACTICE - APPEAL TO HIGH COURT - CLEARANCE FROM COMMITTEE ON DISPUTES

Maintainability - Clearance from Committee on Disputes - No rigid time frame is indicated for making reference to the Committee on Disputes for seeking its clearance for filing an appeal - Committee cannot decline to deal with the matter on the ground of belated approach - In appropriate cases Court can refuse to interfere where there is any indifference and lethargy.

Oriential Insurance Co. Ltd., CIT v/s.
(2008) 10 DTR 113 (SC)

P – 271

PRECEDENT

Decision of Co-ordinate Bench - Once the Tribunal comes to the conclusion that the fact situation in the case before it is identical to the one obtaining in an earlier matter decided by Tribunal it has no right or jurisdiction to record a decision entirely contrary to one reached by another Co-ordinate Bench on the same set of facts and circumstances.

Affection Investments Ltd. v/s. Asstt. CIT
(2009) 222 CTR 387 = 19 DTR 325(Guj)

P – 281

REASSESSMENT - FULL AND TRUE DISCLOSURE

(1) Notice after expiry of four years - In the absence of any averment of the Revenue that there was any omission or failure on the part of the assessee to disclose fully and truly all material facts relevant for the assessment of the assessment year in question impugned notice under s. 148 issued beyond a period of four years from the end of the relevant assessment year is bad in law without jurisdiction.

Nikhil K. Kotak v/s. Mahesh Kumar AO
(2008) 10 DTR 20(Guj)

(2) Notice after expiry of four years - AO having made assessment under s. 143(3) after taking into consideration the relevant details of loans and advances filed by the assessee giving particulars and purpose of the advances made by the assessee notice under s. 148 issued after the period of four years from the end of the relevant assessment year is not valid.
Jagdishbhai Nanubhai Tekrawala, Asst.CIT v/s.
(2008) 12 DTR 270(Guj)

(3) Notice after expiry of four years - Assessment having been completed under s. 143(3) after all necessary details were made available to the AO pursuant to notices issued under ss. 142(1) and 143(2), it cannot be said that there was any omission or failure on the part of the assessee to disclose material facts truly and fully and therefore impugned notice under s. 148 issued by the AO after a period of four years from the end of the relevant assessment year was without jurisdiction.
Priyanka Carbon & Chemical Industries (P). Dy. CIT
(2008) 15 DTR 31(Guj)

(4) Notice after expiry of four years - Once the excess stock of finished goods found during the search was considered to be a part of suppressed sales and was given set off from the addition made by the AO on account of low yield of carbon black while framing the assessment it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts relevant for the assessment and, therefore impugned notice under s. 148 issued beyond a period of four years from the end of the relevant assessment year is quashed.
Gujarat Carbon & Industrial Ltd. v/s. Jt. CIT
(2008) 9 DTR 281 (Guj)

(5) Notice after expiry of four years - There being no failure on the part of assessee to make full and true disclosure of all material facts, assessments made under s. 143(3) allowing deduction under ss. 80HH and 80-I as per the then prevailing law could not be reopened after expiry of four years from the end of the relevant assessment years on the basis of subsequent decision of Supreme Court.
Austin Engineering Co. Ltd. v/s. Jt. CIT
(2008) 9 DTR 268(Guj)

P – 284

REASSESSMENT-GENERAL

Notice - Association of persons - Lottery ticket - Prize winning ticket discharged by fifteen individuals - Act not involving any management - One individual showing one fifteenth of his share in return - Notice beyond four years to individual on ground that he and fourteen others functioned as an association of persons - No obligation in law on an entity by name of that individual and fourteen others to tender a return of income - No failure or omission on part of individual to file return - That individual cannot be treated as an assessee for issuing notice - Notice invalid - Income Tax Act, 1961, ss. 147, 148.

Kanchanlal Maganlal Kapadia v/s. ITO

(2009) 310 ITR 167=177 Taxman 211= (2008) 9 DTR 290(Guj)

P – 285

REASSESSMENT – LIMITATION

Computation - Notices under s. 148 having been issued on 25th July, 1985, four years' period as prescribed under s. 153(2)(a) for making reassessment under s. 147(a) will reckon from the end of asst. yr. 1985-86 i.e from 31st March, 1986, hence reassessments made on 15th March, 1990 were well within limitation.

Ambica Corpn., CIT v/s.

(2008) 6 DTR 115(Guj)

P – 289

REASSESSMENT - REASON TO BELIEVE

(1) Absence of material or rational belief - AO was not justified in reopening the assessment on the ground that income to the extent of amount of discount given by assessee had escaped assessment.

Gujarat Narmada Valley Fertilizers Co. Ltd. v/s. Dy. CIT

(2009) 20 DTR 165(Guj)

(2) Absence of material or rational belief - AO having not stated in the recorded reasons that the gross commission receipts supposedly received by the assessee are the income chargeable to tax and there being no material which could lead the AO to believe that any income has escaped assessment the impugned notice under s. 148 is quashed and set aside .

Shankarlal Nagjit & Co. V/s. ITO

(2009) 20 DTR 116(Guj)

P – 291

RECOVERY - ATTACHMENT AND SALE OF IMMOVABLE PROPERTY

Validity of proclamation and public notice - There being a variation between proclamation made under rr. 52 and 53 read together and the public notice issued and published under r. 54(2) the public notice which followed the proclamation as also consequent auction sale cannot be sustained.

Shatrushalyasinhji Digvijaysinhji Jadeja v/s. CIT
(2009) 20 DTR 128(Guj)

P – 294

RECTIFICATION - MISTAKE APPARENT

Double benefit of set off of capital gains - There was not mistake apparent rectifiable under s. 154 in assessment where appreciation on trucks was added after setting off of short term capital gains offered for taxation.

Chandulal Alias Vallabhdas Damji, CIT v/s.
(2008) 15 DTR 219(Guj)

P – 296

RECTIFICATION U/S. 254(2) - APPEAL TO TRIBUNAL – POWERS

Review or recall of the order - If the Tribunal has committed an inadvertent error which results in injustice to one or the other side, the Tribunal is entitled to recall the order in given set of facts and circumstances of the case and decide the matter in accordance with law facts and evidence on record.

Nirajan K. Zaveri , CIT v/s.
(2009) 20 DTR 153(Guj)

P – 300

REFERENCE - QUESTION OF LAW

Issued already concluded by earlier decision - Question whether the amount in question represented capital gains and the said capital gains was exempt under s. 47(iv) having been finally concluded by the High Court decision in favour of one assessee in another case, and no distinguishing features being pointed out the same requires to be answered in favour of assessee.

Shahibaug Enterprises (P) Ltd., CIT v/s.
(2008) 2 DTR 251(Guj)

P – 312

REVISION - ERRONEOUS AND PREJUDICIAL ORDER

Deduction of interest on borrowings - Tribunal having found in an earlier order that the amounts borrowed by the assessee were utilized for renovation of cinema hall which is admittedly a part and parcel of the assessee's business of exhibiting films, deduction of interest debited to P & L a/c. did not render the assessment order erroneous and prejudicial to the interest of the Revenue and the Tribunal was justified in setting aside the order passed by the CIT under s. 263 on the issue of deduction of interest.

L.N Talkies, CIT v/s.

(2008) 2 DTR 401(Guj)

P – 312

REVISION - POWERS TO REVISE

Order of Assessing Officer partially disallowing claim under section 80-I – Commissioner (Appeals) accepting claim – Commissioner taking different view – Not a case of an order erroneous and prejudicial to Revenue – Commissioner could not withdraw special deduction under section 80-I in revision proceedings – Income Tax Act, 1961, s. 263.

Nirma Chemical Works P. Ltd., CIT v/s.

(2009) 309 ITR 67(Guj)

P – 328

SEARCH AND SEIZURE - AUTHORISATION U/S. 132(1)

Powers of Addl. Director of IT (Inv.) - In view of the fact that CIT in exercise of powers under s. 132B has released cash jewellery and bnooks of accounts seized during search impugned the question whether the Addl. Director of IT (Inv.) has the requisite jurisdiction to authorize any officer to effect search and seizure in purported exercise of his power conferred upon him under s. 132(1) has become infructuous and not examined.

Nalini Mahajan (Dr.) & Ors. , Director of IT & Ors.

(2009) 222 CTR 35 = 19 DTR 50(SC)

P – 329

BLOCK ASSESSMENTS IN SEARCH CASES

(1) Undisclosed income, computation of -Block period 1-4-1986 to 11-10-1996 - Only brought forward losses of past years under Chapter VI and unabsorbed dipreciation under section 32(2) are to be excluded while aggregating total income or loss of each previous year in block period and set of loss suffered in any of previous years in block period against income assessed in other previous years in block period is not prohibited.
Lingamurthy (E.K) v/s. Settlement Commissioner (IT & WT)
(2009) 178 Taxman 116 = 222 CTR 1 = 19 DTR 99 (SC)

(2) Proceedings under s. 158BD - No material showing undisclosed income of partner of the firm having been detected during search of the firm, there could not be any basis for satisfaction for proceeding under s. 158BD against the partner - Mandatory requirement for proceeding under s. 158BD not having been fulfilled notice under 158BD quashed.
Nivedita M. Makwana v/s. P.M Shukla
(2008) 11 DTR 225(Guj)

(3) Procedure for – For issuing notice under section 158BC revenue has to show in first instance that entity to whom a notice under section 158BC is sought to be issued is an entity or person in whose case search proceedings under section 132 have been conducted.
Jayantilal Damjibhai Soni v/s. Director of Investigation
(2009) 177 Taxman 357(Guj)

P – 335

SEARCH AND SEIZURE - AMNESTY SCHEME

Effect of order of CBDT dated 14-2-1986 and Circular No. 451 dated 17-2-1986 - Search operations - No evidence of undisclosed income - Revised return disclosing additional income filed voluntarily and taxes paid for assessment years 1982-83 to 1985-86 - More than one revised return could be filed - Penalty could not be imposed.
Taktawala (C.A) , CIT v/s
(2009) 309 ITR 417(Guj)

P – 336

SEARCH - SUR CHARGE LIABILITY

Search cases - Undisclosed income of block period April 1, 1990 to July 3, 2000 - Search conducted on April 6, 2000 I.e prior to June 1, 2002 - Finance Act, 2001 applicable - Surcharge leviable - Income Tax Act, 1961, ss. 113, 158BC -Nature of - DistiNct charge not dependent on liability to pay income tax.

Rajiv Bhatara, CIT v/s.

(2009) 310 ITR 105 = 178 Taxman 285= 222 CTR 209 = 19 DTR 225(SC)

P – 336

SETTLEMENT COMMISSION

(1) Order of Settlement Commission - Interference by Court - Assessee having filed written submissions after a period of three months from the date fixed for final hearing no interference is called for with the order of the Settlement Commission under s. 245D(4).

Mahavir Inductomelt (P) Ltd. v/s. ITSC

(2008) 13 DTR 113(Guj)

(2) Scope of judicial review - Settlement Commission having heard both the parties at length, considered the material produced before it and dealt with all the respective contentions of both the parties while passing the impugned order of admission under s. 245D(1), and taken adequate care to finally determine the additional income in the hands of the assessee group and the tax payable after appreciating the facts and evidence on record in passing the final order under s. 245D(4), no interference is warranted.

Friends & Friends Co. , CIT v/s.

(2008) 9 DTR 225(Guj)

P – 344

TDS - u/s. 192

Exemption in respect of LTC vis-a-vis evidence of actual utilization of amount - Assessee employer is under no statutory onligation to collect and examine the supporting evidence to the declaration submitted by an employee to the effect that he has actually utilized the amount(s) paid towards leave travel concession / conveyance allowance for the purposes of TDS under s. 192.

Larsen & Toubro Ltd., CIT v/s

(2009) 18 DTR 163(SC)

P – 348
TRIBUNAL

(1) Appellate Tribunal - Scope of powers- Allowed earlier - Appellate Tribunal cannot afect adversely on fresh consideration.
Mcorp Global P. Ltd. v/s. CIT
(2009)309 ITR 434= 178 Taxman 347 = 19 DTR 153(SC)

(2) Scope of powers - Depreciation - Allowed earlier - Appellate Tribunal cannot affect adversely on fresh consideration - Income Tax Act, 1961, ss. 32, 254(1).
Mcorp Global P. Ltd. v/s. CIT
(2009)309 ITR 434 = 178 Taxman 347 = 19 DTR 153(SC)

P – 356
UNEXPLAINED EXPENDITURE

Assessment year 2003-04 – Assessing Officer while confirming assessment under section 143(3) disallowed / added back a sum towards outstanding creditors for freight under section 69C – According to Assessing Officer expenses claimed and shown as outstanding towards freight charges payable could not be treated as real and genuine as assessee had failed to discharge onus by producing creditors for verification – Commissioner (Appeals) confirmed order of Assessing Officer – Tribunal however, deleted impugned addition – On further appeal it was noticed that Tribunal observed in its order that assessee produced vouchers in which name of contractors from whom vehicles were hired had been mentioned - Though said vouchers were signed by recipients and were verifiable from parallel record maintained by assessee, Assessing Officer rejected vouchers only on basis of vouchers being internally generated – Tribunal further found that complete details of tax deducted at source qua payments made including Permanent Account Numbers names and address of parties were available and entries in regular books of account were made on a day to day basis in a chronological manner – It was also found by Tribunal that identical method of accounting and maintenance of record had been accepted in earlier years and higher claim of unpaid transport charges had been accepted in assessment proceedings under section 143(3) – Finally Assessing Officer had not been able to produce a single incident to establish conjecture of payments having been made in cash – Whether in

view of aforesaid findings no legal infirmity existed in impugned order of Tribunal so as to warrant interference – Held, yes.

Hylam Securities & Finance (P) Ltd., ITO v/s.
(2009) 178 Taxman 317(Guj)

P – 358
VALUATION OF CLOSING STOCK
Notional brokerage payable on closing stock of debentures - Assessee is not entitled to reduce the amount of notional brokerage that would be payable on the sale of debentures for working out the value of closing stock of such debentures while valuing the debentures on the basis of market value or cost, whichever is less.
Gujarat State Investments Ltd., Dy CIT v/s.
(2008) 14 DTR 71(Guj)

P - 369
WEALTH TAX – REASSESSMENT
Assessment years 1990-91 and 1992-93 - In absence of reasons recorded notice issued under section 17 for reopening completed assessments was to be quashed .
Krishnadas Govinddas Parikh v/s. WTO
(2009) 177 Taxman 369(Guj)

P 372
WEALTH TAX - REFERENCE TO VALUATION – S. 16A
Assessment years 1983-84 to 1993-94 – Action of Assessing Officer in making reference under section 16A to valuation cell for assessment years for which no assessment was pending could not be sustained.
Krishnadas Govinddas Parikh v/s. WTO
(2009) 177 Taxman 369(Guj)

P – 376
WORDS & PHRASES
'Depreciation actually allowed' as occurring in section 43(6)(b).
Doom Dooma India Ltd., CIT v/s.
(2009) 178 Taxman 261 = 222 CTR 105 = 19 DTR 177 = 310 ITR 392(SC)

xxxxxxxxxxxxxxxxxxxxxxx