[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

BASIR AHMED SISODIYA

v.

INCOME-TAX OFFICER

A. M. KHANWILKAR and DINESH MAHESHWARI JJ.

April 24, 2020.

SS ▶ ITA 1961, ss 68, 143, 144, 145, 271(1)(c)

AY ▶ 1998-99

HF ▶ Assessee

CASH CREDITS—ASSESSMENT—PENALTY—CREDITS STANDING IN NAMES OF PERSONS CLAIMED TO BE SUMS OWED TO CREDITORS FOR PURCHASES OF MARBLE SLABS—FAILURE BY ASSESSEE IN ASSESSMENT PROCEEDINGS TO PROVE CLAIM—TRANSACTIONS TREATED AS BOGUS AND CREDITS TREATED AS INCOME—ASSESSEE IN PENALTY PROCEEDINGS PRODUCING AFFIDAVITS AND STATEMENTS OF UNREGISTERED DEALERS AND ESTABLISHING THEIR CREDENTIALS—EXPLANATION ACCEPTED BY COMMISSIONER (APPEALS) AND PENALTY SET ASIDE ON FINDING THAT THERE WAS NO CONCEALMENT—PENALTY PROCEEDINGS WERE OUTCOME OF ASSESSMENT ORDER—FACTUAL BASIS ON WHICH ADDITION MADE NO LONGER SURVIVING—ADDITION NOT SUSTAINABLE—INCOME-TAX ACT, 1961, SS. 68, 143, 144, 145, 271(1)(c).

For the assessment year 1998-99, the Assessing Officer, treated credits amounting to Rs. 2,26,000 shown in the names of fifteen persons as unexplained and income of the assessee under section 68 of the Income-tax Act, 1961 rejecting the assessee's claim that the sum represented purchase of marble slabs from unregistered dealers. He directed that notice be issued separately for imposition of penalty under section 271(1)(c). The assessee preferred an appeal before the Commissioner (Appeals), who upheld the assessment order as regards the trading account and credits in question, as, on further appeal, did the Tribunal. The assessee appealed but the High Court dismissed the appeal holding that the amount shown as credits was nothing but bogus entries and was justly added to the income of the assessee. On appeal to the Supreme Court, during the pendency of which the assessee brought on record the order of the Commissioner (Appeals) in the penalty proceedings, by which he had cancelled the penalty order on the finding that the assessee had not made any concealment of income or *furnished inaccurate particulars of income for the concerned assessment year, because there was no denial of purchase of marble slabs worth Rs. 4,78,900 and sales of goods worth Rs. 3,57,463 and disclosure of closing stock of Rs. 2,92,490 as disclosed in the trading account for the year, that without purchases of marbles, there could not have been sales and disclosure of closing stock in the trading account, that the Assessing Officer had not raised any objection in respect identity of the unregistered dealers and the claim of sale of marble slabs to the assessee and that thus, there was no justification not to accept the purchase made from unregistered dealers :*

Held, allowing the appeal, that although in the assessment proceedings, the assessee despite being given sufficient opportunity, had failed to prove the correctness and genuineness of his claim in respect of purchases of marbles from unregistered dealers to the extent of Rs. 2,26,000 and the transactions were assumed as bogus entries (standing to the credit of named dealers who were non-existent creditors of the assessee), the assessee in penalty proceedings had offered an explanation and produced affidavits and statements of the unregistered dealers and establish their credentials. That explanation had been accepted by the Commissioner (Appeals) who had noted that the Officer had recorded statements of 12 unregistered dealers out of 13 and their identities had been duly established, that the Officer had neither doubted the identity of those dealers nor offered any adverse comments in reference to their version regarding sale of marble slabs by them to the assessee in the financial year relevant to assessment year 1998-99 and receipt of payments after two to three years. There was also no denial of purchase of marbles worth Rs. 4,78,900 by the assessee and sale thereof worth Rs. 3,57,463 with closing stock of Rs. 2,92,490, as disclosed in the trading account for the year ended March 31, 1998. The appellate authority thus found that without purchases of marbles, there could be no sale and disclosure of closing stock in the trading account. In other words, the materials on record would clearly suggest that the unregistered dealers had sold marble slabs on credit to the assessee, as claimed. As a consequence of this finding, the appellate authority concluded that there was neither any concealment of income nor furnishing of inaccurate particulars of income by the assessee. Though these observations were made by the appellate authority in penalty proceedings, the penalty proceedings were the outcome of the assessment order in question for the assessment year 1998- 1999. The factual basis on which the Officer formed his opinion in the assessment order for assessment year 1998-99 in regard to addition of Rs. 2,26,000 stood dispelled by the affidavits and *statements of the concerned unregistered dealers in the penalty proceedings. That evidence fully supported the claim of the assessee. The appellate authority had not only accepted the explanation offered by the assessee but also recorded a clear finding of fact that there was no concealment of income or furnishing of any inaccurate particulars of income by the appellant/assessee for the assessment year 1998-99. That now being the indisputable position, it necessarily followed that the addition of amount of Rs. 2,26,000 could not be justified, much less, maintained.*

Decision of the Rajasthan High Court reversed.

Cases referred to :

CIT *v*. Aggarwal Engg. Co. [2008] 302 ITR 246 (P&H)

CIT *v*. G. K. Contractors [2009] 19 DTR (Raj) 305

Maddi Sudarsanam Oil Mills Co. *v*. CIT [1959] 37 ITR 369 (AP)

Civil Appeal No. 6110 of 2009.

Appeal from the judgment and order dated August 21, 2008 of the Rajasthan High Court in I. T. A. No. 69 of 2006. (*Sasir Ahmed Sisodiya* v. *ITO*) (N. P. GUPTA and KISHAN SWAROOP CHAUDHARI JJ.)

Dr. Manish Singhvi, Senior Advocate (***Sandeep Kumar Jha***, ***P. V. Yogeswaran*** and ***Arpit Parkash***, Advocates, with him) for the appellant.

K. Radhakrishna, Senior Advocate (***H. Raghavendra Rao***, ***Jitin Singhal*** and ***Ms. Anil Katiyar***, Advocates, with him) for the respondent.

[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

NEW DELHI TELEVISION LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

L. NAGESWARA RAO and DEEPAK GUPTA JJ.

April 3, 2020.

SS ▶ ITA 1961, ss 147, 148

AY ▶ 2008-09

HF ▶ Assessee/General principles

REASSESSMENT—INCOME ESCAPING ASSESSMENT—GENERAL PRINCIPLES—DISPUTE RESOLUTION PANEL FOR SUCCEEDING ASSESSMENT YEAR RAISING DOUBTS AS TO CORPORATE STRUCTURE OF ASSESSEE AND ITS SUBSIDIARIES AND TAX EVASION PETITIONS BY SHAREHOLDERS SHOWING EVIDENCE OF ROUND TRIPPING OF ASSESSEE'S UNDISCLOSED INCOME THROUGH SUBSIDIARIES—MATERIAL SUFFICIENT TO FORM REASON TO BELIEVE THAT INCOME HAD ESCAPED ASSESSMENT—INCOME-TAX ACT, 1961, SS. 147, 148.

REASSESSMENT—LIMITATION—EXTENDED PERIOD—ASSESSING OFFICER AWARE OF ENTITIES WHICH HAD SUBSCRIBED TO CONVERTIBLE BONDS—ALL RELEVANT FACTS, I. E., ENTITIES WHO HAD SUBSCRIBED TO BONDS, THEIR ADDRESSES AND CONSIDERATION PAID BY EACH, WITHIN KNOWLEDGE OF ASSESSING OFFICER—FULL AND TRUE DISCLOSURE OF ALL MATERIAL FACTS NECESSARY FOR ASSESSMENT BY ASSESSEE—INCOME-TAX ACT, 1961, SS. 147, 148.

REASSESSMENT—LIMITATION—EXTENDED PERIOD OF 16 YEARS WHERE FOREIGN ASSET INVOLVED—NOTICE—NO MENTION OF FOREIGN ASSETS—NOTHING IN REASONS TO INDICATE INTENTION TO APPLY EXTENDED PERIOD OF 16 YEARS—NOTICE AND REASONS GIVEN THEREAFTER NOT CONFORMING TO PRINCIPLES OF NATURAL JUSTICE—INCOME-TAX ACT, 1961, S. 147, SECOND PROVISO.

Merely the fact that the original assessment is a detailed one cannot take away the powers of the Assessing Officer to issue notice under section 147 of the Income-tax Act, 1961.

An Assessing Officer can only reopen an assessment if he has "reason to believe" that *undisclosed income has escaped assessment. Mere change of opinion of the Assessing Officer is not sufficient to meet the standard of "reason to believe".*

Subsequent facts which come to the knowledge of the Assessing Officer can be taken into account to decide whether or not the assessment proceedings should be reopened. Information which comes to the notice of the Assessing Officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer under section 147 of the Act.

It is the duty of the assessee to disclose full and truly all material facts which are primary facts. Disclosure of other facts which may be termed secondary facts is not necessary.

The assessee-company ran television channels. It had a subsidiary based in the United Kingdom. The U. K. subsidiary had issued step-up coupon bonds amounting to US $ 100 million in July, 2007 through the Bank of New York for a period of 5 years. The issue was arranged by J and the funds were received by the U. K. subsidiary through THE Bank of New York. The assessee had agreed to furnish a corporate guarantee for this transaction. These bonds were subscribed by various entities and were to be redeemed at a premium of 7.5 per cent. after the expiry of the period of 5 years. However, these bonds were redeemed in advance at a discounted price of US $ 74.2 million in November, 2009. For the assessment year 2008-09 it filed a return declaring a loss. The Assessing Officer held that the U. K. subsidiary had virtually no financial worth, it had no business and could not have issued convertible bonds of US $ 100 million, unless the repayment with interest was secured, that this was secured only because of the assessee agreeing to furnish guarantee in this regard. He held that the transaction should be treated like a guarantee issued by any corporate guarantor in favour of another corporate entity. The Assessing Officer did not doubt the validity of the transaction but imposed a guarantee fee at 4.68 per cent. treating it as a business transaction and added Rs. 18.72 crores to the income of the assessee. On March 31, 2015, the assessment was reopened mainly on the basis of the order of the Dispute Resolution Panel for the following assessment year, 2009-10, to the effect that monies raised by the assessee through its subsidiaries in the Netherlands and the U. K. subsidiary represented sham transactions through which undisclosed income, for which tax had not been paid, was brought back to India by circuitous round-tripping. The Assessing Officer took the view that the U. K. subsidiary had a capital of only Rs. 40 lakhs and no business activities in the United Kingdom except a postal address and that the natural inference was that it was the assessee's *own funds introduced in the U. K. subsidiary in the garb of the bonds. Complaints had been received from a minority shareholder alleging that the money introduced in the U. K. subsidiary was shifted to another subsidiary of the assessee in Mauritius from where it was taken to a subsidiary of the assessee in Mumbai and finally to the assessee. The U. K. subsidiary itself was placed under liquidation. Therefore, the Assessing Officer was of the opinion that the amount of Rs. 405.09 crores introduced into the books of the U. K. subsidiary during the financial year 2007-08 corresponding to the assessment year 2008-09 through the transaction involving the step-up coupon convertible bonds pertained to the assessee. The notice also recorded that the escapement was due to failure on the part of the assessee to disclose fully and truly all facts material for assessment. The Assessing Officer did not accept the assessee's objections and held that there was non-disclosure of material facts by the assessee. The assessee filed a writ petition which the High Court dismissed. On appeal :*

Held, (i) that the assessee's contention that once the transaction of step-up coupon bonds had been accepted to be correct the Department could not reopen it was not sustainable but the genuineness of the transaction would be considered by the concerned Assessing Officer.

(ii) That the original order of assessment was passed on August 3, 2012. It was thereafter on December 31, 2013 that the Dispute Resolution Panel in the case of assessment year 2009-10 raised doubts with regard to the corporate structure of the assessee and its subsidiaries. It noted that certain shares of the U. K. subsidiary had been acquired by U of the Netherlands, indirectly by subscribing to shares of the Netherlands subsidiary. The U. K. subsidiary did not have any business activity in London. It had no fixed assets and was not even paying rent. Other than the fact that the U. K. subsidiary was incorporated in the U. K., it had no other commercial business there. The U. K. subsidiary had declared a loss of Rs. 8.34 crores for the relevant year. The assessee was the parent company of the U. K. subsidiary and its dictates were important for running the U. K. subsidiary. The final assessment order for assessment year 2009-10 disclosed similar facts. The tax evasion petitions filed by the minority shareholders of the assessee described in detail the communication between the assessee and the subsidiaries and showed evidence of round tripping of the assessee's undisclosed income through a layer of subsidiaries which led to the issuance of the notice. The material disclosed in the assessment proceedings for the subsequent years and the material

placed on record by the minority shareholders formed the basis for taking action under section 147 of the Act. At the stage of issuance of notice, the Assessing Officer had only to form a prima facie view. The material disclosed in the assessment proceedings for subsequent years was sufficient to form such a view. There were reasons to believe that income had escaped assessment in this case.

Decision of the Delhi High Court in NEW DELHI TELEVISION LTD. *v.* DY. CIT [2018] 405 ITR 132 (Delhi) *affirmed on this point*.

CLAGETT BRACHI CO. LTD. *v*. CIT [1989] 177 ITR 409 (SC), ESS KAY ENGINEERING CO. P LTD. *v*. CIT [2001] 247 ITR 818 (SC) *and* PHOOL CHAND BAJRANG LAL *v*. ITO [1993] 203 ITR 456 (SC) *applied*.

(iii) That even before the assessment order was passed, the Assessing Officer was aware of the entities which had subscribed to the convertible bonds. The extended period of limitation of 6 years for initiating proceedings under the first proviso to section 147 of the Act could be invoked only if the Department could show that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. The assessee had disclosed all the facts it was bound to disclose. If the Department wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts. The assessee made a disclosure about having agreed to stand guarantee for the transaction by the U. K. subsidiary and it had also disclosed the factum of the issuance of convertible bonds and their redemption. The income, if any, arose because of the redemption at a discounted price. This was an event which took place subsequent to the assessment year in question though it may be income for the assessment year. All relevant facts were duly within the knowledge of the Assessing Officer. The Assessing Officer knew who were the entities who had subscribed to other convertible bonds and in other proceedings relating to the subsidiaries the same Assessing Officer had knowledge of addresses and the consideration paid by each of the bondholders as was apparent from assessment orders passed in the cases of sister companies on the same date. Therefore, there was full and true disclosure of all material facts necessary for its assessment by the assessee. It could not be said that the assessee had withheld any material information from the revenue. The assessee was not bound to disclose that it had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets, etc. The Assessing Officer before finalising the assessment had not asked the assessee to furnish the details. The assessee

disclosed all the primary facts necessary for assessment of its case to the Assessing Officer and it was not required to give any further assistance to the Assessing Officer by disclosure of other facts. The Assessing Officer on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee which he could have done even at that stage on the basis of the facts which he already knew.

(iv) That whereas before the court the Department was urging that the assessee was guilty of non-disclosure of material facts, before the High Court the case of the Department was just the opposite. The Department could not be permitted to blow hot and cold at the same time.

(v) That in the notice dated March 31, 2015 there was no mention of any foreign entity. There was only mention of section 148. There was nothing in the reasons to indicate that the Department was intending to apply the extended period of 16 years. It was only after the assessee filed its reply to the reasons given, that in the order of rejection for the first time reference was made to the second proviso by the Department. This was not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the Department relied upon the second proviso. The assessee must be put to notice of all the provisions on which the Department relies upon. If the Department had issued a notice to the assessee stating that it relied upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee could not be deprived of this chance while replying to the notice. The notice and reasons given thereafter did not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the revenue. The notice issued to the assessee and the supporting reasons did not invoke provisions of the second proviso to section 147 of the Act and therefore at this stage the Department could not be permitted to take benefit of the second proviso.

[The court made it clear that it was not going into the merits of the case nor the question whether on facts of this case the Department could take benefit of the second proviso. The Department was at liberty to issue fresh notice taking benefit of the second proviso if otherwise permissible under law.]

Decision of the High Court in NEW DELHI TELEVISION LTD. *v.* DY. CIT [2018] 405 ITR 132 (Delhi) *partly reversed.*

Cases referred to :

Calcutta Discount Co. Ltd. *v*. ITO [1961] 41 ITR 191 (SC)

Clagett Brachi Co. Ltd. *v*. CIT [1989] 177 ITR 409 (SC)

Ess Kay Engineering Co. P Ltd. *v*. CIT [2001] 247 ITR 818 (SC)

Honda Siel Power Products Limited *v*. Dy. CIT [2012] 340 ITR 53 (Delhi)

Mohinder Singh Gill *v*. The Chief Election Commissioner [1978] 2 SCR 272 ; AIR 1978 SC 851

New Delhi Television Ltd. *v.* Dy. CIT [2018] 405 ITR 132 (Delhi)

Phool Chand Bajrang Lal *v*. ITO [1993] 203 ITR 456 (SC)

Civil Appeal No. 1008 of 2020.

Appeal from the judgment and order dated August 10, 2017 of the Delhi High Court in W. P. (C) No. 11638 of 2015. The judgment of the High Court is reported as *New Delhi Television Ltd*. v. *Dy. CIT* [2018] 405 ITR 132 (Delhi).

Arvind P. Datar, Senior Advocate (***Sachit Jolly***, ***Ms. Anuradha Dutt***, ***Rohit Garg*** and ***Ms. B. Vijayalakshmi Menon***, Advocates, with him) for the appellant.

Tushar Mehta, Solicitor General, and ***Arijit Prasad***, Senior Advocate (***Zoheb Hossain***, ***Rajat Nair***, ***Piyush Goyal*** and ***Mrs. Anil Katiyar***, Advocates, with them) for the respondent.

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[IN THE SUPREME COURT OF INDIA]

PILCOM

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

(Civil Appeal No. 5749 of 2012)

BOARD OF CONTROL FOR CRICKET IN SRI LANKA

v.

DIRECTOR OF INCOME-TAX (INTERNATIONAL TAXATION)

(Special Leave Petition (Civil) Nos. 6829 of 2019 and 7315 of 2019)

UDAY UMESH LALIT and VINEET SARAN JJ.

April 29, 2020.

SS ▶ ITA 1961, ss 2(24)(ix), 5(2), 9(1), 115BBA, 163, 194E

HF ▶ Department

NON-RESIDENT—INCOME DEEMED TO ACCRUE OF ARISE IN INDIA—ASSESSEE, A COMMITTEE FORMED BY CRICKET CONTROL BOARDS OF INDIA, PAKISTAN AND SRI LANKA FOR CONDUCTING WORLD CUP CRICKET TOURNAMENT IN THESE COUNTRIES FOR 1996—BANK ACCOUNTS OPENED BY ASSESSEE IN LONDON—GUARANTEE MONEY PAID FROM LONDON ACCOUNT TO NON-RESIDENT SPORTS ASSOCIATIONS OF PARTICIPATING COUNTRIES—CRICKET TEAMS OF THESE ASSOCIATIONS PLAYING VARIOUS MATCHES IN INDIA DURING TOURNAMENT—GUARANTEE MONEY INTRICATELY CONNECTED WITH EVENT AND SOURCE OF INCOME WAS PLAYING OF MATCHES IN INDIA—PROPORTION OF PAYMENTS TO NON-RESIDENT SPORTS ASSOCIATIONS BEARING SAME RATIO AS NUMBER OF MATCHES PLAYED BY EACH SUCH COUNTRY IN INDIA TO TOTAL NUMBER OF MATCHES PLAYED BY EACH COUNTRY IN TOURNAMENT, REPRESENTED INCOME WHICH ACCRUED OR AROSE OR WAS DEEMED TO HAVE ACCRUED OR ARISEN IN INDIA—ASSESSEE LIABLE TO DEDUCT TAX AT SOURCE THEREON—OBLIGATION TO DEDUCT TAX AT SOURCE NOT AFFECTED BY DOUBLE TAXATION AVOIDANCE AGREEMENT—ORDER TREATING ASSESSEE AS AGENT OF NON-RESIDENT BOARDS AND PLAYERS UNDER SECTION 163 OF ACT—PROPER—INCOME-TAX ACT, 1961, SS. 2(24)(ix), 5(2), 9(1), 115BBA, 163, 194E.

In terms of sub-section (2) of section 5 of the Income-tax Act, 1961, the total income of a non-resident may include income from whatever source which is received or deemed to be received in India or accrues or arises or is deemed to accrue or arise to such non-resident in India. According to section 9(1), the income shall be deemed to accrue or arise in India if "the income accrues or arises, whether directly or indirectly" through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

The assessee (PILCOM) was a committee formed by the Cricket Control Boards of Pakistan, India and Sri Lanka, for the purpose of conducting the World Cup Cricket tournament for the year 1996 in these three countries. These three host countries were required to pay varying amounts to the Cricket Control Boards/Associations of different countries as well as to the International Cricket Council (ICC) in connection with conducting the preliminary phases of the tournament and also for the purpose of promotion of the game in their respective countries. Two bank accounts were opened by the assessee in London to be operated jointly by the representatives of the Indian and Pakistan Cricket Boards, in which the receipts such as from sponsorship and television rights were deposited and from which the expenses were met. The surplus remaining in the bank account was decided to be divided equally between the Cricket Boards of Pakistan and India after paying a lump-sum amount to the Sri Lanka Board under mutual agreements amongst the three Boards. The Board of Control for Cricket in India (BCCI) appointed its own committee for discharge of its functions. It had its bank account at Calcutta. From the bank accounts in London, certain amounts were transferred to the three co-host countries for disbursement of fees payable to the umpires and referees and also defraying administrative expenses and prize money. In respect of seven payments, i. e., of £ 17,00,000 representing guarantee money paid to 17 countries which did not participate in the World Cup matches, of £ 1,20,000, representing amounts transferred from London to Pakistan and Sri Lanka for disbursement of prize money in those countries, of £ 3,75,000 representing payment to the ICC in terms of resolution dated February 2, 1993, £ 2,00,000 representing payment for the ICC Trophy for qualifying matches between ICC associate members held outside India, of £ 3,60,000 representing guarantee money paid to South Africa and the United Arab Emirates both of which did not play any match in India, £ 8,85,000 representing guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom Double Taxation

Avoidance Agreements exist, and of £ 7,10,000 representing guarantee money paid to Pakistan, West India, Zimbabwe and Holland, the Assessing Officer held that taxes should have been deducted at source in accordance with the provisions of section 194E of the Act and passed an order under section 201(1) read with section 194E holding that the the assessee was liable to pay the amount it had failed to deduct from the payments under consideration and interest thereon under section 201(1A) from the date of tax was deductible upto the date of actual payment. The Commissioner (Appeals) gave partial relief. The Tribunal, on appeals by both the assessee and the Department, held that the first five payments were not taxable in India and therefore no liability to deduct tax at source arose in respect of these payments, but that the payments of £ 8,85,000 representing guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom Double Taxation Avoidance Agreements existed, and of £ 7,10,000 representing guarantee money paid to Pakistan, the West Indies, Zimbabwe and Holland, arose directly as a result of their taking part in the cricket matches. However, it held that only that proportion of the total receipt made by each such country from the assessee, which bore the same ratio as the number of matches played by each such country in India to the total number of matches played by each such country in the tournament, should be considered to be income arising or accruing to the cricket association of that particular country. It, therefore, held that the assessee should have deducted tax at source in respect of this portion of the payment made by it to that particular association and the order under section 201 would be considered to be valid in respect of the payment to each such country. The High Court, on appeals by the assessee and the Department, affirmed the view taken by the Tribunal and dismissed both appeals. The Assessing Officer, in separate proceedings, passed orders under section 147 treating the assessee as agent of the non-resident boards and players under section 163 of the Act. In appeals, the Tribunal held that since it had held in an earlier proceeding that the income in question arose in India, a representative assessee could not be liable because it was only liable according to it in respect of the income which was deemed to have arisen in India. The High Court restored the orders of the Assessing Officer and the Commissioner (Appeals). On appeals :

Held, dismissing the appeals, (i) that the payments of £ 8,85,000 representing guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom Double Taxation Avoidance Agreements exist, and £ 7,10,000 representing guarantee money paid to Pakistan, West India, Zimbabwe and Holland were in the nature of guarantee *money paid to non-resident sports associations. The payments were not made by the assessee in India but through its bank accounts at London or elsewhere. The non-resident sports associations had participated in the event, where cricket teams of these associations had played various matches in the country. Though the payments were described as guarantee money, they were intricately connected with the event where various cricket teams were scheduled to play and did participate in the event. The source of income was in the playing of the matches in India. The mandate under section 115BBA(1)(b) is that if the total income of a non-resident sports association includes the amount guaranteed to be paid or payable to it in relation to any game or sports played in India, the amount of income tax calculated in terms of said Section shall become payable. The expression "in relation to" emphasises the connection between the game or sport played in India on the one hand and the guarantee money paid or payable to the non-resident sports association on the other. Once the connection is established, the liability under the provision must arise. To the extent the payments represented amounts which could not be subject matter of charge under the provisions of the Act, appropriate benefit had already been extended to the assessee.*

(ii) That the obligation to deduct tax at source under section 194E of the Act is not affected by the Double Taxation Avoidance Agreement. If the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of the Agreement can be pleaded and if a case is made out, the amount in question will be refunded with interest. But, that by itself, cannot absolve the assessee of the liability under section 194E of the Act. The payments made to the non-resident sports associations represented their income which accrued or arose or was deemed to have accrued or arisen in India. Consequently, the assessee was liable to deduct tax at source in terms of section 194E of the Act.

(iii) The High Court was right in affirming the order treating the assessee as agent of the non-resident boards and players under section 163 of the Act.

Decisions of the Calcutta High Court in PILCOM *v.* CIT [2011] 335 ITR 147 (Cal) *and that* (printed below) *affirmed.*

Cases referred to :

CIT *v.* Eli Lilly and Co. (India) Pvt. Ltd. [2009] 312 ITR 225 (SC)

CIT *v.* Manjoo and Co. [2011] 335 ITR 527 (Ker)

G. E. India Technology Centre Pvt. Ltd. *v.* CIT [2010] 327 ITR (SC) ; [2010] 10 SCC 29

Metallurgical and Engineering Consultant (India) Ltd. *v*. CIT [1999] 238 ITR 208 (Patna)

Performing Right Society Ltd. *v*. CIT [1977] 106 ITR 11 (SC) ; [1976] 4 SCC 37 : 1976 SCC (Tax) 426

PILCOM *v*. CIT [2011] 335 ITR 147 (Cal)

Civil Appeal No. 5749 of 2012 and Special Leave Petitions (Civil) Nos. 6829 of 2019 and 7315 of 2019.

Civil Appeal No. 5749 of 2012 was from the judgment and order dated November 11, 2010 of the Calcutta High Court in I. T. A. No. 196 of 2000. The judgment of the High Court is reported as *PILCOM* v. *CIT* [2011] 335 ITR 147 (Cal).

Special Leave Petition (Civil) Nos. 6829 of 2019 and 7315 of 2019 were from the judgment and order dated September 25, 2018 of the Calcutta High Court in I. T. A. Nos. 242 and 279 of 2008. The judgment of the High Court (I. P. MUKERJI and AMRITA SINHA JJ.) ran as follows :

"JUDGMENT

I. P. MUKERJI J.—Both the appeals are disposed of by this common judgment and order. In 1996, the Cricket World Cup tournament was held in the sub-continent. Sri Lanka won it, for the only time, in history.

The International Cricket Council (ICC) has its headquarters in London. It is the organisation which makes and alters the rules of the game, sets the different levels and minimum standards at which the game is to be played in each country to get its recognition, the different formats of the game, e. g. test cricket, first class cricket, limited overs competition and so on. It has affiliates from similar organisations in countries, all over the world. The ICC may first recognise a country's team to be fit to compete in the limited overs competitions and thereafter declare it fit to play test cricket. It controls, supervises and regulates the game of cricket in every respect. Not only does it recognise countries and teams, it also certifies the fitness of venues, grounds where the game is intended to be played at the international level. It sets a yearly calendar based on which the game above first class level is played.

At a special meeting of the ICC held on February 2, 1993 in London, India, Pakistan and Sri Lanka were chosen to co-host the world cup. A joint management committee of these three countries, [(Pak-Indo-Lanka) joint management committee (PILCOM)] was formed to conduct this world cup cricket tournament. Bank accounts were opened by PILCOM in London to be operated jointly by the India and Pakistan Cricket Boards. In this account were deposited moneys from sponsorships, TV rights, etc.

The Board of Control for Cricket in India (BCCI) appointed its own committee for discharge of its functions. It was known as INDCOM. It had its bank account at Calcutta. From the bank account of PILCOM at London certain amounts were transferred to the bank accounts of the host countries for the purpose of payment of fees to umpires and referees, defraying administrative expenses and payment of prize money. PILCOM paid £43,50,000 which included £19,55,000 as guarantee money to eleven cricket associations. On May 6, 1997 the Income-tax Officer (TDS), Ward – 21(4), Calcutta (ITO (TDS)) made an order under section 201(1)/194E against PILCOM demanding Rs. 2,18,29,3007 as tax which ought to have deducted by it. The proceedings culminated in the order dated January 4, 2000 of the Tribunal. It held that no income could be deemed to accrue or arise to the cricket associations, in India under section 9(1) of the Income-tax Act, 1961. It held that only that proportion of the total fund received by any country from PILCOM which was equal to the ratio of the number of matches played by such country to the total number of matches played by that country in the tournament should be considered to be income arising or accruing to the cricket association of that particular country. Tax should be deducted at source in respect of this portion of the payment made by it to a particular association. Both PILCOM and the Revenue preferred appeals against this order of the Tribunal before this High Court. These appeals [(2011) 335 ITR 147 (Cal)] were decided on November 11, 2010. Both the appeals were dismissed with the observation that the order of the Tribunal did not call for any inference.

Meanwhile, the Assessing Officer issued a notice under section 142(a) of the Income-tax Act, 1961 on March 25, 1998 to PILCOM, Kolkata. The various cricket associations filed returns showing their income as nil. The respondent assessee filed a revised return. Notice under section 148 was issued. The Assessing Officer thereafter made several orders all dated March 21, 2002 under section 147 of the Act for all the Cricket Boards. The Assessing Officer made an assessment of income of each assessee through PILCOM. Appeals were preferred before the Commissioner of Income-tax (Appeals), who on December 10, 2002 partly allowed them. All the assessees filed appeals before the learned Income-tax Appellate Tribunal which by the impugned order dated June 22, 2007 for the assessment year 1996-97, cancelled the assessment made by the Assessing Officer. Supposedly, based on its order dated January 4, 2000 the Tribunal on June 22, 2007 held that since the income had accrued in India it could not be said to be deemed to have accrued in India. Therefore, PILCOM could not be liable as agent under section 163 of the said Act.

Hence, this appeal under section 260A of the said Act.

On August 26, 2008, this appeal was admitted by this court to be heard on the following substantial questions of law :

"Whether on the facts and in the circumstances of the case the learned Tribunal erred in law in cancelling the order of assessment under section 147 passed by the Assessing Officer without considering its earlier decision wherein the learned Tribunal held that the order under section 163 treating PILCOM as agent of non-resident boards and players was valid ?"

At this stage it is necessary to analyse certain provisions of the Income-tax Act, 1961.

Section 5(1) states that the total income in any previous year of a person who is a resident of India includes all income which is received or deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India or accrues or arises to him outside India. Under section 5(2), the total income of a non-resident includes all income which is so received or deemed to be received in India or has accrued or arises or deemed to accrue or arise in India during the previous year. Under section 9(1)(i), the income which is deemed to accrue or arise in India has been defined so as to inter alia include all income accruing or arising whether directly or indirectly through any business connection in India.

Now, we come to section 163 which says that an agent in relation to a non-resident includes, inter alia, any person in India from or through whom a non-resident does any business or is in receipt of any income, directly or indirectly.

Section 160 declares such an agent for the income of a non-resident specified in section 9(1) to be a representative assessee. Under section 161 he is treated as the person who is receiving the income or in whose favour the income has accrued beneficially. He shall be liable to assessment in his own name but in a representative capacity.

Therefore, now we come to a point where each of the foreign Cricket Boards could be said to be a non-resident person and PILCOM could be said to have been their agent.

The Tribunal in its impugned order relied on its previous order dated January 4, 2000 which held that the income had actually arisen in India. On the basis of this order it proceeded to make a completely wrong interpretation of the law.

If one considers section 5, income is divided into two categories. One which is received in India and one which arises or accrues or deemed to arise or accrue in India but may be received here or elsewhere. Section 9 merely tries to classify the income which is deemed to accrue or arise in India by saying that it should, inter alia, arise from business connection of the non-resident with India. Section 160 makes it abundantly plain that a representative assessee would represent the assessee in respect of a non-resident in respect of his income specified in section 9. This simply means that a representative assessee would represent all income accruing or arising in India and not in a foreign country directly or indirectly from any business connection in India. It goes without saying that the representative assessee not only represents an income which has directly arisen or accrued in India but also that which has indirectly arisen or accrued in this country, through a business connection. Only the short title to the section describes this income as deemed to accrue or arise in India. Use of this title does not absolve the representative assessee of the duty to account for any income which has directly or deemed to have arisen to the non-resident in this country.

In my opinion the Tribunal has made a complete misunderstanding of the law in entertaining the opinion that since the income made by the non-resident Cricket Boards were held to have directly arisen in India, this income could not be deemed to have arisen or accrued to the non-resident in India and the responsibility of the representative assessee was confined to accounting for income which had directly arisen or accrued in India. Furthermore, if the Department chooses to make an assessment of the person resident outside India directly, there is no question of assessment of his agent or a representative assessee.

Jyotendrasinhji v. *S. I. Tripathi and others* reported in [1993] 201 ITR 611 (SC).

CIT v. *Kamalini Khatau* reported in [1994] 209 ITR 101 (SC).

In fact, section 166 of the Income-tax Act, 1961 very clearly lays down that nothing in the foregoing sections relating to representative assessee shall prevent either the direct assessment of the person for whom the money is receivable.

The Tribunal, in our opinion, made a clear mistake in believing that since it was held in an earlier proceeding that the income in question arose in India, a representative assessee could not be liable because it was only liable according to it in respect of the income which was deemed to have arisen in India. The effect of the order of the Tribunal is that inspite of a foreign resident having an agent in India and income directly arising in this country to the foreign resident, the agent would escape liability to assessment.

In those circumstances, the order of the Tribunal dated June 6, 2007 is set aside. The questions of law framed by the order of this court dated August 26, 2008 are answered in the affirmative in favour of the Revenue. The orders of the Assessing Officer and of the Commissioner of Income-tax (Appeals) are affirmed. The points left open by the Tribunal in its impugned order may be decided by it in accordance with law.

Both the appeals are allowed.

Urgent certified photo copy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

AMRITA SINHA J.—I agree."

Ms. Jayanti Prasad Khaitan, Senior Advocate (***Agnibesh Sengupta***, ***Indranil Ghosh***, ***Raj Kumar***, ***Palzer Moktan***, ***Ms. Arushi Arora***, ***Ms. Sampurnaa Sanyal***, ***Ms. Swati Sinha***, ***Ms. Taruna A. Prasad***, ***Ms. Sukanya Basu***, ***M/s. Fox Mandal & Co.*** And ***Satish Kumar***, Advocates, with him) for the appellant.

Vikramjit Banerjee, Additional Solicitor General (***Ms. Niranjana Singh***, ***Arjun Garg***, ***Siddhartha Sinha*** and ***Mrs. Anil Katiyar***, Advocates, with him) for the respondent.

[Under processing—To be published shortly}

[IN THE SUPREME COURT OF INDIA]

RAJASTHAN STATE ELECTRICITY BOARD

v.

DY. COMMISSIONER OF INCOME-TAX (ASSESSMENT) AND ANOTHER

ASHOK BHUSHAN and MOHAN M. SHANTANAGOUDAR JJ.

March 19, 2020.

SS ▶ ITA 1961, ss 32, 143(1A)
AY ▶ 1991-92
HF ▶ Assessee

ASSESSMENT—ADDITIONAL TAX—CHANGE OF LAW—AMENDMENT TO EFFECT THAT WHERE LOSS DECLARED BY ASSESSEE REDUCED BY REASON OF PRIMA FACIE ADJUSTMENTS, ADDITIONAL TAX LEVIABLE—ONLY TO BE INVOKED WHERE LOWER AMOUNT SHOWN IN RETURN BY ASSESSEE WAS WITH INTENT TO EVADE TAX—ASSESSEE BY BONA FIDE OVERSIGHT CLAIMING DEPRECIATION AT 100 PER CENT. INSTEAD OF AT 75 PER CENT.—RETURN REMAINING ONE OF LOSS—NO INTENTION TO EVADE TAX—MECHANICAL LEVY OF ADDITIONAL TAX UNCALLED FOR—INCOME TAX ACT, 1961, SS. 32(2), 143(1A).

INTERPRETATION OF TAXING STATUTES—CONSEQUENCES AND HARDSHIP NOT RELEVANT—PURPOSE AND OBJECT OF STATUTE TO BE SEEN.

The object of section 143(1A) of the Income-tax Act, 1961 as substituted by the Finance Act, 1993 with effect from April 1, 1989 was the prevention of evasion of tax. The Memorandum Explaining the Provisions of the Finance Bill was also to persuade assessees to file their income-tax returns carefully to avoid mistakes. The provisions of section 143(1A) should be made to apply only to tax evaders. Section 143(1A) can only be invoked where it is found on the facts that the lower amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully by the assessee.

Although while interpreting a tax legislation the consequences and hardship are not looked into the purpose and object by which taxing statutes have been enacted cannot be lost sight of.

For the assessment year 1991-92, the assessee, in its return filed on December 31, 1991, showed a loss of Rs. 427,39,32,972. Due to a bona fide mistake the assessee claimed *depreciation at 100 per cent. on the written down value of assets instead of at 75 per cent. An intimation under section 143(1)(a) of the Income-tax Act, 1961 was issued by the Assessing Officer disallowing 25 per cent. of the depreciation, restricting the depreciation to 75 per cent. and levying additional tax under section 143(1A) of the Act of Rs. 8,63,64,827. The assessee filed an application for rectification of the demand and a petition to the Commissioner for revision stating that even after allowing only 75 per cent. of depreciation the income of the assessee remained a loss at Rs. 3,43,94,90,393 and prayed for quashing the demand of additional tax. The application for rectification was rejected by the Assessing Officer as was the revision petition by the Commissioner. The assessee filed a writ petition which a single judge allowed quashing the levy of additional tax under section 143(1A). The Department filed an appeal which the Division Bench allowed upholding the demand of additional tax. On appeal :*

Held, allowing the appeal, that by the Taxation Laws (Amendment) Act, 1991 the third proviso was inserted in section 32 to provide that from the assessment year 1991-92 the depreciation shall be restricted to seventy-five per cent. on the written down value. The return was filed by the assessee on December 31, 1991, prior to which date the Taxation Laws (Amendment) Act, 1991 had come into operation. It was due to a bona fide mistake and oversight that the assessee claimed 100 per cent. depreciation instead of 75 per cent. Even after reduction of 25 per cent. depreciation the return was one of loss. In claiming 100 per cent. depreciation the assessee claimed that there was no intention to evade tax and the claim was only a bona fide mistake. The object of section 143(1A) was the prevention of evasion of tax. The Memorandum Explaining the Provisions of the Finance Bill stated that the object was to persuade assessees to file income-tax returns carefully to avoid mistakes. The Commissioner in deciding the revision petition had not made any observation that the claim to 100 per cent. depreciation was with intent to evade payment of tax lawfully payable by the assessee. The mechanical application of section 143(1A) in the facts of the present case was uncalled for.

Decision of the Jaipur Bench of the Rajasthan High Court in CIT (DEPUTY) (ASSTT.) *v.* RAJASTHAN STATE ELECTRICITY BOARD [2008] 299 ITR 253 (Raj) *reversed.*

CIT *v.* SATI OIL UDYOG LTD. [2015] 372 ITR 746 (SC) *applied.*

Cases referred to :

CIT (Dy.) (Assmt.) *v.* Ashok Paper Mills Ltd. [2002] 256 ITR 673 (Gauhati)

CIT *v.* Sati Oil Udyog Ltd. [2015] 372 ITR 746 (SC)

Dy. CIT (Assmt.) *v.* Rajasthan State Electricity Board [2008] 299 ITR 253 (Raj)

J. K. Synthetics Ltd. *v.* Asst. CIT [2001] 251 ITR 200 (SC)

Rajasthan State Electricity Board *v.* Union of India [2020] 15 ITR-OL 254 (SC)

Sati Oil Udyog Ltd. *v.* CIT [1998] 232 ITR 502 (Gauhati)

Varghese (K. P.) *v.* ITO [1981] 131 ITR 597 (SC)

Civil Appeal No. 8590 of 2010.

Appeal from the judgment and order dated November 13, 2007 of the Jaipur Bench of the Rajasthan High Court in D. B. S. C. A. No. 837 of 1993. The judgment of the High Court is reported as *CIT (Deputy) (Asstt.)* v. *Rajasthan State Electricity Board* [2008] 299 ITR 253 (Raj).

Arijit Prasad, Senior Advocate (***Rohit K. Singh***, Advocate, with him) for the appellant.

Mrs. Anil Katiyar, Advocate, for the respondent.

[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

UNION OF INDIA AND OTHERS

v.

EXIDE INDUSTRIES LIMITED AND ANOTHER

A. M. KHANWILKAR, HEMANT GUPTA and DINESH MAHESHWARI JJ.

April 24, 2020.

SS ▶ ITA 1961, s 43B(f) ; Constn of India, arts 14 Part III

HF ▶ Department

BUSINESS EXPENDITURE—DEDUCTION ONLY ON ACTUAL PAYMENT—CHANGE OF LAW—AMENDMENT BRINGING LIABILITY TO PAY LEAVE ENCASHMENT TO EMPLOYEES UNDER PROVISION—LIBERTY TO ASSESSEE TO FOLLOW MERCANTILE SYSTEM OF ACCOUNTING—DOES NOT MEAN DEDUCTION AGAINST ACCRUED LIABILITY CANNOT BE REGULATED BY LAW PROSPECTIVELY—PROVISION DOES NOT REVERSE NATURE OF LIABILITY NOR TAKE AWAY DEDUCTION—NO LIMITATION UPON LEGISLATURE TO INCLUDE ONLY PARTICULAR TYPE OF DEDUCTIONS IN SECTION 43B—OTHER DEDUCTIONS SPECIFIED IN SECTION ALSO PRESENT AND ACCRUED LIABILITIES—COURT DECLARING LIABILITY TO LEAVE ENCASHMENT AN ACCRUED LIABILITY—CONTENTION THAT CLAUSE (F) ENACTED TO DEFEAT JUDGMENT OF COURT NOT TENABLE—INCOME-TAX ACT, 1961, S. 43B(F)

LEGISLATIVE POWERS—PARLIAMENT—VALIDITY OF PROVISION—PRESUMPTION OF VALIDITY—OBJECTS AND REASONS—NON-DISCLOSURE—DOES NOT RENDER PROVISION INVALID.

INTERPRETATION OF STATUTES—VALIDITY OF PROVISIONS—NO AMBIGUITY ABOUT LEGISLATIVE COMPETENCE AND IMPORT OF ENACTMENT—OBJECTS AND REASONS—NO IMPACT UPON VALIDITY OF PROVISION UNLESS PROVISION AMBIGUOUS AND POSSIBLE INTERPRETATION VIOLATES PART III OF CONSTITUTION—UNCONSCIONABILITY OR ARBITRARINESS MUST BE SHOWN TO EXIST IN FORM, SUBSTANCE OR FUNCTIONING OF PROVISION—CONSTITUTION OF INDIA, PART III.

LEGISLATIVE POWERS—PARLIAMENT—DISCRIMINATION—TAXING STATUTES—LEGISLATURE HAS LARGER DISCRETION—CONSTITUTION OF INDIA, ART. 14.

LEGISLATIVE POWERS—PARLIAMENT—ENACTMENT INVALIDATED BY COURT—LEGISLATURE FREE TO DIAGNOSE LAW AND ALTER INVALID ELEMENTS—DOES NOT MEAND LEGISLATURE DECLARES OPINION OF COURT INVALID.

Clause (f) of section 43B of the Income-tax Act, 1961, which makes the actual payment of liability to the employees in respect of leave encashment a condition precedent for extending the benefit of deduction under the Act, is valid.

In testing the constitutional validity of a provision the fundamental concern of the court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution of India.

Whether a provision contravenes any right enshrined in Part III of the Constitution, either in its form, substance or effect begins with a presumption in favour of constitutionality because the power to legislate is the exclusive domain of the Legislature or Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the Legislature and in exercise of judicial review, the court starts with a basic presumption in favour of the proper exercise of such power.

The objects and reasons behind the enactment of a statute signify the intention of the Legislature behind the enactment of a statutory provision. The purpose or underlying aim of a law can be discerned when interpreted in the light of stated objects and reasons. However, when there is no ambiguity about the legislative competence and of the import of the enactment, there no rule, authority or convention to support the view that publication of the objects and reasons is quintessential for the sustenance of a duly enacted provision. In fact, objects and reasons are external aids to interpretation and can be looked into for the limited purpose in the process of interpretation.

When the court examines the validity of a provision, its primary concern is the literal text of the provision. This constitutes the first test of interpretation, often termed as the literal interpretation. If the text of the provision is unambiguous, the legislative intent gets coalesced and is epitomised therefrom. The court is not bound by such external elements. Therefore, the presence or absence of objects and reasons has no impact upon the constitutional validity of a provision as long as the literal features of the provision enable the court to comprehend its true meaning with sufficient clarity. The non-disclosure of objects *and reasons per se would not impinge upon the constitutionality of a provision unless the provision is ambiguous and the possible interpretation violates Part III of the Constitution.*

STATE OF WEST BENGAL v. UNION OF INDIA AIR 1963 SC 1241 *and* SANJEEV COKE MANUFACTURING COMPANY v. BHARAT COKING COAL LTD. [1983] 1 SCC 147 *relied on.*

The process of testing validity is not to look into the prudence or proprieties of the Legislature in enacting the provision. Nor is it to examine the culpable conduct of the Legislature as an appellate authority over the Legislature. In the absence of any finding of any constitutional infirmity in a provision, the court is not empowered to invalidate a provision. To hold a provision violative of the Constitution on account of failure of the Legislature to state the objects and reasons would amount to an indirect scrutiny of the motives of the Legislature behind the enactment. Such a course of action is unwarranted. The time-tested principle of checks and balances does not empower the court to question the motives or wisdom of the Legislature, except in circumstances when the same is demonstrated from the enacted law.

UNITED STATES v. BUTLER ET AL [1936] 297 US 1 *and* GAJAPATI NARAYAN DEO (K. C.) v. STATE OF ORISSA [1954] SCR 1 *relied on.*

Merely holding an enacted provision unconscionable or arbitrary is not sufficient to hold it unconstitutional unless such infirmities are sufficiently shown to exist in the form, substance or functioning of the provision.

The Legislature is the best forum to weigh different problems in the fiscal domain and form policies to address them including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. In the very nature of taxing statutes, Legislature holds the power to frame laws to plug in specific leakages. Such laws are only meant to target a specific avenue of taxability depending upon the experiences of tax evasion and tax avoidance at the ground level. The general principles of exclusion and inclusion do not apply to taxing statutes with the same vigour unless the law reeks of constitutional infirmities. While fiscal statutes must comply with the tenets of article 14, a larger discretion is given to the Legislature in taxing statutes than in other spheres.

ANANT MILLS CO. LTD. v. STATE OF GUJARAT [1975] 2 SCC 175 *relied on.*

The Legislature cannot so to speak overrule a judgment of the Supreme Court. There cannot be any declaration of invalidating a judgment of the court without altering the legal basis of the judgment as a judgment is delivered with strict regard to the enactment as *applicable at the relevant time. However, once the enactment itself stands corrected, the basic cause of adjudication stands altered and necessary effect follows. Upon an enactment being invalidated by the court, the Legislature is free to diagnose such law and alter the invalid elements thereof. In doing so, the Legislature does not declare the opinion of the court to be invalid.*

INDIAN ALUMINIUM CO. v. STATE OF KERALA [1996] 7 SCC 637, WELFARE ASSOCIATION A. R. P., MAHARASHTRA v. RANJIT P. GOHIL [2003] 9 SCC 358 *and* STATE OF T. N. v. AROORAN SUGARS LTD. [1997] 1 SCC 326 *relied on.*

Clause (f) was inserted in section 43B by the Finance Act, 2001 with effect from April 1, 2002, in order to provide for a tax disincentive in cases of deductions claimed by the assessee from income tax in lieu of liability accrued under the leave encashment scheme but not actually discharged by the employer. With the application of clause (f), the eligibility for deduction arises in the previous year in which the payment is actually made and not that in which provision was made in that regard, irrespective of the system of accounting followed by the assessee.

Generally, the heads of income to be subjected to taxability under the 1961 Act are enumerated in section 14 which starts with a saving clause and expressly predicates that profits and gains of business or profession shall be chargeable to income tax. This general declaration of chargeability is followed by section 145, sub-section (1) of which prescribes the method of accounting and explicitly provides that the method of accounting is a prerogative falling in the domain of the assessee and an assessee is well within its rights to follow the mercantile system of accounting. Under the mercantile system of accounting, the assessment of income is made on the basis of accrual of liability and not on the basis of actual expenditure in lieu thereof. The expression "either cash or mercantile system of accounting" offers guidance on the nature of this accounting system. The right flowing from sub-section (1) is subject to the provisions of sub-section (2), which unambiguously empowers the Central Government to prescribe income computation and disclosure standards for accounting. Sub-section (2) is an enabling provision. It signifies that the general principle of autonomy of the assessee in adopting a system of accounting, is controlled by the regulation notified by the Central Government and must be adhered to by the class of assessee governed thereunder. There was a general dispensation of autonomy of the assessee to follow cash or mercantile system of accounting and the sole operative provision was section 145(1) of the

1961 Act that allowed complete autonomy to the assessee to follow the mercantile system. A limited change was brought about by the insertion of clause (f) in section 43B and nothing more. It applies prospectively. Merely because a liability has been held to be a present liability qualifying for instant deduction in terms of the applicable provisions at the relevant time that does not ipso facto mean that the deduction against such liability cannot be regulated by a law made by Parliament prospectively. It is open to the Legislature to withdraw statutory deductions prospectively. Clause (f) in section 43B inserted with prospective effect does not reverse the nature of the liability nor take away the deduction as such. The liability of leave encashment continues to be a present liability under the mercantile system of accounting and the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system. It merely defers the benefit of deduction to be availed of by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, the only effect of the insertion of clause (f) is to regulate the deduction by putting it in a special provision.

Section 43B, however, is enacted to provide for deductions to be availed of by the assessee in lieu of liabilities accruing in a previous year without making actual payment to discharge it. It does not place any embargo upon the autonomy of the assessee in adopting a particular method of accounting, nor deprive the assessee of any lawful deduction. It merely operates as an additional condition for the availment of deduction qua the specified head.

Section 43B opens with a non obstante clause. A non obstante clause assumes an overriding character against any other provision of general application. Out of the allowable deductions, the Legislature consciously earmarked certain deductions from time to time and included them in the ambit of section 43B so as to subject such deductions to the conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of the mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the Legislature and its wisdom in doing so.

Section 43B initially included deductions in respect of sum payable by the assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. The Legislature inserted more deductions to section 43B including cess, bonus or commission payable by employer, interest on loans payable to financial institutions and scheduled banks, payment in lieu of leave encashment by the *employer and repayment of dues to the railways. There is no oneness or uniformity in the nature of deductions included in section 43B. It cannot be said that this section only provides for deductions concerning statutory liabilities. It is not unusual or abnormal for the Legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions. In the basic scheme of section 43B, there is no direct or indirect limitation upon the power of Legislature to include only particular type of deductions in the ambit of section 43B. An external examination of this journey of section 43B reveals that the Legislature never restricted it to a particular category of deduction and that intent cannot be read into the main section by the court, while sitting in judicial review. The broad objective of enacting section 43B concerning specified deductions referred to therein was to protect larger public interest primarily of revenue including welfare of the employees. Clause (f) fits into that scheme and shares sufficient nexus with the broad objective.*

The leave encashment scheme envisages the payment of a certain amount to the employees in lieu of their unused paid leaves in a year. The nature of this payment is beneficial and pro employee. It is not in the form of a bounty and forms a part of the conditions of service of the employee. An employer seeking deduction from tax liability in advance, in the name of discharging the liability of leave encashment, without actually extending such payment to the employee as and when the time for payment arises may lead to abhorrent consequences. When time for such payment arises, an employer may simply refuse to pay. The employee would be entangled in litigation claiming a hard-earned right and a double benefit would accrue to the employer. It is this mischief that clause (f) seeks to subjugate. The interpretation of a statute cannot be unrelated to the nature of the statute. In line with other clauses under section 43B, clause (f) was enacted to remedy a particular mischief and the concerns of public good, employees' welfare and prevention of fraud upon the Revenue are writ large in the clause. Such statutes are to be viewed through the prism of the mischief they seek to suppress.

HEYDON'S CASE [1584] 3 Co Rep 7 *and* STATE OF TAMIL NADU v. M. K. KANDASWAMY [1975] 36 STC 191 (SC) *applied.*

Clause (f) is in sync with other deductions specified in section 43B, which are also present and accrued liabilities. Irrespective of the category of liability, such deductions were regulated by law under the aegis of section 43B, keeping in mind the peculiar exigencies of *fiscal affairs and underlying concerns of public revenue. A priori, merely because a certain liability has been declared to be a present liability by the court, it does not follow that the Legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this court is misconceived.*

Decision of the Calcutta High Court in EXIDE INDUSTRIES LTD. *v.* UNION OF INDIA [2007] 292 ITR 470 (Cal) *reversed.*

Cases referred to :

Anant Mills Co. Ltd. *v.* State of Gujarat [1975] 2 SCC 175

Bhanumati *v.* State of Uttar Pradesh [2010] 12 SCC 1

Bharat Earth Movers *v.* CIT [2000] 245 ITR 428 (SC)

Exide Industries Ltd. *v.* Union of India [2007] 292 ITR 470 (Cal)

Gajapati Narayan Deo (K. C.) *v.* The State of Orissa [1954] SCR 1

Hari Singh *v.* The Military Estate Officer [1973] 1 SCR 515

Heydon's case [1584] 3 Co Rep 7

Indian Aluminium Co. *v.* State of Kerala [1996] 7 SCC 637

Kavalappara Kottarathil Kochuni *v.* States of Madras and Kerala AIR 1960 SC 1080

Kuldip Nayar *v.* Union of India [2006] 7 SCC 1

Manjula Bhashini (A.) *v.* Managing Director, A.P. Women's Cooperative Finance Corporation Ltd. [2009] 8 SCC 431

Sanjeev Coke Manufacturing Company *v.* Bharat Coking Coal Ltd. [1983] 1 SCC 147

State of Andhra Pradesh *v.* McDowell & Co. [1996] 3 SCC 709

State of Madhya Pradesh *v.* Rakesh Kohli [2012] 6 SCC 312

State of T. N. *v.* Arooran Sugars Ltd. [1997] 1 SCC 326

State of Tamil Nadu *v.* K. Shyam Sunder [2011] 8 SCC 737

State of Tamil Nadu *v.* M. K. Kandaswamy [1975] 36 STC 191 (SC)

State of West Bengal *v*. Union of India AIR 1963 SC 1241

Tata Power Co. Ltd. *v*. Reliance Energy Ltd. [2009] 16 SCC 659

United States *v*. Butler et al [1936] 297 US 1

Welfare Association A. R. P., Maharashtra *v*. Ranjit P. Gohil [2003] 9 SCC 358

Civil Appeal No. 3545 of 2009.

Appeal from the judgment and order dated June 27, 2007 of the Calcutta High Court in A. P. O. No. 301 of 2005. The judgment of the High Court is reported as Exide Industries Ltd. v. Union of India [2007] 292 ITR 470 (Cal).

K. K. Venugopal, Attorney General, ***Tushar Mehta*** and ***Ms. Madhavi Divan***, Additional Solicitors General (***Ms. Chinmayee Chandra***, ***Ms. Nidhi Khanna*** and ***Mrs. Anil Katiyar***, Advocates, with them) for the appellant.

Dr. Aman Hingorani and ***Basu***, ***Himanshu Yadav***, Advocates, for ***M/s. Hingorani & Associates***, Advocates, for the respondent.

[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

UNION OF INDIA AND ANOTHER

v.

U. A. E. EXCHANGE CENTRE

A. M. KHANWILKAR and AJAY RASTOGI JJ.

April 24, 2020.

SS ▶ ITA 1961, ss 2(13), (24), 5(2), 9(1)(i) ; DTAA (UAE), arts 5, 7

AY ▶ 2001-02, 2002-03 and 2003-04

HF ▶ Assessee

NON-RESIDENT—TAXABILITY IN INDIA—PERMANENT ESTABLISHMENT—ASSESSEE, A COMPANY INCORPORATED IN UNITED ARAB EMIRATES, OFFERING REMITTANCE SERVICES FOR TRANSFERRING AMOUNTS FROM UAE TO INDIA—FUNDS COLLECTED FROM NON-RESIDENT INDIAN REMITTER BY ASSESSEE IN UAE CHARGING ONE-TIME FEE—FUNDS REMITTED ON BEHALF OF NON-RESIDENT INDIAN CUSTOMER BY SENDING INSTRUMENTS OR CHEQUES THROUGH LIAISON OFFICES TO BENEFICIARIES IN INDIA—PARTICULARS OF REMITTANCES DOWNLOADED BY LIAISON OFFICE IN INDIA BY ACCESSING MAIN SERVERS OF ASSESSEE IN UAE—CHEQUES OR DRAFTS DRAWN ON BANKS IN INDIA PRINTED OUT AND THEREAFTER COURIERED OR DISPATCHED TO BENEFICIARIES IN INDIA, IN ACCORDANCE WITH INSTRUCTIONS OF NON-RESIDENT INDIAN REMITTER—ACTIVITIES OF LIAISON OFFICES OF PREPARATORY OR AUXILIARY CHARACTER—TRANSACTIONS COMPLETED WITH REMITTERS IN UAE —NO PERMISSION GIVEN BY RESERVE BANK OF INDIA TO ASSESSEE TO ENGAGE IN PRIMARY BUSINESS ACTIVITY AND ESTABLISH A BUSINESS CONNECTION—LIAISON OFFICE IN INDIA WOULD NOT QUALIFY AS PERMANENT ESTABLISHMENT—NO INCOME EARNED BY THE LIAISON OFFICE IN INDIA—EVEN IF ACTIVITIES OF LIAISON OFFICE REGARDED AS BUSINESS ACTIVITY, THEY WERE "OF PREPARATORY OR AUXILIARY CHARACTER" AND NOT AMENABLE TO TAX LIABILITY—INCOME-TAX ACT, 1961, SS. 2(13), (24), 5(2), 9(1)(I), *EXPLN. 2*—DOUBLE TAXATION AVOIDANCE AGREEMENT BETWEEN INDIA AND THE UNITED ARAB EMIRATES, ARTS. 5, 7.

The assessee-company was incorporated in the United Arab Emirates and offered remittance services for transferring amounts from the UAE to various places in India. It obtained approval from the Reserve Bank of India for establishing liaison offices in India subject to certain conditions such as that the offices in India would not undertake any other activity of a trading, commercial or industrial nature except the work mentioned in the approval letter, nor enter into any business contracts in its own name without prior permission, and that the entire expenses of the office in India would be met exclusively out of the funds received from abroad through normal banking channels. The assessee set up liaison offices in Cochin, Chennai, New Delhi, Mumbai and Jalandhar in India. The entire expenses of the liaison offices in India were met exclusively out of funds received from the UAE through normal banking channels. The liaison offices undertook no activity of trading, commercial or industrial, as the case may be. No fee or commission was charged or received in India by any of the liaison offices for services rendered in India. The remittance services were offered by the assessee to non-resident Indians, the funds were collected from the non-resident Indian remitter by the assessee in the UAE charging a one-time fee, and after collecting the funds from the non-resident Indian remitter, the assessee made an electronic remittance of the funds on behalf of its non-resident Indian customer in two ways : by telegraphic transfer through bank channels, or on the request of the non-resident Indian remitter, by sending instruments or cheques through its liaison offices to the beneficiaries in India, designated by the non-resident Indian remitter. In the second mode of remittance, the liaison office in India downloaded the particulars of remittances through electronic media and printing cheques or drafts drawn on the banks in India, which, in turn, were couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the non-resident Indian remitter. While doing this, the liaison office of the assessee remained connected with its main server in the UAE, as the information was contained in the main server thereat, which could be accessed by the liaison office in India for the purpose of remittance of funds to the beneficiaries in India by the non-resident Indian remitters. For the assessment year 1998-99 to 2003-04, the assessee filed returns showing nil income, on the basis that no income had accrued or deemed to have accrued to it in India, both under the Income-tax Act, 1961 as well as the Double Taxation Avoidance Agreement between India and the United Arab Emirates. The returns were accepted by the Department. The assessee, however, entertaining some doubts, filed an application before the Authority for Advance

Rulings seeking a ruling on the question whether any income accrued or was deemed to have accrued in India from the activities carried out by the company in India. The Authority answered the question in the affirmative, holding that income shall be deemed to accrue in India from the activity carried out by the liaison offices of the assessee in India as it had carried on business in India through a permanent establishment situated in India and the profits of the enterprise needed to be taxed in India, but only so much thereof as attributable to the liaison offices in India (see UAE Exchange Centre LLC, In re [2004] 268 ITR 9 (AAR)). Following the ruling of the Authority, the Department issued four notices under section 148 of the Act for the assessment years 2000-01, 2001-02, 2002-03 and 2003-04. The assessee filed a writ petition upon which the High Court held (see U. A. E. Exchange Centre Ltd. v. Union of India [2009] 313 ITR 94 (Delhi)) that the nature of activities carried on by the assessee in the liaison offices being only of preparatory and auxiliary character, they were clearly excluded by virtue of deeming provision, that the activity carried on by the liaison offices of the assessee in India did not in any manner contribute directly or indirectly to the earning of profits or gains by the assessee in the UAE, that every aspect of the transaction was concluded in the UAE, whereas, the activity performed by the liaison offices in India was only supportive of the transaction carried on in the UAE. The High Court quashed the ruling of the Authority and the notices issued by the Department under section 148 but gave liberty to the Department to proceed against the assessee on any other ground, as permissible in law. On appeal :

Held, dismissing the appeal, (i) that although the assessee was engaged in "business" and had "business connections", for which, by virtue of the deeming provision and the sweep of sections 2(24), 4 and 5 read with section 9 of the Act, it would be a case of income deemed to accrue or arise in India to the assessee., in the present case, the matter in issue had to be answered on the basis of the stipulations in Agreement notified in exercise of powers conferred under section 90 of the Act.

UNION OF INDIA *v.* AZADI BACHAO ANDOLAN [2003] 263 ITR 706 (SC) *applied.*

(ii) That the place from where the activities ware carried on by the assessee in India was a liaison office and would, therefore, be covered by the term permanent establishment in article 5(2) of the Double Taxation Avoidance Agreement between India and the United Arab Emirates. However, article 5(3) of the Agreement opens with a non obstante clause and predicates that notwithstanding the preceding provisions of the article, which would mean

paragraphs (1) and (2) of article 5, it would still not be a permanent establishment, if any of the clauses in article 5(3) are applicable. For that, the functional test regarding the activity in question would be essential. Assuming that the activities of the liaison offices of the assessee were business activities, since they were of preparatory or auxiliary character, they would fall within the excepted category under article 5(3)(e) of the Agreement. Resultantly, the liaison office could not be regarded as a permanent establishment within the sweep of article 7 of the Agreement. The crucial activities were of downloading particulars of remittances through electronic media and then printing cheques or drafts drawn on the banks in India, which, in turn, were couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the non-resident Indian remitter. While doing so, the liaison offices of the assessee in India remained connected with its main server in the UAE and the information residing thereat was accessed by the liaison office in India for the purpose of remittance of funds to the beneficiaries in India by the non-resident Indian remitters. These were a combination of virtual and physical activities unlike the virtual activity of funds being remitted by telegraphic transfer through banking channels. The permission given by the Reserve Bank of India to the assessee was limited to the activities which the assessee had been permitted to carry on within India. This permission did not allow the assessee to enter into a contract with anyone in India, but only to provide service of delivery of cheques or drafts drawn on the banks in India. The assessee was not to render any consultancy or any other service, directly or indirectly, with or without any consideration nor borrow or lend any money from or to any person in India without prior permission of the Reserve Bank of India. The conditions made it amply clear that the office in India could not undertake any other activity of trading, commercial or industrial, nor enter into any business contracts in its own name without prior permission of the Reserve Bank of India. The liaison office of the assessee in India could not even charge commission or fee or receive any remuneration or income in respect of the activities undertaken by the liaison office in India. The activities carried on by the liaison office of the assessee in India as permitted by the Reserve Bank of India, clearly demonstrated that the assessee could not engage in any primary business activity and establish a business connection as such. It could carry on activities of preparatory or auxiliary nature only. The activities in question of the liaison offices of the assessee in India were circumscribed by the permission given by the Reserve Bank of India and were of preparatory or auxiliary character and, therefore, covered by article 5(3)(e). As a result, the *fixed place used by the assessee as liaison office in India, would not qualify under the definition of permanent establishment in terms of article 5(1) and (2) of the Agreement on account of the non obstante and deeming clause in article 5(3) of the Agreement.*

DIT (INTERNATIONAL TAXATION) *v.* MORGAN STANLEY & CO. INC. [2007] 292 ITR 416 (SC) *applied.*

(iii) That thus, it followed that the assessee was not carrying on any business activity in India as such, but only dispensing the remittances by downloading information from the main server of the assessee in the UAE and printing cheques or drafts drawn on the banks in India in accordance with the instructions given by the non-resident Indian remitters in the UAE. The transactions had completed with the remitters in the UAE, and no charges towards fee or commission could be collected by the liaison office in India in that regard. To put it differently, no income as specified in section 2(24) of the Act was earned by the liaison office in India especially because the liaison office was not a permanent establishment in terms of article 5 of the Agreement (as it only carried on activity of a preparatory or auxiliary character). In that case, the deeming provisions in sections 5 and 9 of the Act could have no bearing whatsoever. No tax could be levied or collected from the liaison office of the assessee in India in respect of the primary business activities consummated by the assessee in the UAE.

(iv) That under Explanation 2 to section 9(1)(i) gives the meaning of the expressions "business connection" and "business activity". However, even if the activities of the liaison office of the assessee in India were regarded as business activity, they were "of preparatory or auxiliary character". By virtue of article 5(3)(e) of the Agreement, the fixed place of business (liaison office) of the assessee in India, otherwise a permanent establishment, was deemed to be expressly excluded from being so. And since by a legal fiction it was deemed not to be a permanent establishment of the assessee in India, it was not amenable to tax liability in terms of article 7 of the Agreement.

Decision of the High Court in U. A. E. EXCHANGE CENTRE LTD. *v.* UNION OF INDIA [2009] 313 ITR 94 (Delhi) *affirmed.*

Cases referred to :

Anglo-French Textile Co. Ltd. *v.* CIT [1953] 23 ITR 101 (SC)

Arabian Express Line Ltd. of United Kingdom *v.* Union of India [1995] 212 ITR 31 (Guj)

Asst. DIT *v*. E-Funds IT Solution Inc. [2017] 399 ITR 34 (SC)

CIT *v*. Davy Ashmore India Ltd. [1991] 190 ITR 626 (Cal)

CIT *v*. R. D. Aggarwal and Co. [1965] 56 ITR 20 (SC)

CIT *v*. R. M. Muthaiah [1993] 202 ITR 508 (Karn)

CIT *v*. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP)

DIT (International Taxation) *v*. Morgan Stanley & Co. Inc. [2007] 292 ITR 416 (SC)

Leonhardt Andra und Partner, GmbH *v*. CIT [2001] 249 ITR 418 (Cal)

U. A. E. Exchange Centre Ltd. *v*. Union of India [2009] 313 ITR 94 (Delhi)

UAE Exchange Centre LLC, In re [2004] 268 ITR 9 (AAR)

Union of India *v*. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)

Civil Appeal No. 9775 of 2011.

Appeal from the judgment and order dated February 13, 2009 of the Delhi High Court in W. P. No. 14869 of 2004. The judgment of the High Court is reported as *U. A. E. Exchange Centre Ltd.* v. *Union of India* [2009] 313 ITR 94 (Delhi).

Arijit Prasad, Senior Advocate (***Ms. Niranjana Singh***, ***Ms. Purnima Bhat***, Adv. ***Ms. Anil Katiyar*** and ***B. V. Balaram Das***, Advocates, with him) for the appellant.

H. P. Ranina, ***Vishnu B. Saharya***, ***Viresh B. Saharya***, ***Vivek B. Saharya***, ***Akshat Agarwal*** and ***M/s. Saharya & Co.***, Advocates, for the respondent.

[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

VODAFONE IDEA LTD. (EARLIER KNOWN AS VODAFONE MOBILE SERVICES LTD.)

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

UDAY UMESH LALIT and VINEET SARAN JJ.

April 29, 2020.

SS ▶ ITA 1961, ss 143(1), (1D), (2), 241A
AY ▶ 2014-15 to 2017-18
HF ▶ Department/Assessee

ASSESSMENT—RETURNS—PROCESSING—REFUNDS—POWER TO DECLINE PROCESSING OF RETURN CLAIMING REFUND—PRIMA FACIE ADJUSTMENTS—ASSESSMENT PURSUANT TO SCRUTINY NOTICE—DISTINCTION BETWEEN—PROCESSING OF RETURN WHETHER PERMISSIBLE AFTER SCRUTINY NOTICE—ASSESSEE CANNOT INSIST THAT PROCESSING BE COMPLETED AND REFUND MADE BEFORE SCRUTINY PURSUANT TO NOTICE COMPLETED—WHERE NOTICE ISSUED AND PROCEEDINGS INITIATED, PROCESSING OF "SHALL NOT BE NECESSARY" FOR ASSESSMENT YEARS ENDING ON MARCH 31, 2017 OR BEFORE—ISSUANCE OF NOTICE ITSELF SUFFICIENT—NO SEPARATE INTIMATION CONTEMPLATED THAT REFUND BEING WITHHELD PENDING SCRUTINY ASSESSMENT—CHANGE OF LAW—ASSESSMENT YEARS COMMENCING ON OR AFTER APRIL 1, 2017—CONDITIONS TO BE SATISFIED BEFORE REFUSING REFUND UNDER SECTION 143(1D)—SEPARATE RECORDING OF SATISFACTION BY ASSESSING OFFICER THAT REFUND LIKELY TO ADVERSELY AFFECT REVENUE AND PREVIOUS APPROVAL OF PRINCIPAL COMMISSIONER OR COMMISSIONER NECESSARY—INCOME-TAX ACT, 1961, SS. 143(1), (1D), (2), 241A.

Sub-section (1D) was inserted in section 143 of the Income-tax Act, 1961 by the Finance Act, 2012 to provide that processing of returns will not be necessary in cases where notice under sub-section (2) of section 143 has been issued for scrutiny of the return. With effect from April 1, 2017, sub-section (1D) and its proviso provide that with effect from assessment year 2017-18, processing under section 143(1) of the Act is to be done before the passing of the assessment order and that the provisions of the sub-section shall cease to apply *in respect of returns furnished for assessment year 2017-18 and onwards. A new section 241A was also inserted to provide that, for the returns furnished for assessment year commencing on or after April 1, 2017, where refund of any amount becomes due to the assessee under section 143(1) of the Act and the Assessing Officer is of the opinion that grant of refund may adversely affect the recovery of revenue, he may, for the reasons recorded in writing and with the previous approval of the Principal Commissioner or Commissioner, withhold the refund up to the date on which the assessment is made.*

Clause (a) of sub-section (1) of section 143 has six sub-clauses specifying the kinds of adjustments which are required to be made for computing the total income or loss. Upon causing such adjustments after due intimation or notice to the assessee, the element of tax, interest and fee is to be computed in terms of clause (b). Thereafter, in terms of clause (c), due credit to the amount of tax paid and any relief that is allowable is to be given and the net amount payable or to be refunded, is to be computed. The intimation to be generated under clause (d) is on the basis of such exercise and if any refund is due, it has to be granted in terms of clause (e). Thus, at every stage in sub-section (1) the return submitted by the assessee forms the foundation, with respect to which, if any of the inconsistencies referred to in various sub-clauses of clause (a) are found, appropriate adjustments are to be made. On the other hand, the exercise of power under sub-section (2) of section 143 of the Act, leading to the passing of an order sub-section (3) thereof, is to be undertaken where it is considered necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not under-paid the tax in any manner. The issuance of notice and consequent proceedings are premised on any of these three postulates. In other words, the return filed by the assessee itself calls for or requires a further probe and deeper consideration. Upon issuance of notice, the assessee is entitled to produce evidence in support of his case. After hearing the assessee and considering the evidence so produced, by an order in writing, assessment of total income or loss is to be made.

The nature of exercise of power under sub-section (1) as against that under sub-sections (2) and (3) is thus completely different. In the former case, the matter is processed, only to check whether any apparent inconsistencies are evident on the face of the return and connected material which may call for any adjustment while in the latter case, the matter is scrutinised after taking into account such evidence as the assessee may produce. The exercise in the latter case is to ensure that there is no understating of income or overstating of loss or *underpayment of the tax in any manner. In other words, the veracity of the return is checked threadbare rather than considering mere apparent inconsistencies from the return.*

The dimension of power under sub-sections (2) and (3) of section 143 of the Act is far greater and deeper than mere adjustments to be made in respect of what is available from the return. Once such scrutiny is undertaken and proceedings are initiated by issuance of a notice under sub-section (2) of section 143, it would be anomalous and incongruent that while such proceedings so initiated are pending, the return be processed under sub-section (1) of section 143, which may in a given case, entail payment of refund. Logically, the outcome of the exercise initiated through notice under sub-section (2) of section 143, must determine whether any refund is due and payable. If the return itself is under probe and scrutiny, such return cannot be the foundation to sustain a claim for refund till such scrutiny is complete. Considering the nature of power exercisable under these two limbs of section 143, the inescapable conclusion is that the processing of the return under sub-section (1) of section 143 must await the further exercise of power of scrutiny assessment under sub-sections (2) and (3) of section 143. If the power under sub-section (2) of section 143 of the Act is initiated in a manner known to law, there cannot be any insistence that the processing under sub-section (1) of section 143 be completed and refund be made before the scrutiny pursuant to notice under sub-section (2) of section 143 is over.

This conclusion is fortified and strengthened by clear stipulation to that effect in sub-section (1D) of section 143. The legislative intent is clear from the expression, "the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2)" and by use of the non obstante clause. Though the period for which it would not be necessary to process the return was sought to be specified by the Finance Act, 2016, the mere absence of such period in the provision as it stands today, makes no difference. The intent of the Parliament is that in cases where notice under sub-section (2) is issued and proceedings are initiated, the processing of a return under sub-section (1) shall not be necessary. The intent to have the general principle emanating from sub-section (1) of section 143 overridden, in cases where proceedings are initiated pursuant to notice under sub-section (2) of the Act, is emphasised by use of the non obstante clause in sub-section (1D) and the expression "it shall not be necessary". Therefore, in respect of assessment years ending on March 31, 2017 or before, if a notice was issued in conformity with the requirements stated in sub-section (2) of section 143 of the Act, it shall not be necessary to process the refund *under sub-section (1) of section 143 of the Act and the requirement to process the return shall stand overridden.*

VAISHALI ABHIMANYU JOSHI v. NANASAHEB GOPAL JOSHI [2017] 14 SCC 373 applied.

Issuance of notice under sub-section (2) itself is sufficient indication that the matter is being considered from the perspective whether there is any avoidance of tax in any manner. Sub-section (1D) of section 143 of the Act does not contemplate either issuance of any such intimation or further application of mind that the processing must be kept in abeyance. It would not, therefore, be proper to read into the provision the requirement to send a separate intimation. Issuance of notice under sub-section (2) of section 143 is enough to trigger the required consequence. No other intimation is either contemplated by the statute or achieve any purpose.

However, in respect of assessment years commencing on or after April 1, 2017, section 241A of the Act requires a separate recording of satisfaction on part of the Assessing Officer that having regard to the fact that a notice has been issued under sub-section (2) of section 143, the grant of refund is likely to adversely affect the Revenue ; whereafter, with the previous approval of the Principal Commissioner or Commissioner and for reasons to be recorded in writing, the refund can be withheld. Since the statute envisages exercise of power of withholding of refund in a particular manner for assessment years commencing after April 1, 2017 the requirements of section 241A of the Act must be satisfied.

For assessment years 2014-15 and 2015-16, the assessee filed its returns claiming refunds of Rs. 1532.09 crores, Rs. 1355.51 crores and Rs. 1128.47 crores respectively. The assessee filed revised returns of income pertaining to the assessment year 2014-15 and the assessment year 2015-16 on March 31, 2016 and November 25, 2016 respectively, claiming refunds of Rs. 1,532.09 crores and Rs. 1,355.51 crores, respectively. It filed its return for the assessment year 2016-17, claiming refund of Rs. 1,128.47 crores filed on November 30, 2016. Subsequently, in view of the advance pricing agreement dated November 18, 2016 entered into with the Central Board of Direct Taxes under section 92CC of the Act, it filed a modified return for the assessment year 2014-15 on February 22, 2017. Notices under section 143(2) of the Income-tax Act, 1961 were issued to the assessee within the specified time in respect of these assessment years. By letters dated July 24, 2017 and September 19, 2017, the assessee communicated to the Department that it was under immense financial stress and, therefore, the returns should be processed forthwith. It filed its return for the assessment year 2017-18 *on November 25, 2017 claiming a refund of Rs. 743.67 crores. On the ground that there was complete inaction on the part of the Department in processing the returns filed by the assessee and in issuing appropriate refunds to the assessee, the assessee filed a writ petition. During the pendency of the writ petition, the Assistant Commissioner issued a letter dated July 23, 2018 stating that exercising the powers under sections 143(1D) and 241A of the Act, the processing of returns under section 143(1) was declined. In the meantime, a revised return was filed by the assessee for assessment year 2017-18 claiming refund of Rs. 744.94 crores. Notice under section 143(2) was issued thereafter for this year. On March 14, 2019 an intimation was sent to the assessee by the Assistant Commissioner stating that refund for the assessment year 2017-18 had been withheld till the completion of scrutiny proceedings under section 143(3) or 144C read with 143(3) of the Act. For the assessment years 2014-15 and 2015-2016, the assessee's objections against the draft assessment orders were disposed of and final assessment orders under section 143(3) of the Act were passed on October 31, 2019, holding the assessee entitled to refund of Rs. 733 crores (approximately) in respect of assessment year 2014-15, and raising a demand in the sum of Rs. 582 crores (approximately) for assessment year 2015-2016. In an appeal preferred by the assessee, the demand for assessment year 2015-16 was stayed by the Appellate Tribunal. The High Court dismissed the writ petition. On appeal to the Supreme Court :*

Held, (i) that the Department had conceded that the order dated July 23, 2018 passed under section 143(1D) of the Act in respect of assessment year 2017-18 was without jurisdiction, as by that time no order under section 143(2) of the Act for that assessment year had been passed. In the circumstances, a fresh order was passed on March 14, 2019 after due compliance with the statutory requirements. The record showed that all the antecedent steps leading to the order were taken in accordance with law and settled practice : the intimation under section 143(1) was sent to the email address provided by the assessee, and the intimation stated that refund determined under section 143(1) in the intimation was withheld in terms of the proviso to section 241A and that the refund if any would be released on completion of the assessment under section 143(3)/144(4) as the case may be, with interest under section 244A and subject to adjustment of arrears demand, if any under section 245.

(ii) That the submission that the intimation dated July 23, 2018 must be held to be invalid, inter alia, on the ground that it was issued well after the period within which the return was required to be processed under sub-section (1) of section 143 of the Act, was not

tenable, in respect of assessment years 2014- 15 to 2016-17.

(iii) That in terms of the second proviso to sub-section (1) of section 143 of the Act, the required intimation under the sub-section must be given before the expiry of one year from the end of the financial year in which the return is made. In respect of the assessment year 2017-18, the return having been filed on November 25, 2017, the period available in terms of the second proviso was up to March 31, 2019, without taking into account the fact that a revised return was filed on July 13, 2018. The exercise of power on March 14, 2019 was not only after issuance of notice under sub-section (2) of section 143 and after recording due satisfaction in terms of section 241A of the Act, but was also well within the period contemplated by sub-section (1) of section 143 of the Act for causing due intimation.

(iii) That whether the satisfaction recorded in terms of said section 241A of the Act was otherwise correct or not and whether or not a case for withholding of refund was made out, were not issues for consideration by the court. There was nothing in the exercise of power that led to the passing of the order dated March 14, 2019 which could be said to have violated any statutory requirements.

(iv) That for assessment year 2014-15 the final assessment order passed under section 143(3) of the Act indicated that the assessee was entitled to refund of Rs. 733 crores, while for assessment year 2015-16 there was a demand for Rs. 582 crores.

[The court directed refund of the amount of Rs. 733 crores within four weeks from today subject to any proceedings that the Department may deem appropriate to initiate in accordance with law. The court also directed the Department to conclude the proceedings initiated pursuant to notices under sub-section (2) of section 143 of the Act in respect of assessment years 2016-17 and 2017-18 as early as possible.]

Decision of the Delhi High Court in VODAFONE MOBILE SERVICES LTD. *v.* ASST. CIT [2020] 421 ITR 193 (Delhi) *affirmed subject to directions.*

Cases referred to :

Brij Kishore Sharma *v.* Ram Singh and Sons [1996] 11 SCC 480

CIT *v.* Gujarat Electricity Board [2003] 260 ITR 84 (SC)

Dy. CIT *v.* Zuari Estate Development and Investment Co. Ltd. [2015] 373 ITR 661 (SC)

Group M. Media India (P) *v.* Union of India [2016] 388 ITR 594 (Bom)

Gujarat Poly-AVX Electronics Ltd. *v.* Dy. CIT (Asstt.) [1996] 222 ITR 140 (Guj)

Mohd. Ibrahim *v.* The State Transport Appellate Tribunal, Madras AIR 1970 SC 1542 ; [1970] 2 SCC 233

Rasammal Issetheerammal Fernandez, etc. *v.* Joosa Mariyam Fernandez [2000] 7 SCC 189

Sohanlal *v.* Amin Chand and Sons [1973] 2 SCC 608 ; AIR 1973 SC 2572 ; [1974] 1 SCR 453

Tata Teleservices Ltd. *v.* CBDT [2016] 386 ITR 30 (Delhi)

Union of India *v.* G. M. Kokil [1984] Supp. SCC 196

Upper India Cable Co. *v.* Bal Kishan [1984] 3 SCC 462 ; AIR 1984 SC 1381

Vaishali Abhimanyu Joshi *v.* Nanasaheb Gopal Joshi [2017] 14 SCC 373

Vodafone Mobile Services Ltd. *v.* Asst. CIT [2020] 421 ITR 193 (Delhi)

Civil Appeal No. 2377 of 2020.

Appeal from the judgment and order dated December 14, 2018 of the Delhi High Court in Writ Petition (Civil) No. 2730 of 2018. The judgment of the High Court is reported as *Vodafone Mobile Services Ltd*. v. *Asst. CIT* [2020] 421 ITR 193 (Delhi).

J. D. Mistri, Senior Advocate (***Ms. Anuradha Dutt***, ***Ms. Fereshte D. Sethna***, ***Sachit Jolly***, ***Rohit Garg***, ***Siddharth Joshi*** and ***Ms. B. Vijayalakshmi Menon***, Advocates, with him) for the appellant.

Mr. Zoheb Hossain, ***Saurabh Mishra***, ***Piyush Goyal***, ***Vivek Gurnani*** and ***Mrs. Anil Katiyar***, Advocates, for the respondent.

[Under processing—To be published shortly]

[IN THE SUPREME COURT OF INDIA]

YUM! RESTAURANTS (MARKETING) PRIVATE LIMITED

v.

COMMISSIONER OF INCOME-TAX

A. M. KHANWILKAR and DINESH MAHESHWARI JJ.

April 24, 2020.

SS ▶ ITA 1961, s 2(24)
AY ▶ 2001-02
HF ▶ Department

INCOME—PRINCIPLE OF MUTUALITY—TESTS—ASSESSEE INCORPORATED AS FULLY OWNED SUBSIDIARY OF PARENT COMPANY WITH APPROVAL FROM SECRETARIAT FOR INDUSTRIAL ASSISTANCE—APPROVAL SUBJECT TO CONDITIONS THAT IT WOULD OPERATE ON NON-PROFIT BASIS ON PRINCIPLES OF MUTUALITY—ASSESSEE ENTERING INTO TRIPARTITE OPERATING AGREEMENT WITH PARENT COMPANY AND ITS FRANCHISEES—ASSESSEE RECEIVING FIXED CONTRIBUTIONS OF 5 PER CENT. OF GROSS SALES FROM FRANCHISEES FOR ADVERTISING, MARKETING AND PROMOTIONAL ACTIVITIES FOR MUTUAL BENEFIT OF PARENT COMPANY AND FRANCHISEES—ASSESSEE REALISING MONEY BOTH FROM MEMBERS AS WELL AS NON-MEMBERS—RECEIPT OF MONEY FROM OUTSIDE ENTITY WITHOUT AFFORDING IT RIGHT TO SHARE IN SURPLUS CONTRARY TO PRINCIPLES OF MUTUALITY—MANAGEMENT OF ASSESSEE UNDER FULL AND ABSOLUTE CONTROL OF PARENT COMPANY—PARENT COMPANY ENJOYING OVERRIDING DISCRETION TO DETRIMENT OF FRANCHISEES BOTH IN MATTERS OF CONTRIBUTION AND MANAGEMENT—FRANCHISEES HAVING NO "ENTITLEMENT" OR "RIGHT" ON SURPLUS—DERIVATION OF GAINS OR PROFITS OUT OF INPUTS SUPPLIED BY OTHERS—NO OBLIGATION ON ASSESSEE TO SPEND CONTRIBUTIONS FOR BENEFIT OF CONTRIBUTORS—ASSESSEE NOT HOLDING AMOUNT UNDER ANY IMPLIED TRUST FOR FRANCHISEES—PURPORTED MUTUAL CONCERN UNDERTOOK COMMERCIAL VENTURE WHEREIN CONTRIBUTIONS WERE ACCEPTED BOTH FROM MEMBERS AS WELL AS NON-MEMBERS—CONDITIONS OF APPROVAL VIOLATED—

ASSESSEE NOT A MUTUAL CONCERN—NO CASE FOR EXEMPTION—INCOME-TAX ACT, 1961, S. 2(24).

The doctrine of mutuality traces its origin from the basic principle that a man cannot engage into a business with himself. For that reason, it is deemed in law that if the identity of the seller and the buyer, or the vendor and the consumer, or the contributor and the participator is marked by oneness, a profit motive cannot be attached to such a venture. Thus, for the lack of a profit motive, the excess of income over the expenditure or the "surplus" remaining in the hands of such a venture cannot be regarded as "income" taxable under the Income-tax Act, 1961. What is taxable under the Act is "income" or "profits" or "gains" as they accrue to a person in his dealings with other party or parties that do not share the same identity with the assessee. For income, there is an underlying exchange of a commercial nature between two different entities.

The three conditions or tests to prove the existence of mutuality are : (i) identity of the contributors to the fund and the recipients from the fund ; (ii) treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate ; and (iii) impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

The first element involves the test of commonality of identity between the members or participators in the mutual concern and the beneficiaries thereof. Succinctly put, this limb requires that no person ought to contribute to the common fund without having the entitlement to participate as a beneficiary in the surplus thereof. Conversely, no person ought to participate as a beneficiary without first having been a contributor or a member of the class of contributors to the common fund. Common identity signifies that the class of members should stay intact as the transaction progresses from the stage of contributions to that of returns and surplus. It must manifest uniformity in the class of participants in the transaction. The moment such a transaction opens itself to non-members, either in the contribution or the surplus, the uniformity of identity is impaired and the transaction assumes the taint of a commercial transaction. The doctrine of mutuality does not prohibit the inclusion or exclusion of new members. What is prohibited is the infusion of a participant in the transaction who does not become a "member" of the common fund, at par with other members, and yet participates either in the contribution or surplus without subjecting itself *to mutual rights and obligations. The principle of common identity prohibits any one-dimensional alteration in the nature of participation in the mutual fund as the transaction fructifies. Any such alteration would lead to the non-uniform participation of an external element or entity in the transaction, thereby opening the scope for a manifest or latent profit-based dealing in the transaction with parties outside the closed circuit of members. It would be amenable to income tax in terms of section 2(24) of the Act.*

Coterminous with the requirement of common identity, the law also contemplates a completeness of identity between the contributors and participators. The theory of completeness of identity presupposes the contributors and participators to be two separate classes, but there is oneness or equality in the matter of sharing of surplus/profits. This is to ensure that there is no interference of any alien commercial entity in the transaction. With the interference of any alien entity, the idea of conducting business with oneself is defeated and any profits or gains accruing therefrom become subject to tax liability.

The factual determination of whether an entity is a mutual concern on a case to case basis poses a complex issue that requires deeper examination. In order to determine the breach in mutuality, the court is well within its powers to go beyond the periphery of the concern and undertake an examination akin to the lifting of the veil in order to discern the real nature thereof.

The members of a financial concern exercise mutual control over its management without the scope of prejudicial exercise of power by one class of members over the others is the quintessence for the existence of a mutual concern. Literally understood, the word "mutual" points towards reciprocity and a mutual arrangement is one in which the members and parties have reciprocal rights or understanding or arrangement. An arrangement wherein one member is subjected to the absolute discretion of another, in such a manner that the entire liability may fall upon one whereas benefits are reaped by all, is antithesis to the mutual character in the eyes of law.

Although every member of the mutual concern might not be required to contribute to the common pool at all times, this does not mean that one member cannot be made to contribute under any pretext whatsoever. For, that would amount to the grant of an overriding position to a member in the mutual agreement, extending up to even overruling the requests for contribution from other members for mutual necessity. It is this all-pervasive overriding position of one member over the others that negates the effect of mutuality. There *is a fine line of distinction between absence of obligation and presence of overriding discretion. In a mutual concern, it is no doubt true that an obligation to pay may or may not be there, but in the same breath, it is equally true that an overriding discretion of one member over others cannot be sustained, in order to preserve the real essence of mutuality wherein members contribute for the mutual benefit of all and not of one at the cost of others.*

In order to qualify as a mutual concern, the contributors to the common fund either acquire a right to participate in the surplus or an entitlement to get back the remaining proportion of their respective contributions. The raison d'etre behind the refund of surplus to the contributors or mandatory utilisation thereof in the subsequent assessment year is to reduce their burden of contribution in the next year proportionate to the surplus remaining from the previous year. Thus, the fulfilment of this condition becomes essential.

The doctrine of mutuality, in principle, entails that there should not be any profit earning motive, either directly or indirectly. The third test of mutuality requires that the purported mutual operations must be marked by an impossibility of profits.

The exemption granted to a mutual concern is premised on the assumption that the concern is being run for the mutual benefit of the contributors and the contributions made by the members ought to be directed in that direction.

The doctrine of mutuality bestows a special status to qualify for exemption from tax liability. It is a settled proposition of law that exemptions are to be put to strict interpretation.

The assessee-company was incorporated by YRIPL as its fully owned subsidiary after having obtained approval from the Secretariat for Industrial Assistance for the purpose of economisation of the cost of advertising and promotion of the franchisees as per their needs. The approval was granted subject to certain conditions as regards the functioning of the assessee, whereby it was obligated to operate on a non-profit basis on the principles of mutuality. In furtherance of the approval, the assessee entered into a tripartite operating agreement with YRIPL and its franchisees, whereunder the assessee received fixed contributions to the extent of 5 per cent. of gross sales for the proper conduct of the advertising, marketing and promotional activities for the mutual benefit of the parent company and the franchisees. For the assessment year 2001-02, the assessee filed its returns showing nil on the principle of mutuality. This was not accepted by the Assessing Officer, the Commissioner Appeals) or the Tribunal on the finding that the essential ingredients of *the doctrine of mutuality to be missing. The consistent opinion recorded by the three forums was approved in appeal by the High Court. On further appeal :*

Held, dismissing the appeal, (i) that P was a contributor to the common pool of funds but did not participate in the surplus as a beneficiary, because it was not a member of the purported mutual concern as the tripartite agreement and the terms of the SIA approval permitted only franchisees to become members of the mutual concern. P was not a franchisee and thus, could not participate in the surplus. P did not enjoy any right of participation in the surplus or any right to receive back the surplus which are mandatory ingredients to sustain the principle of mutuality. Moreover, the tripartite agreement required the assessee to constitute a separate brand fund for each franchisee. Since no brand fund had been constituted for P, it did not become a part of the tripartite mutual arrangement so as to qualify as a beneficiary of the mutual operations. For any amount received by the assessee to be treated as an advertising contribution, it must be paid by a franchisee, that too pursuant to a prior franchisee agreement to that effect. There was no such franchisee agreement with P and therefore, the amounts received from P could not be viewed as advertising contributions "from a member of the mutual undertaking". Therefore, the assessee was realising money both from members as well as non-members in the course of the same activity. Such operations were antithetical to mutuality. Even if any remote or indirect benefit was being reaped by P, that could not be said to be in lieu of its being a member of the purported mutual concern. The surplus of a mutual operation is meant to be utilised by the members of the mutual concern as members enjoy a proximate connection with the mutual operation. Non-members, including P, stood on a different footing and had no proximate connection with the affairs of the mutual concern.

(ii) That the receipt of money from an outside entity without affording it the right to have a share in the surplus also contravened the other two conditions for the existence of mutuality, i. e., impossibility of profits and obedience to the mandate. The mandate of the assessee was laid down in the SIA approval wherein the twin conditions of mutuality and non-profiteering were envisioned as the sine qua non for the functioning of the assessee. The contributions made by P tainted the operations of the assessee with commerciality and concomitantly contravened the pre-requisites of mutuality and non-profiteering.

(iii) That the mutuality and non-profiteering character of a concern were to be determined in light of its actual working structure and the factum of corporation or

incorporation or the form in which it is clothed was immaterial. According to the terms of the SIA approval, YRIPL and the franchisees were equally obligated to make contribution of a fixed percentage to the assessee. This requirement was incorporated as a pre-condition for the grant of permission to operate as a mutual concern. However, the tripartite agreement made it discretionary upon YRIPL to contribute to the common pool, thereby putting it at a higher pedestal than the franchisees. Thus the tripartite agreement was not in conformity with the terms of the approval. Furthermore, the management of the assessee was under the full and absolute control of its parent company YRIPL and the participation of the franchisees in the management of the assessee was again subject to approval by YRIPL. The net effect was to render the pre-conditions for the grant of approval otiose. YRIPL and the franchisees stood on two substantially different footings. Moreover, even upon request for the grant of funds by the assessee, YRIPL was not bound to accede to the request and enjoyed a "sole and absolute" discretion to decide against such request.

(iv) That YRIPL enjoyed the an overriding discretion to the detriment of the franchisees of the purported undertaking, both in matters of contribution and management.

(v) That the franchisees did not enjoy any "entitlement" or "right" on the surplus remaining after the operations had been carried out for a given assessment year. The assessee might refund the surplus subject to the approval of its board of directors. This implied that the franchisees or contributors could not claim a refund of their remaining amount as a matter of right. Even if any surplus remained in a given assessment year, it was unlikely to reduce the liability of the franchisees in the following year as their liability to the extent of 5 per cent was fixed and non-negotiable, irrespective of whether any funds were in surplus in the previous year. The only entity that could derive any benefit from the surplus funds was YRIPL, i.e. the parent company. This was antithetical to the third test of mutuality.

(vi) That the dispensation predicated in the tripartite agreement may entail in a situation where YRIPL would not contribute even a single penny to the common pool and yet be able to derive profits in the form of royalties out of the purported mutual operations, created from the fixed 5 per cent contribution made by the franchisees. This would be nothing short of derivation of gains or profits out of inputs supplied by others. That was violative of the basic essence of mutuality. Furthermore, the tripartite agreement relieved the assessee from any specific obligation of spending the amounts received by way of contributions for the benefit of the contributors. The assessee did not hold such amount under any implied trust for

the franchisees. A priori, it must follow that the assessee had acted in contravention of the terms of approval. Notably, the SIA approval or Government approval was not only a binding document but also a conditional document with a defined set of preconditions for the functioning of the assessee as a mutual concern. The SIA approval categorically was subject to the terms and conditions specified therein and any contravention thereof would be infraction of the mandate of the government approval.

(vii) That the assessee's argument that no fixed percentage of contribution could be imputed upon YRIPL as it did not operate any restaurant directly and thus, the actual volume of sales could not be determined was tenable as YRIPL received a fixed percentage of royalty from the franchisees on the sales. If the franchisees could be obligated with a fixed percentage of contribution, there was no reason why the same obligation ought not to apply to YRIPL. The assessee was formed to manage business on behalf of the holding company. In its true form, it was not contemplated as a non-business concern because operations integral to the functioning of a business were entrusted to it.

(viii) The assessee having failed to fulfil the stipulations and to prove the existence of mutuality, the question of extending exemption from tax liability to the assessee did not arise. The purported mutual concern undertook a commercial venture wherein contributions were accepted both from the members as well as non-members. Moreover, one member was vested with a myriad set of powers to control the functioning and interests of other members (franchisees), even to their detriment. Such an assimilation was not a case of ordinary social intercourse devoid of commerciality.

(ix) That the question of diversion by overriding title was neither framed nor agitated in the appeal before the High Court or before the court and neither the Tribunal nor the High Court had dealt with that plea. The rectification application raising that ground was still undecided and stated to be pending before the Tribunal. It was open to the assessee to pursue the rectification application, if so advised.

CIT *v.* BANKIPUR CLUB LTD. [1997] 226 ITR 97 (SC), BANGALORE CLUB *v.* CIT [2013] 350 ITR 509 (SC), ENGLISH AND SCOTTISH JOINT COOPERATIVE WHOLESALE SOCIETY LTD. *v.* CAIT [1948] 16 ITR 270 (PC) *and* CIT *v.* ROYAL WESTERN INDIA TURF CLUB LTD. [1953] 24 ITR 551 (SC) *relied on*.

Decision of the Delhi High Court (printed below) *affirmed.*

Cases referred to :

Associated Power Co. Ltd. *v.* CIT [1996] 218 ITR 195 (SC)

Bangalore Club *v.* CIT [2013] 350 ITR 509 (SC)

CIT *v.* Royal Western India Turf Club Ltd. [1953] 24 ITR 551 (SC)

CIT *v.* Bankipur Club Ltd. [1997] 226 ITR 97 (SC)

CIT *v.* Sitaldas Tirathdas [1961] 41 ITR 367 (SC)

CIT *v.* Travancore Sugars and Chemical Ltd. [1973] 88 ITR 1 (SC)

Dalmia Cement Ltd. *v.* CIT [1999] 237 ITR 617 (SC)

English and Scottish Joint Cooperative Wholesale Society Ltd. *v.* CAIT [1948] 16 ITR 270 (PC)

New York Life Insurance Co. *v.* Styles (Surveyor of Taxes) [1889] 2 TC 460

Yum! Restaurants (India) P. Ltd. *v.* CIT [2010] 327 ITR 150 (Delhi)

Civil Appeal No. 2847 of 2010.

Appeal from the judgment and order dated April 1, 2009 of the Delhi High Court in I. T. A. No. 1433 of 2008. The judgment of the High Court (VIKRAMAJIT SEN and RAJIV SHAKDHER JJ.) ran as follows :

"JUDGMENT

1. This is an appeal preferred by the assessee-company under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") against the judgment dated 31.01.2008 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") in I. T. A. No. 3235/Del/2005 pertaining to assessment year 2001-02.

2. The only issue which arose in this case is with respect to the taxability of Rs 44,44,002 being excess amount of income over expenditure. The said surplus had arisen on account of advertisement contributions received from the holding company of the assessee-company which remained unexpended.

2.1 The broad facts with respect to the above case have been delineated in the connected appeal entitled *Yum! Restaurants (India) Pvt Ltd* v. *CIT*, being I. T. A. No. 192 of 2009, which was heard along with the present appeal. Judgment was reserved in both the appeals. (See *Yum! Restaurants (India) P. Ltd*. v. *CIT* [2010] 327 ITR 150 (Delhi).

3. Briefly, the parent company, that is, Yum! Restaurants (India) Pvt Ltd (in short "YRIPL") formerly known as Tricon Restaurants India Pvt Ltd was incorporated on March 17, 1994. YRIPL had a licence arrangement with Kentucky Fried Chicken International Holdings, Inc. (in short "KFC") and Pizza Hut International LLC (in short "PHILLC"). YRIPL sought permission from the Government of India, Ministry of Industry, Department of Industrial Policy and Promotion, Secretariat for Industrial Assistance (SIA), Foreign Collaboration, for setting up a wholly owned step-down

subsidiary to manage retail restaurant business, for advertising and promotion at local store level, regional level and national level. By a letter dated October 5, 1998, the SIA granted approval to YRIPL to set up a step-down wholly-owned subsidiary on the basis of a broad framework indicated by YRIPL. The broad framework being that the proposed new subsidiary company would be a non-profit enterprise which would be governed by the principles of mutuality. The wholly owned subsidiary, as indicated by YRIPL, was being set up to carry out and economise the cost of advertising and promotion by catering to the specific needs of its franchisees in order to enable them to concentrate on restaurant operations and management. The approval was granted on the condition that the subsidiary would be a non-profit enterprise and that it would not repatriate its dividends out of the country.

3.1 Upon receiving the requisite permission the assessee-company was incorporated on June 8, 1999.

3.2 In September, 2000, YRIPL, the assessee-company, as well as the franchisees entered into tripartite agreements. Under the agreement the assessee-company received contributions from the franchisees as well as the franchisees of YRIPL to the extent of 5 per cent. of the gross sales in order to carry on co-operative advertising. The agreement also envisaged that the purpose of incorporating the assessee-company was really to carry the marketing activities of each of the brands of which YRIPL was a licensee for the mutual benefit of the franchisees. The entire activity of the assessee-company was to be carried out on no-profit basis and that the assessee-company was obliged not to repatriate any dividends. The broad purpose of the agreement is best encapsulated in the following clauses:-

"2.2 TRIM will establish and operate brand funds in respect of each brand for the purpose of allocating and using the advertising contribution received from franchisee and other franchisee of Tricon operating restaurants under the brands. TRIM will allocate the advertising contribution received from the franchisees including franchisee for each restaurant to the respective brand funds established for that brand. It is agreed between the parties that the advertising contribution paid into a brand fund will be used for the AMP activities relating to that brand.

3.1 As and from the effective date, franchisee will pay the advertising contribution of 5 per cent. of revenue for a particular month into the bank account of the brand fund established by TRIM by the tenth day of the following month. Details of the bank account of each brand fund set up by TRIM will be notified to franchisee by TRIM from time to time. Notwithstanding the aforesaid the executive committee of any brand (constituted under article 7 of this agreement) may, by a three fourth majority, which shall be binding on all franchisees of Tricon including the franchisee, require the franchisee to pay the advertising contribution in advance. For the avoidance of doubt it is clarified and agreed that while recommending advance payment of advertising contribution the chairman will not have a casting vote.

Franchise will spend an additional 1 per cent. of revenues, in the manner directed by Tricon and/or TRIM in writing from time to time, on such local store marketing, advertising, promotional and research expenditure proposed by franchisee and approved in advance by Tricon and/or TRIM during the relevant accounting period, in accordance with the requirements and guidelines set out in the manuals, provided that if franchisee fails to spend the full amount as directed by Tricon and/or TRIM franchisee will pay the unspent amount to TRIM within the period specified in a written demand from TRIM. Upon receipt of the unspent amount TRIM will spend the amount on regional and/or national advertising, promotions or research expenditure conducted by TRIM in its discretion.......”

4.1 Tricon may at the request of TRIM, but subject to Tricon’s sole and absolute discretion pay to TRIM any such amount(s) as it may deem appropriate to support the AMP activities during any accounting period. For the avoidance of doubt, it is clarified and agreed between the parties that Tricon shall have no obligation to pay any such amounts if it chooses not to do so.

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8.4 In the event there is any surplus left over in any of the brand funds at the end of an accounting period, TRIM shall be entitled to retain the surplus to be spent on AMP activities during the following accounting period. Alternatively, TRIM may, subject to the approval of its board of directors refund the surplus amounts to the franchisees including franchisee in the same proportion as the actual advertising contribution made by each franchisee including franchisee in that accounting period.

On the other hand, if there is a deficit in any of the brand funds at the end of an accounting period, the deficit will be carried forward to the next accounting period and be met out of the advertising contribution paid by the franchisees including franchisee for that accounting period. For the avoidance of doubt, it is agreed between the parties that Tricon and/or TRIM shall not be obliged to fund the deficit.

8.5 It is clearly understood and agreed between the parties that the only objective of TRIM is to coordinate the marketing activities of the brands including the mutual benefit of the franchisees including the franchisee. It is envisaged that no profits will be earned and no dividends will be declared by TRIM."

3.3 It is in this background that on October 31, 2001 the assessee-company filed its return for assessment year 2001-02. On August 27, 2002 the assessee's return was processed under section 143(1) of the Act. On October 24, 2002 the assessee's case was picked up for scrutiny and a notice under section 143(2) of the Act was issued to the assessee-company. During the course of scrutiny, queries were raised with the representatives of the assessee-company, whereupon it was revealed that the assessee-company had an excess income over expenditure amounting to Rs 44,44,002. However, the gross total income had been declared as "nil". The income and expenditure account as recorded in the order of the Assessing Officer read as follows :

"INCOME	
Advertising contribution from franchises, Holding company and key associates	26469546
EXPENDITURE	
Advertising, Marketing and Promotional Expenditure	21256032
Preliminary expenses	454992
Administrative and other expenses	190272
21901296	
Excess of expenditure carried forward from the Previous year	(124248)
Excess of income/ (Expenditure) over (expenditure)/income carried forwarded to the Balance sheet (included under current Liabilities)"	4444002

3.4 With the return the assessee-company had appended the notes broadly indicating that it was operating on principles of mutuality and on "no-profit" basis. The note further read that there was a complete identity between the contributors and the receipts of the fund, that is, the assessee-company. The assessee-company rendered services exclusively to the franchisees and that the franchisees had exclusive right over the surplus. The outlet of the franchisee did not derive any profit from the funds. The funds of the assessee-company could only be used for meeting expenses on their behalf or be returned to them.

4. The Assessing Officer examined the case law and the details submitted by the assessee-company. The Assessing Officer after examining the contents of the SIA approval granted vide letter dated October 5, 1998 and the contents of the tripartite agreement returned the following finding of facts :

"It was seen from the details filed by the assessee company that in terms with the approval SIA as per clause 3 as reproduced above in para VI.1, YRIPL and the franchisees will contribute fixed percentage of their revenues to the proposed new company, i. e., the assessee. Whereas clause 4.1 of the tripartite operating agreement as reproduced above in para VI.2, provides that YRIPL has no obligation to contribute any amount which is contradictory to the terms of approval of SIA.

Separate funds were to be maintained for KFC and Pizza Hut brands. Further as per clause 5.1 as reproduced above in para VI.2 of the operating agreement provides that bank account of each brand fund established by assessee-company will be notifying to the franchisee and the franchisee will paying the advertising contribution of 5 per cent. of revenues for a particular month into such bank account. However, it was seen brand funds was established by assessee-company. In fact, YRIPL continued to receive the advertising contribution from the franchisee as was being done by it prior to setting up of assessee-company. This findings shows that assessee-company has been used as a tool to evade tax on excess of income over expenditure incurred in during the previous year. A chart giving complete details of contributions receivable by assessee-company and amounts actually received by assessee-company and YRIPL is being enclosed as annexure A. This annexure shows that most of the contribution has been received by YRIPL which is against terms of SIA approval and even the clauses of Tripartite operating agreement.

VI.5 Single Ledger Account- assessee-company and YRIPL – considered as one entity

Information under section 133(6) was called from all the franchisees. The information received from such franchisees is analyzed in the ensuing paras below. In their books of account, the franchisees have one ledger account for royalties marketing advertising payable to YRIPL/assessee-company. For them it is single entity. They have not maintained any separate account of assessee-company. A few instances are discussed below.......

....The assessee-company was also informed about non submission of details by

Pepsi Foods Ltd. vide order sheet entry March 5, 2004. It is pertinent to mention here that as per details of contributions filed by the assessee company M/s Pepsi Food Ltd's Marketing Contributions of Rs. 32.70 lakhs was received by YRIPL.

All the above findings make it clear that the assessee company was not operating in terms with the SIA approval."

"It was seen from the details of accrued marketing filed by the assessee company during the course of assessment proceedings under section 143(2) of the Income-tax Act, 1961 in the case of M/s Yum! Restaurants India Pvt Ltd pending before this office that not all the franchises are paying 5 per cent. of their revenues : e. g. M/s. Devyani International Private Limited and Specialty Restaurants were paying contribution at 4 per cent. instead of 5 per cent. as prescribed in the tripartite agreement. All the participants to the so called brand fund or so called 'mutual concern' should have been contributing equally or an equal proportion.

It is further seen that as for clause 3 of SIA letter as reproduced in para VI.1 of this order the franchisees and YRIPL were required to make contribution of affix (a fixed percentage) of their respective revenue. However, as per clause 4.1 of the tripartite operating agreement as reproduced in para VI.2 of this order YRIPL is under no obligations to payable any contribution if it chooses not to do so which is totally in contradiction to SIA letter."

4.1 From the aforesaid the Assessing Officer came to the conclusion that the assessee-company was not operating in terms of the SIA approval.

5. Based on these findings the Assessing Officer brought to tax a sum of Rs 44,44,002 which was an excess of income over expenditure by rejecting the claim that it was a mutual concern.

6. Aggrieved by the same the assessee-company filed an appeal before the Commissioner of Income-tax (Appeals) (hereinafter referred to as the "CIT(A)"). The Commissioner of Income-tax (Appeals), after analyzing all the facts and the case laws in issue, was of the view that all the participants in the module set up by the assessee-company were business concerns and the purpose of setting up of fund was a commercial purpose. The Commissioner of Income-tax (Appeals) observed that the advertising, marketing and promotional activities (hereinafter referred to as the "APM activities") being a critical component of running a successful business venture, it is intrinsically linked to profit on sales of franchisees, that is, the contributors. It could not

be said that the contributors activity was immune from the taint of "commerciality" and that unlike a club the assessee-company was not set up for social intercourse nor was a set up for cultural activity where the idea of profit or trade does not exist. What was essential was that there should not be any dealing with the outside body which results in benefit which promotes some commercial/business venture. He further held that though the form taken up to conduct its activity resembles a mutual concern, it could not however be denied that the contributions were made undoubtedly for business considerations. The Commissioner of Income-tax (Appeals) being of the view that the underlying purpose was solely for commercial consideration and excess of income over expenditure should be brought to tax.

7. Being aggrieved, the assessee-company preferred an appeal to the Tribunal. The Tribunal by the impugned judgment dismissed the appeal of the assessee-company after noting the facts of the case as well as the principle of mutuality invoked by the assessee-company to sustain its stand that the said excess of income over expenditure was not taxable. The Tribunal noted that in the present case the principle of mutuality was not applicable on account of the fact that apart from contributions received from various franchisees contributions to the extent of Rs. 32.70 lakhs had also been received from Pepsi Foods Ltd as also from YRIPL, who were neither franchisees nor beneficiaries. As per the tripartite agreement it noted that contributions were received from YRIPL, that is, the parent company which was not under any obligation to pay. Therefore the essential requirements of a mutual concern were missing. This was especially so that since Pepsi Food Ltd and YRIPL who was a contributor to the fund did not benefit from the APM activities. Thus the Tribunal held that the principles of mutuality being not applicable to the excess of income over expenditure was required to be taxed.

8. Having heard the learned counsel Mr. C. S. Aggarwal, Senior Advocate for the assessee-company and Ms. Prem Lata Bansal for the Revenue we are of the view that the judgment deserves to be sustained. The principle of mutuality as enunciated by the courts in various cases is applicable to a situation where the income of the mutual concern is the contributions received from its contributors. The expenses incurred by the mutual concerns are incurred from such contributions and hence on the principle that no man can do business with himself, the excess of income over expenditure is not amenable to tax. However, in the present case, the authorities below have returned a finding of fact that the fund has contributors such as Pepsi Food Ltd which do not

benefit from the APM activities. Moreover, the principle of mutuality is applicable to those entities whose activities are not tinged with commercial purpose. As a matter of fact in the instant case, the parent company, i. e., YRIPL, which has also contributed to the brand fund is under the agreement under no obligation to do so. The contributions of YRIPL are at its own discretion. Thus, looking at the facts obtaining in the present case, it is quite clear that the principle of mutuality would not be applicable to the instant case. This was the only stand taken by the appellant before the authorities below. In these circumstances we are of the opinion that the impugned judgment of the Tribunal does not call for interference. The authorities below have returned pure findings of fact which are not perverse to our minds. No substantial question of law arises for our consideration. Resultantly, the appeal is dismissed."

Balbir Singh, Sr. Adv. Ms. Anuradha Dutt, Adv. Ms. Fereshte D. Sethna, Adv. Mr. Tushar Jarwal, Adv. Mr. Rahul Sateeja, Adv. Ms. B. Vijayalakshmi Menon, AOR Mr. Deepak Thakur, for the appellant.

Balbir Singh, Sr. Adv. Ms. Anuradha Dutt, Adv. Ms. Fereshte D. Sethna, Adv. Mr. Tushar Jarwal, Adv. Mr. Rahul Sateeja, Adv. Ms. B. Vijayalakshmi Menon, AOR Mr. Deepak Thakur,, for the respondent.
