THE
# INCOME TAX REPORTS
VOLUME 413 — 2019
(JOURNAL)

## LANDMARK CASES

S. Rajaratnam[1]

**Constitutionality**

*Section 234E*

Section 234E imposes a *per diem* "fee" for the delay in furnishing the prescribed statement relating to tax deducted at source and deposit of such tax to the credit of the Government within the time prescribed under section 200(3) or under proviso to section 206C(3) of the Act. The fees charged for the delay with reference to each day of delay, cannot be construed as tax, but merely as a "late fee" to compensate for the inconvenience to which the administration has been put. In a sense, it is a *quid pro quo* and need not always be construed as a *sine qua non* in its strict sense. There is a difference between a tax and fee as has been pointed out by the Supreme Court in *B. S. E. Brokers' Forum* v. *Securities and Exchange Board of India* [2001] 104 Comp Cas 506 (SC) following the settled law taking the view that the traditional concept of *quid pro quo* in a fee has undergone considerable transformation, so that such regulatory fee is not conditional for a *quid pro quo* in its strict sense, but on that account, it does not lose the character of a fee. It cannot, therefore, be construed as a tax. The collection is, therefore, constitutionally valid. At any rate, it is a well known principle of interpretation of law that where two views are possible as regards constitutionality of a legal provision, the court must lean in favour of constitutionality as was decided in *Government of Andhra Pradesh* v. *P. Laxmi Devi* [2008] 4 SCC 720, which was followed in upholding the validity of section 234E charging a fee in *Biswajit Das* v. *Union of India* [2019] 413

1. Retd. Member, I. T. A. T.

ITR 92 (Delhi) dismissing the writ petition filed by the petitioner in this case.

**Firm/partnership**

*Partner's credit in the books of the firm*

There were three amounts of Rs. 2 lakhs, Rs. 7.15 lakhs and Rs. 4.45 lakhs credited in the name of each of the three partners in the books of the firm. The partner explained the source as an amount received from one Sreedevi, who confirmed the advance explaining the source to be from sale of property. As regards the amount of Rs. 7.15 lakhs, it was explained by the partner to have been received from his wife, who in turn explained that it was received from her brother in cash as the amount could not be paid by bank draft owing to the assessee's lack of necessary identity proof to open a bank account in the Gulf country, where he was stationed. As regards advance of Rs. 4.45 lakhs, the amount was said to have been received by the partner from his nephew from whom a confirmation letter was filed along with copies of his passport, demand draft and his employer's certificate for proof of source. The Assessing Officer did not believe these credits, but added the same. Evidence filed was found to be acceptable by the Tribunal in respect of these credits as the source was identified and creditworthiness established. The Revenue took up the matter to the High Court in *CIT* v. *Sree Ganesh Trading Co.* [2019] 413 ITR 61 (Ker), where the High Court found that the Tribunal had given its reasons for its conclusion on facts. The assessee not only identified the creditors, but had also given credible explanation as regards the creditworthiness and genuineness of the payments. It also added that if the genuineness of any credit has been found to be not established by the partners, the further question that arises is whether it is not the partner, who should be assessed and not the firm. When it is assumed that it is only the firm that is responsible in every case of credits in the names of partners, there is a misdirection in law. There are a number of decisions which were cited, indicating that where a partner proves the source of advance made to the firm, it is the partner who has to face the addition, if his explanation is not acceptable. It was in this view that the High Court dismissed the Departmental appeal.

**Charities**

*(i) Exemption under section 10(23C)(iiiab)*

Section 10(23C)(iiiab) exempts any university or other educational institution which exists solely as a non-profit educational institution, if it is wholly or substantially financed by the Government. How substantial should the financial assistance from the Government be ? This was the issue that was posed before the High Court in *DIT (Exemptions)* v. *Tata Institute of Social Sciences* [2019] 413 ITR 305 (Bom). The assessee's claim was that it was substantially assisted, because the Government grant was more than 50 per cent. of its total expenditure. The Assessing Officer expected such assistance by way of grant to be at least 75 per cent. of its receipts. Rule 2BBB was notified to resolve this matter by providing for exemption, where the grant exceeds 50 per cent. of total expenses. But this Rule notified by the Income-tax (Thirteenth Amendment) Rules, 2014 ([2015] 370 ITR (St.) 1), was made applicable with effect from December 12, 2014, so that its application for the assessment year 2004-05 and the assessment year 2006-07 was denied, but allowed by the Tribunal in the view that this rule would be applicable, though not retrospective, because it was meant to clarify a pending issue in appeal before the High Court. The Revenue argued with reference to an *Explanation* to section 14(1) of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971, that the Government grant of less than 75 per cent. of the expenditure would not justify exemption. The High Court pointed out that even 37 per cent. was accepted as substantial in *CIT* v. *Indian Institute of Management* [2011] 196 Taxman 276 (Karn) following *CIT* v. *National Education Society* in I. T. A. No. 808 of 2009. The High Court found that the assessee had received as much as Rs. 12.79 crores as against the total expenditure of Rs. 22.49 crores, so that there was more than 50 per cent. grant. The Rule, though subsequent, is meant to clarify the obscurity or vagueness of the main enactment, so that it should be applicable even before the clarification by this Rule in the light of its object and purpose as a guide for interpretation as pointed out by the Supreme Court in *S. Sundaram Pillai* v. *R. Pattabiraman* AIR 1985 SC 582. A similar view has been taken in other cases as in *Thiru Manickam and Co.* v. *State of Tamil Nadu* [1977] AIR 1977 SC 518. At any rate, the same view had been taken for an earlier assessment year 2007-08, so that a different view cannot possibly be taken for other years, though the decision for the earlier year is pending in further appeal.

*(ii) Scientific research—Scope of section 35(1)(ii)*

Section 35(1)(ii) recognises the role for research in an educational institution. This difference in roles as between research and education came up for consideration before the High Court in *Manipal Academy of Higher Education* v. *Union of India* [2019] 413 ITR 412 (Delhi) in a matter of writ petition filed by the assessee, which was a trust formed to undertake educational and research activities. The assessee filed a petition before the Central Board of Direct Taxes for approval under section 35(1)(ii) of the Act as an institution for research, but was rejected after calling for information during an opportunity of hearing. While rejecting the petition, it was conceded that the assessee was expected to do scientific research in sectors like nursing, business management, arts, etc., but its activities were limited to what was done by way of project reports from the students as a part of their curriculum with no details of any full-fledged activities made available. The amount spent for research, though in crores, was still only about 1 per cent. of the total expenditure. The research publications by way of articles was found to be not tangible contributions on the subject with publication mostly in the college magazines affiliated to the assessee, so that such results were hardly impressive. It is true that recognition can be granted subject to the conditions, which may be imposed, as was pointed out by the Supreme Court in *American Hotel and Lodging Association Educational Institute* v. *CBDT* [2008] 301 ITR 86 (SC). Monitoring process has also been stressed by the Supreme Court in *Queen's Educational Society* v. *CIT* [2015] 372 ITR 699 (SC). In the absence of any such process, it was all the more difficult to recognise the institution as a research body.

The above conclusion of the Central Board of Direct Taxes was taken up by way of writ petition to the High Court, which found that the meaning of the terms "research" and "scientific research", is wide in scope and that, they need not always be successful. There should, however, be a value for research. But the report from the writ petitioner to the Board, it was felt, "appears to be rather sketchy", so that the writ petition was allowed subject only to the condition that research carried on was genuine and that for this purpose the assessee should make further submissions, which will have to be considered on merits for which a time frame of eight weeks was allowed by the Supreme Court with right for the Board to ask for further documents, if considered necessary, so that the matter was remanded back to the Central Board of Direct Taxes for a fresh consideration. It would appear that an administrative body may not be competent to decide a matter on the quality of research, so that if the matter is to be adjudicated, it should have been entrusted to another research institution or any one competent to decide the matter.

**Income**

*(i) Remission of liability under section 41(1)*

The assessee, a shipping agent, had credits in favour of 900 customers in its books carried over from the past six or seven years aggregating to about Rs. 2.9 crores. The amounts were collected towards ground rent payable by the assessee on behalf of its customers to Chennai Port Trust as stewardship charge for the use of the containers belonging to its customers. The amounts collected were not paid to the Port Trust because of a successful writ petition against such collection. However, the amounts were not refunded to the customers. The Assessing Officer, therefore, brought this amount to tax under section 41(1) of the Act as remission of a liability. However, the Commissioner (Appeals) allowed the assessee's appeal because the issue as regards the payment was pending determination before judicial authorities during the relevant years, so that there could be no presumption of remission till finality is reached as held by the Supreme Court in *CIT* v. *Hindustan Housing and Land Development Trust Limited* [1986] 161 ITR 524 (SC). The assessee had neither made entries of remission in its books of account nor has it obtained the benefit of cessation of any liability, so that the assessee could not be brought to tax following the decision in *CIT* v. *Southern Roadways Ltd.* [2004] 266 ITR 135 (Mad), where it was held that the terms used in section 41(2) do not require that the amount be forgone since the emphasis is on the point of time at which the amount ceased to be due for taxability. The High Court also referred to the other decisions on the subject and came to the conclusion that the addition was rightly found to be unwarranted in *CIT* v. *Chakiat Agencies Pvt. Ltd.* [2019] 413 ITR 113 (Mad).

*(ii) Undisclosed income under section 69*

A claim of loss or deduction found to be bogus amounts to concealment of income from undisclosed sources as was understood in a case of a rice dealer carrying on the business through a commission agent claiming losses relying on a statement of the commission agent. When such statement was sought to be examined, the requisite information was not made available for one reason or the other, so that the claim of loss as well as the payment of commission were disallowed. The additional evidence was offered at the stage of first appeal on the basis of which the addition was deleted. Admission of the additional evidence was appealed against by the Department before the Tribunal, which upheld the contention of the

Department, setting aside the order in first appeal. The assessee went to the High Court questioning the decision of the Tribunal on the admission of additional evidence in appeal. The High Court found that the Tribunal's finding was based on facts on its own independent analysis and reasoning in preference to the finding in first appeal which was based more on previous orders in the past assessments, so that the finding of the Tribunal, which is not unreasonable and having no infirmity, did not warrant interference as decided in *Mathur Marketing Pvt. Ltd.* v. *CIT* [2019] 413 ITR 353 (Delhi).

*(iii) Capital subsidy*

The assessee had received an amount described as capital subsidy in respect of joint venture from its joint venture partner under an agreement to enable the assessee to invest such amount in the share capital of the joint venture company to be promoted. The Assessing Officer treated this amount of Rs. 2.12 crores as revenue receipt but this addition was deleted in first appeal only to be restored by the Tribunal. On the assessee's appeal to the High Court, it was decided in *Sundaram Finance Ltd.* v. *Asst. CIT (No. 2)* [2019] 413 ITR 298 (Mad) that what was described as capital subsidy was a capital receipt not only because it was so described but also because the amount was invested in the share capital of joint venture company as per the terms in the agreement. There has been no diversion of the use of the funds. The assessee's appeal was, therefore, allowed as it was an amount received on capital account.

*(iv) Interest compensation for delay in payment for share issue in an open offer*

A company made an open offer of shares to the existing shareholders at the price of Rs. 1,475 per share with interest, if the payment is not made within the time frame prescribed by the Securities and Exchange Board of India (SEBI). There was an upward revision of consideration to Rs. 2,084 besides compensation for delay at Rs. 16 per share amounting to Rs. 2.2 crores. The question arose whether the compensation for delay could be treated as revenue receipt on the inference that it is in the nature of penal interest as contested by the Department. The Tribunal had held that the amount additionally paid has the same character as the amount paid as the offer price. The additional consideration was nothing more than an additional component of the increased price of shares, so that it cannot be treated differently from the offer price itself. This conclusion, therefore, that it was a capital receipt was endorsed by the High Court in *CIT*

*(International Taxation)* v. *Morgan Stanley Mauritius Co. Ltd.* [2019] 413 ITR 332 (Bom).

**Schedular system of taxation**

*Capital gains or business ?*

The assessee had disclosed capital gains on sale of three scrips, one of which was that of M/s. Pyramid Saimira for which the assessee had subscribed an amount of Rs. 1.2 crores in the month of May and November, 2006. There was a lock-in period of twelve months from the year of launch of these shares. The assessee sold the shares in March, 2008 after more than a year from the date of purchase for an amount of about Rs. 14.17 crores with gain of Rs. 12.97 crores, which was offered as capital gains. But the Assessing Officer inferred it as business income. The assessee argued that the holding was for a fairly long period of 628 days. The assessee had incurred loss in certain other scrips indicating that the assessee had considered these purchases as investments even as shown in its balance-sheet. It is under these circumstances, the finding of the Tribunal that these were held as investments prior to sale and that the surplus is assessable as capital gains, was upheld by the High Court, *inter alia*, relying upon the argument in Board Circular dated February 29, 2016, which had generally considered holding a share for more than twelve months to ordinarily give rise to the inference of investment in *Principal CIT* v. *Hiren M. Shah* [2019] 413 ITR 143 (Bom).

**Transfer Pricing**

*(i) Comparables*

Choice of comparables is always a matter decided on facts, so that any dispute relating to such choice does not raise a substantial question of law for the High Court to interfere unless the choice of the comparable is *ex facie* perverse as was pointed out by the High Court in *Principal CIT* v. *Inteva Products India Automotive Pvt. Ltd.* [2019] 413 ITR 406 (Karn) following *Principal CIT* v. *Softbrands India Pvt. Ltd.* [2018] 406 ITR 513 (Karn).

*(ii) Role of Transfer Pricing Officer*

In *Times Global Broadcasting Company Ltd.* v. *Union of India* [2019] 413 ITR 42 (Bom), the law relating to transfer pricing rules was also applied to specified domestic transactions and the role of the Transfer Pricing Officer in this regard was considered on writ petitions, which were admitted and dealt with because the issues posed by the petitioner were ones of law involving matters of jurisdiction, which could be entertained under writ jurisdiction.

Sections 92 and 92CA in Chapter X sets out the mechanism in determination of arm's length price in respect of transactions with associated enterprises. This power to substitute transaction price by arm's length price could be exercised by the authorities only with the previous approval of the Principal Commissioner or Commissioner with effect from April 1, 2013 by insertion of sub-section (2A) in section 92CA by the Finance Act, 2011. Section 92CA(2B) inserted by the Finance Act, 2012 with retrospective effect from June 1, 2002 limits the role of the Transfer Pricing Officer to a reference by the Assessing Officer. In respect of international transactions, the Transfer Pricing Officer has jurisdiction, which he can assume *suo motu* or on reference by the Assessing Officer. But the *suo motu* power is not available in respect of specified domestic transactions. The amendments by the Finance Act, 2012 extending transfer pricing to specified domestic transactions did not choose to amend sub-section (2A) or (2B) to section 92CA, so that a presumption arises that the Legislature consciously decided to include reference to Transfer Pricing Officer for specified domestic transactions as well pointed out in this judgment.

The fact that the above issue was raised only by way of writ was no bar because of the involvement of law and jurisdiction. The Transfer Pricing Officer is, however, recognised only in respect of international transactions as had been pointed out while considering the role of the Transfer Pricing Officer on his own in respect of international transactions, though reference to him is also provided for. In a case, the assessee-company, Times Global Broadcasting Co. Ltd., a wholly owned subsidiary of M/s. Bennett, Coleman and Company Ltd. (BCCL) engaged in the business of distribution of television channels for group entities, besides providing support services in areas of finance, law, human resources and commercial administration both in technical and broadcasting from April 1, 2014 continued such assistance even after demerger of this business of running television channel in the name of "Times Now", which was earlier carried on by the subsidiary, then got vested in the holding company BCCL by demerger. The difference between assets and liabilities was accounted in the profit and loss account as seen from the balance-sheet as on March 31, 2014, the demerger being effective from April 1, 2014.

The assessee had declared a total income of Rs. 5.9 crores after adjustment consequent on transfer pricing by treating the parties to demerger as related parties for assessment year 2015-16. The admitted adjustment was on adoption on cost-plus basis with a mark up at 10 per cent. As regards subscription fee, the argument was that no adjustment was necessary, though the payment of subscription fee was to a related party, as it was at arm's length on adoption of the most appropriate method which was Transactional Net Margin Method (TNMM) according to the assessee. The return filed on this basis was taken up for scrutiny where the *suo motu* adjustment came up for consideration after reference to the Transfer Pricing Officer.

The role of the Transfer Pricing Officer was accepted as per Instruction No. 15 dated October 16, 2015 [2015] 378 ITR (St.) 27, 30 wherein his role has been described as under :

> "4. *Role of Transfer Pricing Officer*
>
> 4.1 The role of the Transfer Pricing Officer begins after a reference is received from the Assessing Officer. In terms of section 92CA of the Act, this role is limited to the determination of the arm's length price in relation to international transaction(s) referred to him by the Assessing Officer. However, if any other international transaction comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, then he is empowered to determine the arm's length price of such other international transactions also by virtue of sub-sections (2A) and (2B) of section 92CA of the Act."

The High Court referred to the above passage in the Instruction for its conclusion that the Transfer Pricing Officer unless empowered to examine, what was admittedly a specified domestic transaction, had no role to play unless he was required to make his recommendation. Since the Assessing Officer has no occasion even to notice that the transaction was a specified domestic transaction, the question of reference to the Transfer Pricing Officer did not arise. There was also no approval from the Principal Commissioner or Commissioner for such reference. It is under these circumstances, the recommendation of the Transfer Pricing Officer was without jurisdiction.

As regards the merits of the adjustment proposed by the Transfer Pricing Officer, though not binding, these were considered by the High Court after pointing out that the assessee has all the remedies to question both jurisdiction and merits of such recommendation in a regular assessment. But the writ petition is bound to be entertained following *CIT* v. *Chhabil*

*Dass Agarwal* [2013] 357 ITR 357 (SC) because the issues involved related to law and jurisdiction in respect of adjustments on account of transfer pricing law. Application of this law requires minute and detailed examination of documents on record, besides accounts. The High Court was not inclined to undertake this task in writ jurisdiction, when statutory remedies are available including appeal to the High Court, if the assessee is not satisfied with such remedies before the authorities and the Tribunal.

The assessee was heard by the Transfer Pricing Officer before he recommended an adjustment of Rs. 84.09 crores to the transaction price. It is against this recommendation the matter was taken up by way of writ to the High Court, wherein the writ petition was admitted and the order of the Transfer Pricing Officer in respect of arm's length price towards payment of creditors in the demerged process recommending adjustment of Rs. 57.54 crores was quashed while deciding that in respect of adjustment relating to payment of subscription fees, irrespective of whether the assessee had any arguable points, is a matter on which the assessee cannot be heard bypassing the satisfactory procedure by filing normal appeals, so that it decided not to interfere with the adjustment recommended by the Transfer Pricing Officer especially on the matter regarding adjustment to the extent of Rs. 57.54 crores because the adjustment involved minute examination of documents and materials on record and accounts which is not possible within the limited writ jurisdiction, though one of the complaints is breach of natural justice. It could not be lightly entertained because the Transfer Pricing Officer had issued several notices, so that even this plea could not be entertained *prima facie* as such lack of opportunity is not established.

**Business Expenditure**

*(i) Restructuring expenses*

The assessee had several units in respect of the business carried on by it. It had sold one of the units in respect of pharmaceutical business with effect from January 1, 2002, though it was actually handed over on March 27, 2002. Where the Tribunal allowed restructuring expenses as revenue expenditure, the Departmental appeal on this point was not entertained by the High Court as the Tribunal decision was one on facts not involving any question of law to justify the interference of the High Court in *Principal CIT* v. *Akzo Noble India Ltd.* [2019] 413 ITR 79 (Cal).

In the same case, the other issue raised by the Revenue questioning the deduction of the whole of the expense was also found to be without merit since the Tribunal had considered the matter in great detail, so that it was not considered necessary for the High Court to revisit the same.

As for the issue questioning take over of the expenses during the intervening period between agreement and actual handing over of possession agreed to be borne by the purchaser, though relating to the period before sale, it is admissible as it is connected with the sale, so that it was held that there is no question of law on the finding of the Tribunal in this matter as well.

*(ii) Deduction only on actual payment under section 43B*

Tax is one of the items, which would be admissible as a deduction under section 43B only on payment, so that it is not to be allowed on the basis of accrual. This section was sought to be applied in respect of unutilized Modvat credit, which was claimed as a deduction, but disallowed with reference to section 43B of the Act by the Assessing Officer, but allowed by the Commissioner (Appeals), but it was remanded to the Assessing Officer for one year, but disallowed unutilized Modvat credit for another year. The issue came up on the assessee's appeal to the High Court, which decided that unutilized Modvat credit balance at the end of the year was to be treated as a payment of excise duty, so that the deduction is not barred under section 43B as was decided in *Glaxo Smithkline Consumer Healthcare Ltd.* v. *Asst. CIT* [2019] 413 ITR 104 (P&H) following *CIT* v. *Modipon Ltd.* [2018] 400 ITR 1 (SC).

**Capital gains**

*(i) Determination of cost in respect of gifted assets*

Where the assessee had received gift of shares from his father on March 15, 2009, the shares having been purchased by the father on August 1, 1989, the assessee is entitled to deduction under *Explanation (b)(ii)* to section 55(2) on exercise of the option to adopt the cost either at the prevailing market rate on the date on which he received the gift or the cost to his father as the previous owner. Where the assessee had exercised the option, it is such cost to the father which should have been adopted as was rightly done by the Tribunal. But it was taken up by the Revenue before the High Court in *Principal CIT* v. *Manoj Bhupatbhai Vadodaria* [2019] 413 ITR 159 (Guj), wherein it was held that the assessee is entitled to have the cost of his father with right to indexation as on that date as the cost to him and, therefore, dismissed the Departmental appeal following *CIT* v. *Rajesh Vithalbhai Patel* [2013] 37 taxmann.com 439 (Guj).

*(ii) Treatment of foreign currency bonds*

The Government of India has notified in 1993, the Foreign Currency Convertible Bonds and Original Shares (through Depository Receipt Mechanism) Scheme, 1993 effective from April 1, 1992. Prior to the introduction of the Scheme, taxability of income from foreign currency convertible bonds and global depository receipts was governed by section 115AC making interest therefrom liable to be taxed in the hands of the non-residents at 10 per cent. and long-term capital gains on transfer of these bonds also at 10 per cent. in India under section 115AC. Both transfer and redemption are treated on par for purposes of taxation. The cost of acquisition for computation of capital gains for a non-resident investor could be the conversion price prevailing at the Bombay Stock Exchange or National Stock Exchange on the date of conversion of foreign currency convertible bonds into shares per section 47(xa) and section 49(2A) of the Act.

The law on the subject prior to the Scheme was explained in Board Circular No. 1 of 2009 dated March 27, 2009 [2009] 310 ITR (St.) 42 which was the Explanatory Memorandum to the Finance Bill, 2008. The application of the law relating to foreign currency convertible bonds had arisen in the case of a non-resident assessee incorporated in Hong Kong, which had purchased 352 zero-coupon foreign currency convertible bonds issued by an Indian company listed in National Stock Exchange with the bonds having been issued under the aforesaid 1993 Scheme. On transfer of these bonds, the assessee reported short-term capital gains of Rs. 7,36,52,016 on sale of 83,89,938 equity shares acquired on conversion of foreign convertible bonds. The assessee computed short-term capital gains in the manner provided under clause 7(4) of the Scheme adopting the closing price of equity shares of the company in National Stock Exchange on the date of conversion as cost. The Assessing Officer followed the amended provision and Circular No.1 of 2009 containing Explanatory Notes to the provisions of the Finance Bill, 2008.

The assessee filed a revision petition under section 264. But the Commissioner declined to interfere as in his opinion the computation should have actually resulted in a higher amount of capital gains, but he did not make an upward revision, as he had no power to modify the computation of capital gains adverse to the assessee under section 264.

The matter went to the High Court in *Kingfisher Capital CLO Ltd.* v. *CIT* [2019] 413 ITR 1 (Bom), wherein the High Court observed that the amendment by the Finance Act, 2008 had no application for sale in pursuance of the agreement in respect of cost of acquisition, which has to be determined with reference to the date of acquisition as is normally done in computation of capital gains in any case. The inference whether it is long-term or short-term, should also depend upon the period of holding. It is under these circumstances, it was argued that the determination of cost of acquisition with reference to clause 7(4) of the Scheme should have been applied. The view that the provision was not applicable was found to be erroneous. The law under the Scheme, 2008 which was a later one had equal status with the Scheme 1992, so that the computation made by the assessee was held to be accurate and it, therefore, allowed the writ petition with no order as to cost in an elaborate judgment pointing out that the different judgments cited by either party related to a different asset at a different point of time, so that the rules governing them at the relevant time need not have any bearing on the issue under consideration. The High Court discarded some of the judgments as not being relevant for this reason on the issue before it.

*(iii) Short-term or long-term*

Period of holding of the property determines its character as to whether it is short-term or long-term capital asset. Where the assessee wanted the date of letter of allotment issued by the builder to be adopted at the date of acquisition, so as to get the benefit of long-term capital gains, its claim was accepted in first appeal and the Tribunal and endorsed by the High Court in *Pr.CIT* v. *Vembu Vaidyanathan* [2019] 413 ITR 248 (Bom) on the basis of Board Circular No. 471 dated October 15, 1986 [1986] 162 ITR (St.) 41 reiterated by another Board Circular No. 672 dated December 16, 1993 [1994] 205 ITR (St.) 47. It is on the basis of these circulars, the date of allotment was taken as date of acquisition by the High Court endorsing the view of the authorities below.

*(iv) Section 54—Multiple investments*

The assessee, a Hindu undivided family, sold a residential house property and invested capital gains in two residential houses. But the Assessing Officer limited the relief under section 54 to only one of them in the view that section 54 limited the relief to "a residential house property", which was in singular. The Commissioner (Appeals) took the view that the expression connoted plurality, while the Tribunal restored the order of

Assessing Officer, so that the matter came up before the High Court in *Tilokchand and Sons* v. *ITO* [2019] 413 ITR 189 (Mad). The High Court, reviewing the conflicting decisions on the subject, pointed out that an amendment to section 54 made it clear that the benefit will be available for investment in more than one house along with simultaneous amendment to section 54F, but such amendment, being prospective, was effective from the assessment year 2015-16 and that it could not be treated as clarificatory in view of the Memorandum, which accompanied the Bill declaring the amendment to be prospective. All the same, it followed the interpretation conceding relief to plurality following the Karnataka High Court in *CIT* v. *D. Ananda Basappa* [2009] 309 ITR 329 (Karn) and *CIT* v. *Khoobchand M. Makhija* [2014] 43 taxmann.com 143 (Karn) in favour of the more liberal view.

*(v) Diversion by overriding title*

Property which was purchased by the assessee, an individual, was offered as a security for a loan from State Bank of India to the company in which the assessee was interested, in pursuance of guarantee by the assessee and the other two co-owners of the property. Though a formal mortgage deed was not executed, the bank brought the property to sale in view of default in repayment of loan. The sale proceeds amounted to Rs. 1.96 crores as against the outstanding loan of Rs. 3.75 crores, which was the amount originally availed with arrears as on date to include interest. Capital gains on sale of property was sought to be taxed in the hands of the assessee by initiating reassessment proceedings under section 147. The assessee responded to the notice and claimed that she had not earned any capital gains on the property as no part of sale proceeds was receivable by her. The Assessing Officer rejected the contention and held that the property was hers and that the fact that the sale proceeds from such property to the extent of Rs. 1,96,18,200 was appropriated by the bank was mere application and that it was not a case of diversion of income by overriding title, so that he brought an amount of Rs. 5,20,590 to tax on capital gains of Rs. 61,72,298 on her one-third interest in the property as capital gains after allowing the indexed cost of property and indexed cost of improvement by way of a compound wall. Appeal was preferred by the assessee and another co-owner, wherein the order of the Assessing Officer was upheld. The assessee's argument was that she had not received even a single pie from the sale consideration, so that she is not assessable on capital gains and that it was a case of diversion of capital gains by overriding title. The High Court, in *Tmt. D. Zeenath* v. *ITO*

[2019] 413 ITR 258 (Mad), dismissed the appeal in the view that the mortgage had never been registered and that there was no occasion for the bank to bring it to sale. Since the sale was made by the assessee and her co-owners, no income had been diverted by the assessee, the payment of consideration to the bank merely amounting to application of the sale proceeds and not an instance of diversion by overriding title. It was so decided following the decisions in *RM. Arunachalam* v. *CIT* [1997] 227 ITR 222 (SC), *V. S. M. R. Jagadishchandran (decd.)* v. *CIT* [1997] 227 ITR 240 (SC), *CIT* v. *N. Vajrapani Naidu* [2000] 241 ITR 560 (Mad) and *Sri Kanniah Photo Studio* v. *ITO* [2016] 286 CTR (Mad) 538 after review of the case law on the subject of diversion by overriding title.

*(vi) Sale consideration on sale of land*

Sale consideration on sale of land in computation of capital gains would have to be taken as the stamp value under section 50C, if it is higher than the apparent consideration. Where the ownership of the property devolved on a partner of the firm on retirement of the erstwhile partners, who brought the property as their contribution to share capital under section 45(3), leading to the dissolution of firm, it is the partnership firm, which becomes liable to tax on capital gains on transfer of the firm's property to the partner under section 45(4) on the difference between the book value at the price at which partners were credited, when the asset was brought to the firm and its fair market value on distribution of assets to a partner on dissolution. Since section 45(4) provided for the same on the basis of fair market value as on the date of dissolution as consideration received in this case was for a theatre and a land registered on February 14, 2001 in favour of a surviving partner with the firm having been constituted on February 26, 1976. On dissolution of the firm, cash consideration was also partly paid. On notice by the Assessing Officer, a loss return of Rs. 1,40,068 was filed with no supporting material in respect of the value of the land and the building. Thereafter, a report of market value from a sub-registrar for land at Rs. 33 lakhs and building at Rs. 11.07 lakhs was obtained on the basis of which short-term capital gains were computed for the two assets at about Rs. 23 lakhs and Rs. 10 lakhs each and brought to tax in the hands of the firm. The partners filed an appeal which was dismissed by the Commissioner (Appeals). The Tribunal also upheld the dismissal. The matter went to the High Court, where it was found that the firm was rightly assessed. Mere relinquishment of the interest of the partners does not avoid liability. Since no valuation was filed as required for computation of capital gains, the computation by the Assessing Officer had necessarily to be upheld as decided by the High Court in *S. K. Ravikumar* v. *ITO* [2019] 413 ITR 456 (Karn).

**Incentive deductions**

*(i) Exemption under section 10B*

A unit, the income of which was exempt under section 10B was taken over by a company on merger, so that the question arose whether the income from such unit will continue to be available for the remaining period of its eligibility in the hands of the merged company. The business was in production and manufacture of export of iron ore eligible for exemption under section 10B recognised before merger. Even after merger, some partners continued to be interested. The claim for exemption after merger was denied by the Assessing Officer, but was allowed in first appeal and the Tribunal. On Departmental appeal in *CIT* v. *Trident Minerals* [2019] 413 ITR 461 (Karn), the High Court upheld the finding of the Tribunal that the unit continued with same activity along with the other unit of the company with both of them being eligible for exemption under section 10B. The income of the unit taken over, it was held, will continue to be entitled for exemption under section 10B following *CIT* v. *Shri Renuga Textiles Mills Ltd.* [2014] 366 ITR 649 (Mad) and *MKU (Armours) P. Ltd.* v. *CIT* [2015] 376 ITR 514 (All).

*(ii) Deduction under section 80-IA*

The assessee engaged in development of infrastructure was entitled to the benefit of section 80-IA. But the question arose, whether the work got done through a contractor would merit deduction. This question was posed before the High Court in *CIT* v. *Chettinad Lignite Transport Services P. Ltd.* [2019] 413 ITR 162 (Mad). The contract, entrusted to a contractor, was approved and was recognised by the concerned authorities. In fact, per proviso to section 80-IA(4) even a transfer need not lose the benefit of relief as long as the conditions with reference to which approval was granted by the concerned authorities are continued to be satisfied. In this case, eligibility for deduction for operation and maintenance of railway sidings at two railway stations was, therefore, unassailable, so that deduction under section 80-IA could not have been denied, so that the finding of the Tribunal in favour of the assessee was upheld dismissing the Departmental appeal.

**Assessment**

*Special audit under section 142(2A)*

The assessee, a public sector undertaking, was issued a show-cause notice under section 142(2A) asking why special audit should not be directed against it as some anomalies were found in its books of account, which were complex in nature with the assessee reporting losses for a long time in its core business on the ground that it is a sick company, while it had shown income regaining its net worth later. But the Assessing Officer also felt that the assessee had shown some income from other sources but not in its regular business. Further there were some adverse comments in the report of the Comptroller and Auditor General on financial statements and the audit report of accounts relating to assessment year 2015-16.

The assessee contested the show-cause notice by way of a writ petition before the High Court in *National Projects Construction Corporation Ltd. (NPCC)* v. *Deputy CIT* [2019] 413 ITR 130 (Delhi). The High Court elaborately discussed the assessee's objection pointing out to the guiding principles regarding special audit laid down by the Supreme Court in *Sahara India (Firm)* v. *CIT* [2008] 300 ITR 403 (SC), where emphasis has been placed on the opinion to be formed on the basis of objective criteria and not subjective satisfaction. The special audit provision is not intended for merely passing on the responsibility of the Assessing Officer to special auditor. It is only where accounts are found to be complex after time spent by the Assessing Officer to genuinely understand the accounts, that the question for reference to special audit can arise and that too after all reasonable efforts are made with the assessee to clarify doubts regarding the accounts. Bearing in mind these requirements, it was found that the Assessing Officer started enquiry in late September, 2018, the response to which was given only after two months in November 21, 2018. The argument of the assessee was that there was no genuine effort on the part of the Assessing Officer to understand the nature of the business and the method of accounting in the books and documents, so that the reasons given for special audit was claimed to be not acceptable. The High Court found that it cannot be said that there was no genuine effort on the part of the Assessing Officer to understand the assessee's method of accounting, books and documents. In the light of the Assessing Officer's notice, it cannot be said that there was any pretence of complexity.

The decision to refer the matter to special audit under section 142(2A) was upheld by the High Court for the reasons, that the assessee was unable to provide particulars in respect of substantial deductions claimed, that the responses to show-cause notices were unduly delayed, that while turnover increased, the profit showed decline, that details of purchases and liabilities were not made available and that confirmation for balances at the end of the year had not been obtained. It was further pointed out that even special auditor after appointment could not get necessary details. It is under these circumstances, the High Court, which earlier stayed direction for special audit has now decided to dismiss the writ petition with a direction, that the normal time limit to carry on and conclude special audit would exclude the period of stay covered by the writ petition as decided in this case without any order as to the costs.

In another case under section 142(2A), which empowers the Assessing Officer to direct a special audit and submit the audit report within the specified time limit not exceeding 180 days with extension being available on application made by the assessee "for any good and sufficient reason" as was clarified by an amendment by the Finance Act, 2008 with effect from April 1, 2008, that extension of time could also be granted *suo motu* by the Assessing Officer. The extension of time limit is a matter of discretionary exercise on the part of the Assessing Officer. The provision became the subject matter of clarification before the Supreme Court in *CIT* v. *Ram Kishan Dass* [2019] 413 ITR 337 (SC), which held that the understanding of the law need not be different, so that even *suo motu* extension of time should be treated as not impermissible before the amendment. If the authority has the power to extend time limit, it follows that it can so extend the time limit especially for any genuine reason or in the words of the statute "for any good and sufficient reason". The understanding of the word "and" in the expression, can mean "or" as well. In other words, the reason could be either good or sufficient following the interpretation on such phraseology in *Ishwar Singh Bindra* v. *State of U. P.* AIR 1968 SC 1450. Provision for extension of time by way of amendment should be treated as having retrospective application because the amendment relates to a procedural matter. Apart from the same, an amendment which is clarificatory meant to remove any ambiguity in law having due regard to the general scope and purview of the statute can be understood as retroactive in the light of the legislative power contemplated as pointed out in *Zile Singh* v. *State of Haryana* [2004] 8 SCC 1.

It is in the light of the above law, the Supreme Court in this case affirmed the decision of the High Court in *CIT* v. *Popular Automobiles* [2011] 333 ITR 308 (Ker), while approving the decisions in *Jagatjit Sugar Mills Co. Ltd.* v. *CIT* [1994] 210 ITR 468 (P&H) and *Ghaziabad Development Authority* v. *CIT* [2011] 12 taxmann.com 334 (All). This decision of the Supreme Court overruled the decision to the contrary in *CIT* v. *Bishan Saroop Ram Kishan Agro Pvt. Ltd.* [2011] 203 Taxman 326 (Delhi) and the decision in *Principal CIT* v. *Nilkanth Concast P. Ltd.* [2016] 387 ITR 568 (Delhi), which had held that *suo motu* extension of time will not be valid.

**Accounting**

*Method of accounting*

The assessee, a finance company, engaged in hire-purchase finance was lending monies on equated monthly instalment basis, so that it was necessary to split up the monthly instalment between the repayment of principal amount and interest component since there was liability only on the interest part. This was done by the Assessing Officer by recognizing the interest element on adoption of sum-of-digits method also known as equated-sum method as per guidelines issued by the Institute of Chartered Accountants of India. The method incidentally was what was approved for bifurcation of instalment amount in the past and what was adopted during the year. The same method, which was accepted by the High Court, in the preceding years was bound to be followed ruling out the decision of the Tribunal, that internal-rate-return method was preferable as decided by the High Court in *Sundaram Finance Ltd.* v. *Asst. CIT (No. 1)* [2019] 413 ITR 291 (Mad) on the ground that the rule of consistency required that same sum-of-digits method to be adopted for bifurcation as between principal and interest. It was pointed out that by this method, the assessee was offering higher finance charges in initial years than in later years. There was, therefore, no reason to change the method adopted for this year to the method of internal rate return, which was even otherwise not acceptable. It was, therefore, held that the income should continue to be taken for income-tax purposes by equated-sum method as it has been decided for earlier years following *CIT* v. *Ashok Leyland Finance Ltd.* [2012] 210 Taxman 95 (Mad).

The assessee relied upon the decision of the Andhra Pradesh High Court in *Chakra Financial Services Ltd.* v. *CIT* [2013] 350 ITR 396 (AP), which after taking note of the Madras High Court view still held that in the absence of hire-purchase agreement indicating the manner of splitting up the monthly instalment between principal and interest, it followed what it called indexing method, which involves offer of much higher income in the initial year, so as to be distinguishable. It was pointed out by the High Court in this case that the split up has to depend upon the terms and conditions of hire-purchase contract, which did not justify either sum-of-digits method or reducing-balance method and that indexing method also could have no application. The Tribunal, in *Deputy CIT* v. *Nagarjuna Investment Trust Ltd.* [1998] 65 ITD 17 (Hyd) [SB] had preferred the sum-of-digits method distinguishing the decision of the Madras High Court in *Ashok Leyland Finance Ltd.'s* case (supra) on the ground that a different method was consistently followed in that case, so as to require continuation of the same method in the context of method approved for earlier years in the same case, following the decision of the jurisdictional High Court in *Ashok Leyland Finance Ltd.'s* case (supra).

**Reassessment**

*(i) On the question of validity*

Where reassessment proceedings are initiated within six years but after four years the requirement for approval by the Joint Commissioner under section 149(1)(b) need not be satisfied, if the purported escapement does not exceed Rs. 1 lakh, it was held that the objection to the jurisdiction has to fail in the assessee's case. In this case notice was issued to the assessee, a contractor, in pursuance of a search under section 158BD for reassessment for making two claims, one of excessive depreciation on equipment at 40 per cent. and the other for payment of supervisory charges on an arrangement with a third party. The disallowances initially made in a post-search block assessment under section 158BD failed because jurisdiction under section 158BD was not upheld, so that the assessments were reopened by issue of notices under section 148.

Copy of the recorded reasons were asked for and on obtaining the same, objections were raised. But such objections were rejected by the Assessing Officer, so that both the question of validity of the notices under section 148 and the merits of the additions came up before the Tribunal which held that the issues raised were mixed questions of law and facts and that the Department had the right to probe the matter, and if the assessment is not justified, take appropriate action under the law for reassessment. Reopening of the assessment was questioned on the basis of a proviso to section 147 limiting the jurisdiction beyond four years, unless there is a failure on the part of the assessee either to file a return or disclose fully and truly all material facts necessary for assessment. It was assessee's case that there was no such failure, so that writ petition were filed.

The law relating to conditions for assuming jurisdiction for reassessment is now well settled in *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC). The expectation of the recorded reasons to accompany the notices for reassessment, it was found, was not justified. It was noticed by the High Court that the assessee had already applied for copy of the recorded reasons, so that it has to await the receipt of the same and take further action on the lines laid down by the Supreme Court in *GKN Driveshafts (India) Ltd.'s* case (supra). It was under these circumstances that the High Court declined to interfere on the basis of the writ petitions which were dismissed along with the connected miscellaneous petitions in *T.C.V. Engineering Pvt. Ltd.* v. *Asst. CIT* [2019] 413 ITR 319 (Mad).

*(ii) Scope of writ jurisdiction against notice of reassessment under section 148*

The reasons on which reassessment proceedings are initiated need not accompany the notice. The procedure for questioning jurisdiction in respect of reassessment notice is well settled by the Supreme Court in *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC), so that any challenge to jurisdiction should follow the guidance available from this decision. The High Court cannot interfere on a writ petition except where the above-said procedure is followed. Considering the fact that what is challenged is only a notice and not a final order, the High Court under its jurisdiction cannot lightly interfere in a routine manner on mere initiation of proceedings in the absence of any valid and acceptable legal grounds as decided in *Seshasayee Paper and Boards Ltd.* v. *Union of India* [2019] 413 ITR 370 (Mad).

*(iii) Not valid*

In a case of challenge to the notices under section 148 on the basis of information received from the Investigation Wing reporting bank transactions which did not tally with the assessee's accounts, the assessee's explanation was that it had multilevel marketing business carried on with group companies, so that receipts from customers at various levels in an essentially cash-intensive business are prone to such variation, which nevertheless can be, and are, finally reconciled. The assessee kept regular accounts and these were examined in the original assessment. There cannot be a case for reassessment without verification of any of the entries. The High Court was inclined to accept the explanation, when the Assessing Officer was aware of the multilevel marketing business model which was cash-intensive with past transactions themselves being of no guide. Notice of reassessment was found to be not valid and accordingly quashed in *Revolution Forever Marketing Pvt. Ltd.* v. *ITO* [2019] 413 ITR 400 (Delhi) following *CIT* v. *Kelvinator of India Ltd.* [2010] 320 ITR 561 (SC) and *CIT* v. *Lovely Exports P. Ltd.* [2009] 319 ITR (St.) 5 (SC).

In another case, where a writ petition was filed questioning the validity of notice under section 148 for reopening the assessment, it was found that the matter would require examination of facts, which does not fall within the ambit of writ jurisdiction as was decided in a matter, where the issue related to the question whether an expenditure which was accounted, but disallowed as capital expenditure merits adjudication. A Single Judge dismissed the writ petition holding the view that where the assessee had not filed an objection to the jurisdiction before the Assessing Officer as stipulated in *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC), he cannot object to jurisdiction before the High Court in *Hanon Automotive Systems India Pvt. Ltd.* v. *Deputy CIT* [2019] 413 ITR 431 (Mad). The fact that objections were not raised before the Assessing Officer is fatal to the assessee's case. The decisions rendered prior to *GKN Driveshafts (India) Ltd.'s* case (supra) cannot be of any assistance to the petitioner. The issue, whether a particular expenditure is of capital or revenue nature has to be decided solely on facts. It is seen that the assessee did ask for copy of the recorded reasons which were furnished. But since the assessee has not chosen to file any objection to them, the writ cannot be admitted. The High Court found that there was no *prima facie* to question jurisdiction and that there was no opinion formed in the original assessment, which was sought to be changed by the Assessing Officer in the notice for reassessment. The assessee has an alternative remedy of regular appeal in which objection to jurisdiction can be raised, so that the extraordinary remedy under article 226 of the Constitution need not be invoked. It was under these circumstances, the writ petition along with connected miscellaneous petitions were dismissed.

*(iv) Notice in the name of deceased not valid*

When the assessee, an individual dies, the legal representative becomes the assessee in his place under section 159(2)(b), so that any action for assessment or reassessment could be taken only in the name of the legal representative as representing the deceased. Where the notice was wrongly issued in the name of the deceased and the legal representative had raised objections to validity of such notice without participation in any further proceedings, such proceedings in pursuance of notice under section 148 could not be valid. Section 292B, which would validate a defect in notice, if it is otherwise in substance and effect in conformity with intent and purpose of the Act, this section, would come to the aid of the Revenue, but in this case, where action is clearly against the language of statute, reassessment notice under section 148 was held to be invalid in *Chandreshbhai Jayantibhai Patel* v. *ITO* [2019] 413 ITR 276 (Guj) following *Rasid Lala* v. *ITO* [2018] 11 ITR-OL 212 (Guj) besides more decisions to the same effect.

**Post search assessment**

*Section 153A*

Where a search revealed instances of gifts and loans received from relatives apart from expenditure on foreign travel, the jurisdiction under section 153A for the year and six earlier years was assumed by the Assessing Officer, but challenged successfully during the appeal before the Tribunal sparing the assessee from liability in the view that jurisdiction was wrongly assumed. On Departmental appeal before the High Court in *CIT* v. *K.P. Ummer, Prop. Star Rolling Mill* [2019] 413 ITR 251 (Ker), it was found that materials for reassessment as regards gifts and loans from relatives and expenditure on foreign travel were information available on account of search to justify action under section 153A, though there was no seizure. It is not necessary that there should be any recovery of materials. There is no justification for the view that such materials should be available for each one of six years for jurisdiction for that year. The intention of the Legislature in giving such jurisdiction for the years other than year of search is to ensure that there had been no suppression of income for other years. It is not necessary that assessment for those years should have been concluded as jurisdiction for other years does not depend upon incriminating materials found for each such year. It is for this reason that the decision of the Tribunal that there was no need for distinction as between the years either with reference to materials for each such year or with reference to the time limit as to whether notice under section 143(2) had already lapsed. There is, therefore, jurisdiction for six earlier years without any limitation as was held in this case.

**Recovery of tax**

*(i) Stay of disputed demand*

The decision of the Madras High Court in *Mrs. Kannammal* v. *ITO* [2019] 413 ITR 390 (Mad) is a veritable compendium on the subject of law on stay of disputed demand rendered in the case of an assessee, who was assessed at Rs. 10.2 crores against the declared income of Rs. 6.24 lakhs by denial of an exemption claimed by the assessee. The assessee filed an appeal and asked for stay of disputed demand before the Assessing Officer under section 220(6), which was dismissed. It was on such dismissal, the matter was taken up to the High Court by way of a writ. The High Court pointed out that the petition for stay should have been considered in the light of Circulars issued by the Central Board of Direct Taxes, which are not averse to the grant of stay of disputed demand and that the response to a request for stay should be in speaking order, if the stay is not allowed. Where the denial of exemption appears to be *prima facie* questionable, the stay is required to be considered favourably as laid down by the Supreme Court. The following principles listed by the High Court in this case should serve as guidelines on the subject :

(1) It is realised that a stay has not to be granted merely because there is an appeal, but all the same where there is no binding decision against the relief claimed in appeal from any higher appellate authority or any order of the Court, the stay order has to be considered in the light of the fact that the question of stay can always be reviewed on any subsequent development of law.

(2) Where the authorities apprehend risk to the Revenue, they can still grant stay subject to the assessee furnishing security or assuring co-operation in having the appeal disposed of expeditiously, so that mere apprehension of non-realisability need not come in the way of stay of demand on mere apprehensions.

(3) Stay is not a matter to be merely allowed or rejected, because there is a third way by which the demand can be allowed to be paid in instalments staggered through reasonable period not exceeding eighteen months, so that this course of action also deserves to be examined.

(4) The provisions under section 220(3) or 220(6) or 220(7) provide for treating the assessee as not in default on stay, so that the law specifically providing for stay of demand in suitable cases cannot be disregarded.

(5) While considering the application for stay, the Assessing Officer is bound to consider all the relevant facts having a bearing on the demand raised and communicate his decision in a speaking order.

(6) Instruction No. 1914 dated February 29, 2016 modified by the Office Memorandum F. No. 404/72/93-ITCC dated July 31, 2017 [2017] 396 ITR (St.) 55 spells out the clear instructions on the subject, so that these guidelines are required to be followed, wherever there is a *prima facie* case for stay.

(7) A mere rejection of stay asking for immediate payment in disregard of all the relevant factors in a cryptic manner had come for criticism after referring to the Board Circular ignoring the three parameters for grant of stay, viz., (i) existence of a *prima facie* case for stay ; (ii) financial stringency covering within its ambit "irreparable injury" and undue hardship and (iii) balance of convenience as laid down in the two decisions in *CIT* v. *Mahendra Mills* [2000] 243 ITR 56 (SC) and *CIT* v. *Aircel Ltd.* [2008] 296 ITR 85 (Mad). The Board itself had recognised the practice of high-pitched assessments and conveyed by way of a memorandum issued as early as 1969 in F. No. 1/6/69-ITCC dated August 21, 1969, the observation of the then Deputy Prime Minister as to the need for absolute stay in such cases. Even the concessional instruction of granting stay of balance amount, if 20 per cent. disputed tax is paid, does not mean that in every case such payment of 20 per cent. should be insisted upon, where there is a *prima facie* case for stay of the entire amount especially where the much larger amount of 80 per cent. is stayed, while the 20 per cent. to be paid itself is also abnormal as in some cases of high-pitched assessments, when the demand itself is totally unjustified.

The reference in the judgment to other modes of recovery to the statute itself as alternative modes of recovery are enumerated in section 226 itself. These modes, which are summarised as under :

(1) If the assessee is a salaried employee, the Assessing Officer or Tax Recovery Officer can require the person paying the salary to pay it only after deducting the arrears of tax due from the assessee (vide sub-section (2)).

(2) If the assessee has to receive some money from any person or is likely to receive the same in future or such a person holds or may hold money belonging to the assessee, the Assessing Officer or Tax Recovery Officer may require such a person to pay such money to him (vide sub-section (3)).

(3) If the money belonging to the assessee is in the custody of a Court, the Assessing Officer or Tax Recovery Officer may apply to the court which holds such money to pay him an amount sufficient to discharge the arrears of tax due against the assessee (vide sub-section (4)).

(4) The Assessing Officer or Tax Recovery Officer may recover the money by distraint and sale of movable property where he is duly authorised by the Commissioner in this behalf (vide sub-section (5)).

*(ii) Waiver of interest under section 220(2A)*

Waiver of interest for delayed payment of tax is a power conferred on the Chief Commissioner under section 220(2A). A producer engaged in the business of production and sale of video cassettes, besides purchase and sale of video copyrights of cinematographic films, was subjected to assessment consequent to a search on a third party under section 153C. The assessment made resulted in tax to the extent of Rs. 1.1 crore of which the assessee has paid only Rs. 23 lakhs. The balance remained in arrears for as long as fourteen years resulting in heavy interest payable by the assessee on the arrear amount under section 220(2).

An application for waiver of interest under section 220(2A) can be entertained, if the delay was prompted by genuine hardship with the default beyond the control of the assessee, and the assessee had co-operated in the assessment and recovery proceedings.

The Chief Commissioner held on the application for waiver that there had been no co-operation for expeditious disposal of the assessment as was evident from the fact that the assessee had attempted to retract a statement admitting income. Further, the inability of the assessee to pay the tax was not established in the light of the fact that the partners were in affluent position with ability to meet the taxes in the light of the law that as partners they were responsible for the dues of the firm. It was on these facts that the Assessing Officer made a report to the Chief Commissioner objecting to the waiver. Such report was made available to the petitioner for waiver and the assessee was heard by the Commissioner thereafter.

The petitioner for waiver alleged hardship in respect of payment of tax, but such inability to pay tax as claimed by the assessee had to be considered not solely as that of the firm on a standalone basis without considering the financial position of the partners. The Commissioner while rejecting the petition, found that the argument that the hardship should be considered only in the light of the firm, was found to be preposterous in view of the joint and several liability of the partners for the dues of the firm under section 188A of the Act. Such argument could not, therefore, be entertained in a writ petition filed by the assessee.

The order of rejection of waiver was found to be in order not warranting interference in *Video Master* v. *Chief CIT* [2019] 413 ITR 153 (Bom). While dismissing the reliance on the two cases, where such waiver was allowed in *J. Jayalalitha* v. *CIT* [2000] 244 ITR 74 (Mad), which was a case where the defaulter could not make the payment because her bank accounts were frozen and all her properties were attached, so that her case is distinguishable. Similarly, in the decision in *B. M. Malani* v. *CIT* [2008] 306 ITR 196 (SC), it was found that it was a case where the matter was remanded for a report as to the claim of genuine hardship. While in the instant case, the High Court found that the cases relied upon were not only distinguishable, but the facts of the case clearly demonstrated that an assessee knowing full well that the delay in payment would attract interest neglected to make the payment, so that he cannot take advantage of his own wrong by claiming waiver of such interest.

**Tax deducted at source**

*(i) Interest or compensation ?*

Where a Government corporation, engaged in providing housing, had claimed expenditure incurred by way of compensation paid to the purchasers for delay in delivery of plots sold as per sale agreement, the payment of compensation measured with reference to period of delay was construed as interest, so as to be liable for tax deduction at source in the wider sense of definition of interest under section 2(28A) of the Act, so that the entire payment was disallowed by the Assessing Officer for non-deduction of tax at source under section 40(a)(ia) of the Act and confirmed in first appeal. The Tribunal found that in respect of compensation, there was neither borrowing of money nor incurring of a debt, so that the definition of interest under section 2(28A) had no application. There was no requirement of tax deduction at source from such payment of compensation, so that it was held by the Tribunal that the disallowance was not in order. The order of the Tribunal was upheld by the High Court in *Principal CIT* v. *West Bengal Housing Infrastructure Development Corporation Ltd.* [2019] 413 ITR 82 (Cal). Special leave petition filed by the Department against this judgment has since been dismissed.

*(ii) Technical fees*

Where the assessee had failed to deduct tax at source in respect of technical fees paid to a foreign university in the context of the agreement which put the burden of taxes on the assessee, if any, due by the non-resident, the payment has necessarily to be grossed up by the amount of tax payable for purposes of deduction in computation of its income. *Explanation 2* inserted by the Finance Act, 2010 with retrospective effect from June 1, 1976 to section 9(2) for removal of doubts deems any income under section 9(1)(v), (vi) or (vii) to be taxable in India irrespective of whether the non-resident has residence or place of business or business connection or whether services were rendered in India. The Assessing Officer applied this *Explanation* and assessed the technical fees directing the assessee to pay tax and interest. But the ground for grossing up the payment for deduction in computation of deductor's income was taken up for the first time before the Tribunal in *TVS Motor Co. Ltd.* v. *ITO (IT)* [2019] 413 ITR 171 (Mad). Whether this ground could have been admitted by the Tribunal was the second issue raised before the High Court by the assessee. As regards the merits of first question relating to the deduction for the amount grossed up for tax raised for the first time before the Tribunal, it is odd that the High Court took the view, that the assessee not having raised the issue before the Commissioner (Appeals), it has to be understood that it had accepted his order, as not being aggrieved at relevant time on receipt of order or at the time of filing appeal to the Tribunal. If so, it could not be aggrieved later, so that what was not disputed nor challenged could not be admitted by way of additional ground vulnerable on this reason for non-admission. It is equally odd that the High Court found another reason for non-admission on the ground that the Assessing Officer was fair and reasonable in not imposing any penalty for non-deduction of tax at source in respect of payment of technical fees being content only with levy of tax ! Grossing up was denied on the plea of the standing counsel that the agreement itself does not provide for the mechanism for computation of income ! Section 195, which deals with grossing up by defining income payable net of tax in the context of section 192(1A) in section 195A, where it forms part of the income as pointed out in the decision in *CIT* v. *Tata Ceramics Ltd.* [2011] 15 taxmann.com 49 (Ker), which had held that grossing up is available only in case of net-of-tax arrangement and that the definition of income under the treaty does not necessarily take into consideration the need for grossing up. But this interpretation cannot have application, where the assessee bears as per agreement the non-resident's tax as its own liability, offering the gross income including the tax of the non-resident borne by the assessee, so that the claim for deduction of gross income including the tax borne by the assessee should have been allowed in computation of its income.

**High Court**

*(i) Its powers*

Where the assessee had declared nil income for the assessment year 1999-2000 both in respect of book profits and statutory profits, an intimation accepting the return under section 143(1) was issued in the normal course. But proceedings for reassessment under section 147 by issue of notice under section 148 was initiated. Such proceedings were dropped on assessee's objection, but later a second notice was issued. The objections to the second notice were rejected. It is under these circumstances, that jurisdiction under section 147 was questioned. The Tribunal held that the notice was based upon change of opinion even as seen from the Assessing Officer's letter to the audit officers as noticed in the course of proceedings in respect of the first notice under section 148. It was seen from the records that the Assessing Officer did examine the records even at the time of issue of intimation as had been stated in the reply to audit objection that the provision for unabsorbed liabilities has not been disallowed in computation of book profits in response to which the Assessing Officer had replied that such disallowance was not permitted under the jurisdiction under section 148. It was under these circumstances that the Departmental appeal against the Tribunal order in favour of the assessee was dismissed *in limine* on the ground that no substantial question of law was involved. The matter was taken up by the Revenue to the Supreme Court in *Principal CIT* v. *Nokia India Pvt. Ltd.* [2019] 413 ITR 146 (SC) which allowed the Departmental appeal in that the High Court was not justified in its inference, that no substantial question of law was involved. It was also pointed out that the original assessment was by way of intimation under section 143(1) and not 143(3), so that the question whether there was any ground for forming any opinion could not possibly arise, and therefore, the inference of invalidity of the notice under section 148, where there was only intimation, does raise a substantial question of law as pointed out by the Supreme Court which observed that the Departmental reference contained facts constituting reason to believe, besides pointing out necessary details for inference of escaped income, so that the order of the Tribunal accepting assessee's objections without taking into consideration the admitted facts could not have been held to be proper and legal, when the Tribunal has not considered the merits of each of the items for issue of notice. The questions raised by the Revenue before the High Court, it was held, were questions of law bound to be entertained by the High Court, so that the Supreme Court allowed the appeal and set aside the impugned order of the High Court and remanded the matter back to the High Court to decide the answer to the four questions of law raised by the Revenue as substantial questions of law requiring answer from the High Court in respect of the merits of each of the question. While deciding the matter in pursuance of its remand, the Supreme Court expected the High Court not to be influenced by any observation in its judgment as an expression of its opinion on merits of the case.

*(ii) Its role*

The Supreme Court has reiterated the procedure to be followed by the High Court when hearing an appeal filed before it. The High Court has first to decide on admission, which depends upon its finding, whether the issue involves a substantial question of law. If it does not, appeal will be dismissed *in limine*. If it does, the question of law that arises has to be set out before proceeding to hear the appeal on the question so framed. When the High Court deals with an appeal on merits straightaway without following the procedure of framing the issue as a preliminary step, by embarking upon merits, the hearing will not be proper. It is under these circumstances, the Supreme Court, in *CIT* v. *A. A. Estate Pvt. Ltd.* [2019] 413 ITR 438 (SC), set aside the order of the High Court and remanded the matter back to the High Court to decide the appeal afresh answering the three questions which were referred by the Supreme Court as arising in the matter under appeal in this case, but at the same time directing that any observation made on merits in this decision shall not bind either party.

In another case, where the issue related to the inference whether an expenditure was of capital or revenue nature arising out of a compromise in a suit filed for specific performance, the findings were inconsistent between the Assessing Officer and the Commissioner (Appeals). But the Tribunal recorded the inconsistent findings and came to its own conclusion in a matter involving the amount of Rs. 3.25 crores covered by a memorandum of understanding regarding the shareholding pattern in the settlement of dispute between the co-promoters of a joint venture company. The Assessing Officer held that the payment could not be considered as revenue expenditure, a view confirmed in first appeal with Tribunal deciding in assessee's favour on which the Department filed an appeal to the High Court. The High Court allowed the Departmental appeal pointing out that the Assessing Officer does not dispute that it was a business expenditure while the Commissioner (Appeals) questioned this very premise, taking the view that it was not even a business expenditure, so as to be a capital expenditure. The Tribunal had allowed the amount as a revenue deduction as between these two inconsistent views. The Tribunal did not come to its own correct interpretation of the arrangement, but all the same proceeded to reverse the order in first appeal, which was upheld by the High Court. In view of lack of clear appreciation of facts and its conclusion, the matter should have been remanded to the Tribunal by the High Court according to the finding of the Supreme Court. Such an order would not prejudice either party. It is in this view, the Supreme Court set aside the order of the High Court while remanding the matter to the Tribunal to decide the matter afresh without in any manner being influenced by the observation of the Tribunal itself or the High Court or the Supreme Court in *Principal CIT* v. *Ballarpur Industries Ltd.* [2019] 413 ITR 447 (SC).

**Writ**

*Not maintainable*

Where a writ petition was filed questioning the validity of reassessment proceedings initiated against the assessee-company, it was found that the notices under section 148 were issued on the basis of recorded reasons on the information received from Central Bureau of Investigation (CBI) by way of charge-sheets relating to investments made by the assessee and that the contributions received towards its share capital were understood as not capital receipts, but income camouflaged as capital receipts. The recorded reasons were also supplied on assessee's request and its objections were that the information did not involve any concealed income and that reassessment proceedings cannot be initiated merely for verification of certain information received. These objections were considered and rejected in a speaking order. It was under these circumstances, the High Court, on a writ petition filed by the assessee, in *South Asia FM Ltd.* v. *Asst. CIT* [2019] 413 ITR 205 (Mad) held as regards the first objection that the initiation of reassessment proceedings was based on preliminary information gathered by the Assessing Officer, so that there was no cause of action for filing writ. Secondly, a mere initiation of proceedings on information received by the Assessing Officer is a matter on which the assessee can avail of the opportunities under the law to resist an assessment. Thirdly, where alternative remedy is available, the writ should not be entertained in a routine manner especially in the context of the fact that the Assessing Officer had received some information and, fourthly, the notice was within the time limit under section 149(1)(b) with reference to date of issue of notice and not with reference to date of communication of reasons as wrongly understood by the assessee, so that the notice was in time.

**Income Declaration Scheme, 2016**

Income Declaration Scheme, 2016 provides for an opportunity to make year-wise declarations of undisclosed income. But where a declarant had filed declarations for more than a year for several years, the declaration of income, when invalid only for some years, cannot be rejected for other years. A certificate could be given for a year, when a subsequent valid declaration is filed for a year. Writ petitions for some years were allowed, while they were dismissed for other years in *Umesh D. Ganore* v. *Principal CIT* [2019] 413 ITR 66 (Bom). It incidentally dissented from the decision in *Kumudam Publications P. Ltd.* v. *CBDT* [2017] 393 ITR 599 (Delhi), where adjustment for tax paid by way of advance tax and self-assessment tax was held permissible to be adjusted against tax payable in the declaration against the clear provisions of the Scheme as decided by the jurisdictional High Court in *Earnest Business Services P. Ltd.* v. *CIT* [2017] 393 ITR 453 (Bom). The High Court also directed that for the years for which the declaration was found to be not valid in its judgment, the assessee's regular appeal to the Appellate Commissioner, if such appeal had been filed, should be dealt with on merits without any objection on the question of limitation.