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CIT (Dy.) *v.* Cholamandalam MS General Insurance Co. Ltd. [2012] 12 ITR (Trib)-OL 540 (Chennai) **affirmed** in CIT (LTU) *v.* Cholamandalam MS General Insurance Co. Ltd. [2020] 424 ITR 272 (Mad)

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67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide *Kedarnath Singh* v. *State of Bihar*, AIR 1962 SC 955. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide *G. P. Singh's Principles of Statutory Interpretation*, 9th Edition, 2004 page 497. Thus . . . would have become unconstitutional.

68. The court must, therefore, make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the court declare a statute to be unconstitutional.

80. However, we find no paradox at all. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the Legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic Legislature) and try to enforce its own views and perceptions."

33 Parliament is competent to pass legislation on taxes on income under entry 82 of List I to the Seventh Schedule. Section 234E is not violative of any of the other provisions of the Income-tax Act or the Constitution of India. Nothing has been shown as to how the section is manifestly arbitrary for it to be struck down.

34 In view of the above, W. P. Nos. 13331, 13118 and 13377 of 2019 fail and are hereby dismissed. Since the levy is constitutional, the challenge to the demand notices also fail.

Accordingly, W. P. Nos. 13114, 13337 and 13379 of 2019 are also dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

[2020] 424 ITR 162 (Delhi)

[IN THE DELHI HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

VALVOLINE CUMMINS PVT. LTD.

MANMOHAN and SANJEEV NARULA JJ.

March 13, 2020.

SS ▸ ITA 1961, s 92
AY ▸ 2011-12
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—ARM'S LENGTH PRICE—DETERMINATION—ADVERTISING, MARKETING AND PUBLICITY EXPENSES—NO PROOF THAT THERE EXISTED INTERNATIONAL TRANSACTION BETWEEN ASSESSEE AND ITS ASSOCIATED ENTERPRISE WITH RESPECT TO SUCH EXPENSES—REMANDED FOR DETERMINATION OF ARM'S LENGTH PRICE NOT WARRANTED—INCOME-TAX ACT, 1961, S. 92.

Held, *that the Tribunal was not justified in remanding the matter to the Assessing Officer/Transfer Pricing Officer for determining the arm's length price of the advertising, marketing and publicity expenses when the Department had failed to prove that there had existed an international transaction between the assessee and its associated enterprise.*

VALVOLINE CUMMINS P. LTD. *v.* DEPUTY CIT [2018] 11 ITR-OL 136 (Delhi) *followed*.

Order of the Delhi Bench of the Income-tax Appellate Tribunal in VALVOLINE CUMMINS P. LTD. *v.* DEPUTY CIT [2019] 14 ITR (Trib)-OL 140 (Delhi) *affirmed*.

Cases referred to :

Bausch and Lomb Eyecare (India) Pvt. Ltd. *v.* Addl. CIT [2016] 381 ITR 227 (Delhi) (para 2)

Honda Siel Power Products Ltd. *v.* Deputy CIT [2016] 7 ITR-OL 22 (Delhi) (para 2)

L. G. Electronics India P. Ltd. *v.* Asst. CIT [2013] 22 ITR (Trib) 1 (Delhi) [SB] (para 2)

Le Passage to India Tour and Travels P. Ltd. *v.* Deputy CIT [2017] 391 ITR 207 (Delhi) (para 2)

Maruti Suzuki India Ltd. *v.* Addl. CIT [2010] 328 ITR 210 (Delhi) (para 2)

Maruti Suzuki India Ltd. *v.* CIT [2016] 381 ITR 117 (Delhi) (para 2)

Sony Ericsson Mobile Communications India P. Ltd. *v*. CIT [2015] 374 ITR 118 (Delhi) (para 2)

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Valvoline Cummins P. Ltd. *v*. Deputy CIT [2018] 11 ITR-OL 136 (Delhi) (para 2)

I. T. A. No. 187 of 2020.

Ruchir Bhatia, Senior Standing Counsel with *Ms. Madhura M. N.*, Advocate, for the appellant.

Neeraj Jain and *Aniket D. Agarwal*, Advocates, for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

Manmohan J.—*C. M. Application No. 9279 of 2020*

Keeping in view the averments in the application, delay in refiling the appeal stands condoned.

Accordingly, the present application is allowed.

I. T. A. No. 187 of 2020

The present appeal has been filed by the Revenue under section 260A of **1**
the Income-tax Act, 1961 challenging the order dated November 26, 2018 passed by the Income-tax Appellate Tribunal in I. T. A. No. 527/Del/2016 (*Valvoline Cummins P. Ltd.* v. *Deputy CIT* [2019] 14 ITR (Trib)-OL 140 (Delhi)) for the assessment year 2011-12.

Admittedly, the present case is covered by the assessee's own case **2**
decided by a Co-ordinate Bench of this court for the assessment year 2010-11 in *Valvoline Cummins P. Ltd.* v. *Deputy CIT* [2018] 11 ITR-OL 136 (Delhi) I. T. A. No. 158 of 2016. The relevant portion of the order in I. T. A. No. 158 of 2016 is reproduced hereinbelow (page 138 of 11 ITR-OL) :

> "This is an appeal filed by the assessee under section 260A of the Income-tax Act, 1961 ('Act') challenging the order dated March 31, 2015 passed by the Income-tax Appellate Tribunal ('ITAT') in I. T. A. No. 608/Del/2015 for the assessment year ('AY') 2010-11.
>
> While admitting the appeal on February 19, 2016, the following question was framed for determination by this court :
>
> 'Whether in the light of the decision in *Maruti Suzuki India Ltd.* v. *CIT* [2016] 381 ITR 117 (Delhi) the Income-tax Appellate Tribunal was justified in holding that there was an international transaction

1. Oral judgment.

between the assessee and its associated enterprise with regard to advertising, marketing and publicity (AMP) expenses and in remanding the matter to the Assessing Officer/Transfer Pricing Officer for determining the arm's length price of such transaction for the purpose of transfer pricing adjustment ?' . . .

The assessee drew the attention of the Income-tax Appellate Tribunal to the decision of this court in *Sony Ericsson Mobile Communications India P. Ltd.* v. *CIT* [2015] 374 ITR 118 (Delhi) whereby the court had declared that the bright line test had no statutory mandate and considering the excess expenditure beyond the bright line as an international transaction was 'unwarranted'.

In para 5 of the impugned order, the Income-tax Appellate Tribunal noted as under :

'5. On enquiry from the Bench, the learned counsel of the assessee submitted that the facts and figures required for coming to the conclusion pleaded by him were not available on record and an opportunity may be given to him to present the same before the Transfer Pricing Officer. He further submitted that the Revenue is also required to verify the fresh data to be submitted by the assessee.'

Ultimately, the Income-tax Appellate Tribunal stated that it had, in view of the submissions of the counsel of both sides, 'no other option, but to set aside the issue in dispute to the file of the Assessing Officer/Transfer Pricing Officer on the above issue'. Further, the Assessing Officer/Transfer Pricing Officer was directed to follow the binding judgment of this court.

It is the submission of Mr. Vohra that, as explained by this court in *Sony Ericsson India Pvt. Ltd.* (supra) and later in *Maruti Suzuki India Ltd.* v. *Additional CIT* [2010] 328 ITR 210 (Delhi), a basic requirement had to be fulfilled prior to commencing the exercise of determining the arm's length price of an international transaction. The Revenue had to discharge its onus of showing that there was an international transaction involving the assessee and its associated enterprises with regard to the advertising, marketing and publicity expenses. If the Revenue failed to discharge this onus then the question of the further step of determining the arm's length price of such advertising, marketing and publicity expenses does not arise.

Mr. Vohra submitted that there was in fact no concession made by the assessee on this score. He submitted that the Income-tax Appellate Tribunal ought not to have remanded the matter to the Transfer Pricing Officer as the material on record before the Income-tax

Appellate Tribunal was sufficient to arrive at a conclusion on this issue.

Mr. Sanjay Kumar, on the other hand, submitted that it was the assessee's own case before the Income-tax Appellate Tribunal that in the absence of facts and figures the matter should be sent back to the Transfer Pricing Officer for fresh determination. He further submitted that when the Transfer Pricing Officer decided the issue in the present case, he did not have the benefit of the decision of this court in *Sony Ericsson India Pvt. Ltd.* (supra). He also submitted that if the matter went back to the Transfer Pricing Officer he would have to examine the issue afresh, dehors the bright line test, and this was the reason why the entire matter, and not just the issue regarding determination of arm's length price, ought to be sent back to the Transfer Pricing Officer. Mr. Sanjay Kumar also placed reliance on this decision of this court in *Le Passage to India Tour and Travels P. Ltd.* v. *Deputy CIT* [2017] 391 ITR 207 (Delhi).

The decision in *Le Passage to India Tour and Travels (P.) Ltd.* (supra) turned on the fact that there was no determination by the Transfer Pricing Officer in the first place whether there was an international transaction. In the present case, however, the Transfer Pricing Officer did apply his mind to the existence of an international transaction involving the advertising, marketing and publicity expenses. The only ground on which the conclusion was reached by the Transfer Pricing Officer was that the advertising, marketing and publicity expenditure incurred by the assessee was in excess of that incurred by the comparables. His conclusion was not based on any other factor. In other words, it was not as if the conclusion arrived by the Transfer Pricing Officer was based on two or three grounds, one of which was the bright line test.

This court in *Sony Ericsson India Pvt. Ltd.* (supra) categorically found that the bright line test was not an appropriate yardstick for determining the existence of an international transaction or for that matter for calculating the arm's length price of such transaction. The decision of the Special Bench of the Income-tax Appellate Tribunal in *L. G. Electronics India P. Ltd.* v. *Asst. CIT* [2013] 22 ITR (Trib) 1 (Delhi) [SB] which sought to make bright line test the basis was set aside by this court.

Once the bright line test has been declared by this court in *Sony Ericsson India Pvt. Ltd.* (supra) to no longer be a valid basis for determining the existence of or the arm's length price of an international

transaction involving the advertising, marketing and publicity expenses, the order of the Transfer Pricing Officer was unsustainable in law. The mere fact that the assessee was permitted to use the brand name 'valvoline' will not automatically lead to an inference that any expense that the assessee incurred towards the advertising, marketing and publicity was only to enhance the brand 'valvoline'. The onus was on the Revenue to show the existence of any arrangement or agreement on the basis of which it could be inferred that the advertising, marketing and publicity expenses incurred by the assessee was not for its own benefit but for the benefit of its associated enterprises . That factual foundation has been unable to be laid by the Revenue in the present case. On the basis of the existing record, the Transfer Pricing Officer has found no basis other than by applying the bright line test, to discern the existence of international transaction. Therefore, no purpose will be served if the matter is remanded to the Transfer Pricing Officer, or even the Income-tax Appellate Tribunal, for this purpose.

This court has in similar circumstances in a series of decisions including *Maruti Suzuki Ltd.* (supra) ; *Bausch and Lomb Eyecare (India) Pvt. Ltd.* v. *Addl. CIT* [2016] 381 ITR 227 (Delhi) and *Honda Siel Power Products Ltd.* v. *Deputy CIT* [2016] 7 ITR-OL 22 (Delhi) ; [2016] 237 Taxman 304 (Delhi) emphasized the importance of the Revenue having to first discharge the initial burden upon it with regard to showing the existence of an international transaction between the assessee and the associated enterprises .

For the aforementioned reasons, this court is of the view that the Income-tax Appellate Tribunal was not justified in remanding the matter to the Assessing Officer/Transfer Pricing Officer for determining the arm's length price of the alleged international transaction involving the advertising, marketing and publicity expenses, when in fact, the Revenue was unable to show that there existed an international transaction between the assessee and its associated enterprises in the first place.

The question framed by this court is, accordingly, answered in the negative, i. e., in favour of the assessee and against the Revenue. The appeal is, accordingly, allowed."

3 Keeping in view the aforesaid judgment of the Division Bench of this Court, no substantial question of law arises for consideration in the present appeal. Accordingly, the present appeal stands dismissed.

[2020] 424 ITR 167 (Delhi)

[IN THE DELHI HIGH COURT]

INTEC CORPORATION

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

VIPIN SANGHI and **SANJEEV NARULA** JJ.

December 16, 2019.

SS ▸ ITA 1961, ss 150, 153
AY ▸ 2009-10
HF ▸ Department

REASSESSMENT—LIMITATION—EXCLUSION FROM LIMITATION—EFFECT OF SECTIONS 150 AND 153—REASSESSMENT TO GIVE EFFECT TO FINDING AND DIRECTION OF APPELLATE AUTHORITY—MEANING OF "FINDING" AND "DIRECTION"—DISALLOWANCES FOR NON-COMPLIANCE WITH PROVISIONS FOR ASSESSMENT YEAR 2008-09—REASSESSMENT PROCEEDINGS TO DISALLOW DEDUCTIONS FOR ASSESSMENT YEAR 2009-10—SECTION 153 APPLICABLE—NOTICE ON OCTOBER 2011—NOT BARRED BY LIMITATION—INCOME-TAX ACT, 1961, SS. 150, 153.

WORDS AND PHRASES—MEANINGS OF "FINDING" AND "DIRECTION" .

Sub-section (3) of section 153 of the Income-tax Act, 1961 lifts the bar of limitation laid down under sub-sections (1) and (2) thereof in respect of the classes of assessments, reassessments or recomputations enumerated thereunder. Thus, in the light of the provisions of section 153(3)(ii) the normal time-limit for completion of assessments or reassessments, as contained in section 153(1) or section 153(2), shall have no application where the assessment is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under sections 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act. Thus for the purpose of the exception provided under sub-section (3)(ii), it is not necessary that there should be any specific finding or direction contained in the order with regard to assessment of income for another assessment year in the light of the deeming provision in Explanation 2 *below section 153 of the Act. The very fact that income has been excluded from the total income of the assessee for an assessment year by virtue of an order referred to in clause (ii) of sub-section (3) would be sufficient for the purpose of making an assessment of such income in another year and for the purpose of sections 150 and 153, the*

assessment would be deemed to have been made in consequence of or to give effect to any finding or direction contained in the order.

The expressions "finding" and "direction" must be given full meaning. "Finding" is a finding necessary for giving relief in respect of the assessment for the year in question and "direction" is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited, the words also must be related to the scope of the findings and directions.

In view of the enactment of sub-section (2) to section 150 and Explanations 2 *and 3 added to section 153, there cannot be any doubt that a finding in respect of a different year can also be used for the purpose of invoking the provisions of section 150. A plain reading of section 150 reveals that it deals with a situation where an assessment or reassessment for a particular year or for a particular person is necessitated by an order passed by the appellate or revisional authority or on a reference. In such cases, it may not be possible for the Revenue to adhere to the time limits prescribed under section 149, as the order of appeal, reference or revision or by a court, in a proceeding under any other law may be passed beyond the period contemplated under section 149. It is for this reason, the Legislature has not placed any time-limit for making the assessment or reassessment in such circumstances and for this reason, section 150 begins with the non obstante clause. At the same time, it does not mean that the power under section 150(1) is uncanalised or unrestricted. The safeguard has been built under sub-section (2) of section 150. Section 150(2) provides that directions under section 150(1) cannot be given by the appellate or revisional authority or the court if on the date on which the order impugned in the appeal or revision was passed, the reassessment proceedings had become time barred. In other words, under section 150(2), the appellate authority could give directions for the reassessment only in respect of an assessment year, which was within the limitation stipulated under section 148 in respect of which reassessment proceedings could be initiated on the date of passing of order under appeal.*

The assessee was engaged in the business of manufacturing and marketing of roof mounted package air conditioners and had a manufacturing unit in Himachal Pradesh. In order to expand its business, the assessee set up a new unit in Uttarakhand, in the year 2006. The assessee claimed to have started production, in the Uttarakhand unit during the financial year 2007-08, and claimed deduction of profits, under section 80-IC of the Act, in the assessment

year 2008-09. The claim was rejected by the Assessing Officer, inter alia, on the ground of violation of the conditions prescribed in section 80-IC(4)(ii) of the Act. The assessee preferred an appeal before the Commissioner (Appeals), against the order of the Assessing Officer and succeeded therein. As a result the deductions claimed by the assessee under section 80-IC of the Act were allowed. The order of the Commissioner (Appeals), was challenged by the Revenue, before the Appellate Tribunal. In the meanwhile, the assessee's case for the assessment year 2009-10 was also selected for scrutiny on the same ground, i.e., deductions claimed under section 80-IC of the Act. The assessee requested the Assessing Officer to follow the order of the Commissioner (Appeals), as it was binding upon him. The Assessing Officer acceded to the assessee's request and completed the assessment for the assessment year 2009-10 under section 143(3) of the Act, allowing the deduction under section 80-IC of the Act. Subsequently, by an order dated January 16, 2017, the Appellate Tribunal reversed the findings of the Commissioner (Appeals) with respect to the assessment year 2008-09 and allowed the Departmental appeal. In this background, the Assessing Officer issued notice dated March 25, 2017, under section 147/150 of the Act, for reassessment for the assessment year 2009-10. On a writ petition to quash the notice on the ground that it was barred by limitation :

Held, *dismissing the petition, that the finding given by the Appellate Tribunal struck at the foundation of the claim of the assessee that the Uttarakhand unit was entitled to deduction under section 80-IC for the immediate succeeding year in question. Since the Appellate Tribunal had categorically observed that the assessee could not claim deduction under section 80-IC, as it did not commence production at the Uttarakhand unit for the assessment year 2008-09, the assessee could not claim deduction under the same proviso without satisfying the Assessing Officer that for the assessment year 2009-10, it had in fact commenced production at the Uttarakhand unit. Moreover, during scrutiny proceedings before the Assessing Officer for the assessment year 2009-10, the assessee took benefit of the order of the Commissioner (Appeals) submitting that its case for that year was covered by the decision of the Commissioner (Appeals) for the assessment year 2008-09. The acceptance of the deduction claimed by the assessee in the relevant assessment year was a direct consequence of the order passed by the Commissioner (Appeals) in the preceding assessment year, and the undertaking given by the assessee to be bound by the order of the Appellate Tribunal for the assessment year 2008-09. Pertinently, at that stage the assessee did not claim that each year was to be treated separately and, therefore, the finding of the Commissioner*

(Appeals) for the assessment year 2008-09 was not relevant for assessment of income for the assessment year 2009-10. The assessee was now clearly approbating and reprobating, which is not permissible. Thus, in view of the facts of the case, where the assessee having categorically agreed to be bound by the order of the Appellate Tribunal, the finding rendered by the Appellate Tribunal was sufficient and the Revenue would be entitled to avail of the benefit of section 150. Since as on October 5, 2011, the time-limit for reopening of assessment for the assessment year 2009-10 had not lapsed, the order of the Appellate Tribunal was well within the limitation. The notice was valid.

Cases referred to :

CIT (Dy.) *v.* Ace Multi Axes Systems Ltd. [2018] 400 ITR 141 (SC) (para 21)

CIT *v.* Greenworld Corporation [2009] 314 ITR 81 (SC) (para 23)

CIT *v.* P. P. Engineering Work [2014] 369 ITR 433 (Delhi) (para 16)

CIT *v.* Satellite Engineering Ltd. [1978] 113 ITR 208 (Guj) (para 21)

CIT *v.* Seeyan Plywoods [1991] 190 ITR 564 (Ker) (para 21)

CIT *v.* Suessin Textile Bearing Ltd. [1982] 135 ITR 443 (Guj) (para 21)

Gujarat Power Corporation Ltd. *v.* Asst. CIT [2013] 350 ITR 266 (Guj) (para 15)

HCL Technologies *v.* Asst. CIT [2015] 377 ITR 483 (Delhi) (para 21)

ITO *v.* Murlidhar Bhagwan Das [1964] 52 ITR 335 (SC) (paras 13, 14, 16)

Intec Corporation *v.* Pr. CIT [2019] 13 ITR-OL 279 (Delhi) (para 20)

Kalyan Ala Barot *v.* M. H. Rathod [2010] 328 ITR 521 (Guj) (para 16)

Marubeni India P. Ltd. *v.* CIT [2010] 328 ITR 306 (Delhi) (para 24)

Parveen Kumari *v.* CIT [1999] 237 ITR 339 (P&H) (para 26)

Rajender Nath *v.* CIT [1979] 120 ITR 14 (SC) (para 14)

Rural Electrification Corporation Ltd. *v.* CIT (No. 1) [2013] 355 ITR 345 (Delhi) (para 16)

Sharma (K.M.) *v.* ITO [2002] 254 ITR 772 (SC) (para 26)

Sivalingam Chettiar (N. Kt.) *v.* CIT [1967] 66 ITR 586 (SC) (para 14)

Sundaram Pillai (S.) *v.* V. R. Pattabiraman [1985] 1 SCC 591 (para 17)

W. P. (C) No. 11452 of 2017.

M. S. Syali, Senior Advocate with *Bharat Beriwal*, *Mayank Nagi*, *Tarun Singh* and *Pulkit Verma*, Advocates, for the petitioner.

Zoheb Hossain, Senior Standing Counsel with *Deepak Anand*, *Piyush Goyal*, *Vivek Gurnani* and *Agni Sen*, Advocates, for the respondent.

JUDGMENT

The judgment of the court was delivered by

SANJEEV NARULA J.—The present petition filed under article 226 of the Constitution of India, inter alia, seeks issuance of a writ of certiorari for quashing the notice dated March 25, 2017 issued by the respondent under section 148 of the Income-tax Act, 1961 (hereinafter "the Act") in relation to the assessment year (AY) 2009-10 and the order dated December 7, 2017 passed by the respondent disposing of the objections raised by the petitioner in response to the aforesaid notice. 1

The petitioner has premised the challenge to the notice dated March 25, 2017 (hereinafter "the impugned notice"), on the ground that the Assessing Officer (AO) did not have the jurisdiction to issue the impugned notice beyond six years from the end of the relevant assessment year 2009-10, i.e., the maximum time limit provided for issuance of notice under section 148 of the Act. 2

Before delving into the merits of the case, we may note that the petitioner has not addressed any arguments with respect to the merits of the case, i.e., the assumption of jurisdiction by the Assessing Officer under section 147/148 of the Act. This has been specifically averred in the note of arguments filed in the court. The Revenue, also asserts that there is no pleading or ground in the petition questioning the validity of reopening, viz., section 147/148 of the Act. Thus, we are not venturing into the contest- whether, or not, the impugned notice fulfils the requirement of section 147. Consequently, we have confined and restricted our scrutiny only to the issue of limitation, in the context of applicability of section 150 of the Act. Since the scope of challenge has been curtailed, the judgments relied upon by the petitioner and the Revenue, dealing with the scope of notice under section 147 have not been dealt with in the present case. 3

Brief facts

The petitioner is engaged in the business of manufacturing and marketing of roof mounted package air conditioners (RMPU's) and has a manufacturing unit in Kala Amb, H.P. (hereinafter referred as "Kala Amb unit"). In order to expand its business, the petitioner set up a new unit at Selaqui in Uttarakhand (hereinafter "the Selaqui unit"), in the year 2006. The petitioner claimed to have started production of the RMPU's, in the Selaqui unit during the financial year 2007-08, and claimed deduction of profits, under section 80-IC of the Act, in the concerned assessment year, 2008-09. The claim filed by the petitioner for deduction of profits was selected for scrutiny and rejected by the Assessing Officer, inter alia, on the 4

ground of violation of the conditions prescribed in section 80-IC(4)(ii) of the Act. The petitioner preferred an appeal before the Commissioner of Income-tax (Appeals), against the order of the Assessing Officer and succeeded therein. As a result the deductions claimed by the petitioner under section 80-IC of the Act, were allowed. The order of the Commissioner of Income-tax (Appeals), was challenged by the Revenue, before the Income-tax Appellate Tribunal (hereinafter "ITAT").

5 In the meanwhile, the petitioner's case for the assessment year 2009-10 was also selected for scrutiny on the same ground, i.e., deductions claimed under section 80-IC of the Act. The petitioner requested the concerned Assessing Officer to follow the order of the Commissioner of Income-tax (Appeals), as the same was binding upon him. The concerned Assessing Officer acceded to the petitioners request and completed the assessment for the assessment year 2009-10 under section 143(3) of the Act, without disallowing deduction under section 80-IC of the Act.

6 Subsequently, vide order dated January 16, 2017, the Income-tax Appellate Tribunal reversed the findings of the Commissioner of Income-tax (Appeals) with respect to the assessment year 2008-09 and allowed the Departmental appeal in favour of the Revenue.

7 In this background, the Assessing Officer issued the impugned notice dated March 25, 2017, under section 147/150 of the Act, for reassessment of the return filed by the petitioner for the assessment year 2009-10, requiring the petitioner to file the return for the said assessment year. The petitioner complied with the notice and sought reasons for reopening the assessment, which were provided to it by the Revenue. Thereafter, the petitioner vide letter dated November 20, 2017 raised objections against the reasons provided by the Revenue for reopening the assessment, which were rejected on December 7, 2017, reiterating that reopening of the assessment is necessary and obligatory in consequence of and in order to give effect to, the finding or direction contained in the order dated July 16, 2019, passed by the Income-tax Appellate Tribunal.

Case of petitioner

8 Mr. M. S. Syali, learned senior counsel for the petitioner, contends that as per section 149, notice under section 147 could have been issued within a maximum period of 6 years from the end of the relevant assessment year. The period of six years in the present case, i.e., for the assessment year 2009-10 ended on March 31, 2016. Invocation of section 150 of the Act, on the premise of giving effect to finding/direction contained in the order passed by the Income-tax Appellate Tribunal, with respect to the assessment year 2008-09, is not valid and does not justify the extension of

limitation of six years to reopen an assessment. He contends, it is trite law that the principle of res judicata is not applicable to income-tax proceedings, and assessment for each year is a distinct and independent proceeding. The finding recorded in one assessment year is not required to be mandatorily followed in subsequent years, and the Assessing Officer is duty bound to consider new facts placed on record by the assessee. Further, he contends that in its order dated July 16, 2019, the Income-tax Appellate Tribunal has not given any finding or direction with respect to the assessment year 2009-10. Thus, section 150 of the Act cannot be invoked for reopening the assessment for the assessment year 2009-10 on the basis of the aforesaid order. Concomitantly, he submits that the Income-tax Appellate Tribunal could not have given any material finding or direction in respect of an assessment year, of which the assessment was not under challenge before it. He further submitted that the word "effect" used in section 150(1) would mean "final effect" and the term "finding/direction" would mean "final finding/direction". Since, the order of the Income-tax Appellate Tribunal is subject to final adjudication by the High Court or Supreme Court, and also for the fact that the petitioner's miscellaneous application under section 254(2) of the Act, seeking rectification of mistakes in the order of the Income-tax Appellate Tribunal is pending until today, the order of the Income-tax Appellate Tribunal cannot be given effect to, until it has attained finality, one way or the other. In support of his submissions, he has relied upon several precedents on various legal propositions that have been taken into account and dealt with appropriately while giving our analysis and findings.

Case of the respondent

Per contra, Mr. Zoheb Hossain, learned senior standing counsel for the **9**
Revenue, contends that the order passed by the Income-tax Appellate Tribunal, holding the petitioner not eligible to claim benefit of deduction under section 80-IC of the Act, is binding for the assessment year 2009-10 as well, and reopening of the assessment under section 148 read with section 150 is valid and proper. He contends that the provision of section 150(1) and 153(3) are clear and unambiguous as to the power of the Revenue to reopen assessments, in consequence of, or to give effect to, any finding or direction of an appellate authority. The assessee is not eligible for any benefit under section 80-IC and as per its own submissions during the course of assessment proceedings in the relevant year, the assessee agreed that the order of the Income-tax Appellate Tribunal for the assessment year 2008-09 will be binding for the assessment year 2009-10. Thus, the reopening under section 148 read with section 150 is in accordance

with law. Moreover, section 150 does not contemplate finality of orders and has a non obstante clause specifically excluding applicability of section 149.

Analysis and findings

10 Before adverting to the merits of the contentions raised by learned counsel for both the parties, the relevant extracts of the provisions of law are reproduced hereunder for ready reference :

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) : . . .

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E ;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been under assessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ; . . .

148. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed ; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 : . . .

150. (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a court in any proceeding under any other law.

(2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.

153. (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable : . . .

Explanation 2.—For the purposes of this section, where, by an order referred to in clause (i) of sub-section (6),—

(a) any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order ; or

(b) any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, if such other person was given an opportunity of being heard before the said order was passed."

11 The present case pertains to the assessment year 2009-10. In terms of section 149(1)(b) of the Act, the case can be reopened within six years from the end of the relevant assessment year. The Revenue has relied upon section 150 to reopen the assessment for the assessment year 2009-10, in the light of the order of Income-tax Appellate Tribunal pertaining to the assessment year 2008-09. The reasons as provided to the petitioner are indicated in the letter dated September 15, 2017. Reference thereto is essential for deciding the present petition and the same is extracted hereinbelow :—

"In response to your letter dated June 22, 2017, you are hereby provided the reasons for reopening as under :

'In this case, the return for assessment year was filed by the assessee on September 29, 2009 declaring total income of Rs. 2,18,95,890. The assessee has claimed deduction of Rs. 25,36,835 being the profit from its industrial unit of Selaqui under section 80-IC during the assessment year 2009-10. The return was processed under section 143(1) on same income. The case was selected for scrutiny under section 143(3) and the returned income was accepted.

In this case of the assessee the return of the income for the assessment year 2008-09 was filed by the assessee declaring income of Rs. 1,52,82,400. The assessee claimed deduction of Rs. 3,13,09,690 from its gross total income under section 80-IC of the Income-tax Act being the profit from a new industrial unit at Selaqui in Uttarakhand claimed to have commenced the manufacturing and production during the year. The entire manufacturing of the assessee was done up to the assessment year 2007-08 from its industrial unit at Kala-Amb,

Himachal Pradesh and during the year under assessment, the manufacturing process had been split between the unit at Kala-Amb and Selaqui. Hence, during scrutiny proceedings for the assessment year 2008-09, the Assessing Officer (AO) disallowed the deduction claim under section 80-IC on the profits of Selaqui unit being the unit not eligible as the same was made by splitting its earlier manufacturing unit. The aggrieved assessee filed appeal before the learned Commissioner of Income-tax (Appeals) who decided the matter in favour of the assessee vide his order dated October 5, 2011.

The scrutiny proceeding for the assessment year 2009-10 was under progress when the order of the Commissioner of Income-tax (Appeals) was pronounced. The assessee has claimed deduction of Rs. 25,36,835 being the profit from its industrial unit at Selaqui under section 80-IC during the assessment year 2009-10. Though the Department filed the appeal before the Income-tax Appellate Tribunal against the decision of the Commissioner of Income-tax (Appeals) for the assessment year 2008-09 before the then Assessing Officer, in relation to the proceedings for the assessment year 2009-10, the assessee pressed to follow the order of the Commissioner of Income-tax (Appeals) in respect of allowability of deduction under section 80-IC for the assessment year 2008-09 and also submitted that the decision of the Tribunal would be binding as on that date. The relevant portion of the submission made by the assessee vide letter dated December 22, 2011 is reproduced as under :

"At the very outset, we would like to bring on record that the directions given by the Additional Commissioner of Income-tax, Range-23, New Delhi (copy of which has not been enclosed with your notice under reply) are prejudiced to the assessee inasmuch as the same are beyond the scope of the Act and the application under section 144A dated November 30, 2011 filed by the assessee. However, we assume that this must be in response to our application dated November 30, 2011 to him under section 144A of the Income-tax Act, 1961 seeking directions to you to follow the order of the learned Commissioner of Income-tax (Appeals)-XXIII, New Delhi (copy of which has already been placed on record) in the assessee's own case for the assessment year 2008-09. That, as such, the Commissioner of Income-tax (Appeals) order being the only order before you till date the same is binding upon you. The reason given to us for not following the said order being that you will be preferring an

appeal to the Tribunal is academic in nature and as and when you do so the decision of the Tribunal would be binding as on that date."

The then Assessing Officer allowed the deduction while considering the submission of the assessee.

Now, the hon'ble Income-tax Appellate Tribunal in its order dated January 16, 2017 allowed the appeal of the Revenue and sustained the addition made by the Assessing Officer for the assessment year 2008-09 by holding that it is a case of splitting up/reconstruction of the business already in existence for which the assessee is not eligible for deduction under section 80-IC.

The Assessing Officer allowed the deduction of Rs. 25,36,835 under section 80-IC for the assessment year 2009-10 by considering the submissions made by the assessee following the order of the Commissioner of Income-tax (Appeals) in the assessee's own case for the assessment year 2008-09 which was in assessee's favour. Now that the Income-tax Appellate Tribunal has held that the assessee is not at all eligible for any benefit under section 80-IC. Now, as per the assessee's own submission made during the proceeding for the assessment year 2009-10, the directions of the Income-tax Appellate Tribunal in 2008-09 is also binding for the assessment year 2009-10.

I have independently examined all the material and reached on the conclusion that the case is squarely covered by section 150 of the Income-tax Act which states as under :

"Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a court in any proceeding under any other law."

As per the assessee's own submission made during the proceedings for the assessment year 2009-10, the directions of the Income-tax Appellate Tribunal in the assessment year 2008-09 is also binding for the assessment year 2009-10.

The case is not covered under the first proviso to section 147 of the Income-tax Act.

Considering the factual matrix, statutory provisions and legal principles, the undersigned has reason to believe that there has been an escapement of income to the tune of Rs. 25,36,835 chargeable to tax

for the assessment year 2009-10 and hence it is a fit case for initiation of proceedings in terms of section 147 of the Income-tax Act, 1961.

Accordingly, necessary approval under section 151 of the Income-tax Act, 1961 is solicited for issuance of notice under section 148 of the Income-tax Act for the assessment year 2009-10.'

2. The reason for reopening of the assessment year 2009-10 under section 147 of the Income-tax Act, 1961 provided above is for your information."

12 On a perusal of the reasons for reopening, it emerges that, during the course of assessment for the assessment year 2009-10, the petitioner has claimed deduction from its gross income under section 80-IC of the Act, being the profit from manufacturing and production at its new industrial unit at Selaqui in Uttarakhand. The petitioner claimed that the entire manufacturing of assessee up to the assessment year 2007-08, was done from its industrial unit at Kala Amb, Himachal Pradesh and thereafter, the manufacturing process had been split between the unit at Kala Amb and Selaqui. During scrutiny proceedings for the assessment year 2008-09, the Assessing Officer disallowed the deductions claimed under section 80-IC on the profits of Selaqui unit made by splitting its earlier manufacturing unit. On an appeal preferred by the petitioner, the Commissioner of Income-tax (Appeals) decided the matter in favour of the assessee. During the scrutiny proceeding for the assessment year 2009-10, the petitioner pressed to follow the order of the Commissioner of Income-tax (Appeals) in respect of deduction under section 80-IC for the assessment year 2008-09 and also submitted that the decision of the Income-tax Appellate Tribunal would be binding upon it. The relevant portion of the submission made by the petitioner has been reproduced in the reasons that formed the basis for reopening the assessment, as extracted hereinabove. Since the petitioner agreed to be bound by the findings of the Income-tax Appellate Tribunal, the question arises as to whether it is legally permissible to reopen the assessment pertaining to the assessment year 2009-10 in the light of the decision of the Income-tax Appellate Tribunal pertaining to the assessment year 2008-09.

13 The main plank of the petitioner's argument is that section 150 mandates the existence of "finding" or "direction" for the reassessment of the year for which the action is taken. Mr. M. S. Syali has argued, that the "finding" or "direction" must relate to the assessment year 2009-10, and a finding in respect of the assessment year 2008-09 would not suffice. In this regard, Mr. Syali has firmly relied upon the judgment of the Supreme

Court in *ITO* v. *Murlidhar Bhagwan Das* [1964] 52 ITR 335 (SC), wherein it has been held as under (page 343 of 52 ITR) :

> *". . . . It is important to remember that the proviso does not confer any fresh power upon the Income-tax Officer to make assessments in respect of escaped incomes without any time-limit. It only lifts the ban of limitation in respect of certain assessments made under certain provisions of the Act and the lifting of the ban cannot be so construed as to increase the jurisdiction of the Tribunals under the relevant section. The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing Tribunal within the scope of its jurisdiction. If the intention was to remove the period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-section (1) thereof.*
>
> . . . The words relied upon are 'section limiting the time', 'any person', 'in consequence of or to give effect to any finding or direction.' . . . *A 'finding', therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year*. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression 'direction' cannot be construed in vacuum, but must be collated to the directions which the Appellate Assistant Commissioner can give under section 31. Under that section he can give directions, inter alia, under section 31(3)(b), (c) or (e) or section 31(4). *The expression 'direction' in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other Tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression 'finding' as well as the expression 'direction' can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words 'in consequence of or to give effect to' do not create any*

difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions.

. . . The expression 'any person' in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment ; but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. . . . A combined reading of section 30(1) and section 31(3) of the Act indicates the cases where persons other than the appealing assessees might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the HUF or the individual, as the case may be. In such cases though the latter are not eo nomine parties to the appeal, their assessments depend upon the assessments of the former. It is not necessary to pursue the matter further. *It was, therefore, to be held that the expression 'any person' in the setting in which it appeared must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal.*" (emphasis[1] supplied)

The petitioner has further relied on *Rajender Nath* v. *CIT* [1979] 120 ITR 14 (SC), wherein it has been held as under (page 18 of 120 ITR) : **14**

"*The expressions 'finding' and 'direction' are limited in meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding it must be directly involved in the disposal of the case*. It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. For instance, where the facts show that the income can belong either to A or B and to no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be treated as A's income. A finding

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respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A. If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of B, then finding made in respect, of B is an incidental finding only. *It is not a finding necessary for the disposal of the case pertaining to A. The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year. As regards the expression 'direction' in section 153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it. The expressions 'finding' and 'direction' in section 153(3)(ii) is not of the Act must be accordingly confined (sic). Section 153(3)(ii) is not a provision enlarging the jurisdiction of the authority or court. It is a provision which merely raises the bar of limitation for making an assessment order under section 143 or section 144 or section 147—ITO* v. *Murlidhar Bhagwan Das* [1964] 52 ITR 335 (SC) and *N.Kt. Sivalingam Chettiar* v. *CIT* [1967] 66 ITR 586 (SC). The question formulated by the Tribunal raised the point whether the Appellate Assistant Commissioner could convert the provisions of section 147(1) into those of section 153(3)(ii) of the Act. In view of section 153(3)(ii) dealing with limitation merely, it is not easy to appreciate the relevance or validity of the point.' (emphasis[1] supplied)

15 The petitioner also relied upon *Gujarat Power Corporation Ltd.* v. *Asst. CIT* [2013] 350 ITR 266 (Guj) wherein it has been held as under (page 294 of 350 ITR) :

"The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. *Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be reopened by the same authority*. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interests of the Revenue, therefore, such special provisions are made under section 147 of the Act. *However, it must be appreciated*

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that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the Revenue. *This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that the power to reopening cannot be equated with review*." (emphasis[1] supplied)

On this issue, the Revenue has relied upon the decision of this court in **16**
CIT v. *P. P. Engineering Work* [2014] 369 ITR 433 (Delhi), where the court had the occasion to interpret sections 150 and 153. In the said decision, this court also considered the judgment of the Supreme Court in *Murlidhar Bhagwan Das* (supra), and taking note of the legislative history including purpose behind enactment of sub-section (2) to section 150, and *Explanations 2* and 3 to section 153 of the Act, observed as under (page 436 of 369 ITR) :

"Aggrieved, the appellant-Revenue preferred an appeal before the Tribunal relying upon section 153 of the Act. *It is noticeable that the Commissioner of Income-tax (Appeals) did not refer to section 150(2) and section 153, Explanation 2 of the Act*. The Tribunal also without referring to the two provisions, held that the assessment order could not be sustained, as the Tribunal had not given any finding or direction in the earlier order dated August 11, 2008, relating to the assessment year 2000-01 . . .

The Delhi High Court in *Rural Electrification Corporation Ltd.* v. *CIT (No. 1)* [2013] 355 ITR 345 (Delhi) had occasion to consider the effect of *Explanation 3* and whether the ratio as expounded by the Supreme Court in *ITO* v. *Murlidhar Bhagwan Das* [1964] 52 ITR 335 (SC) would be still applicable. The legislative history including purpose behind the enactment of sub-section (2) of section 150 and *Explanations 2* and 3 to section 153 of the Act were referred to. Reference was also made to sub-section (3), clause (ii) of section 153 of the Act and, thereafter, it was opined (page 352 of 355 ITR) :

'When the Income-tax Act, 1961, was enacted, section 153 did not contain the *Explanations 2* and *3*. Those *Explanations* were

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introduced subsequently in 1964 after the Supreme Court decision in *Murlidhar Bhagwan Das* (supra). *It is, therefore, apparent that the two Explanations were added so as to supersede the view taken by the Supreme Court in respect of the 1922 Act.* Explanation 2 *in section 153 makes it clear that even where any income is excluded from the total income of the assessee from a particular assessment year, then an assessment of such income for another assessment year shall, for the purpose of section 150 as also of section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. In other words, a finding in respect of a different year can also be used for the purposes of invoking the provisions of section 150 of the said Act, by virtue of the deeming provision contained in* Explanation 2 *in section 153 of the said Act. This would otherwise not have been available in view of the decision of the Supreme Court in* Murlidhar Bhagwan Das *(supra). Similarly,* Explanation 3 *stipulates that where, by an order, inter alia, passed by the Tribunal in an appeal, any income is excluded from the total income of one person and held to be the income of another person, then, assessment of such income on such other person shall, for the purposes of section 150 as also section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.'*

In *Rural Electrification Corporation Ltd.* (supra), *Explanation 3* to section 153 was applicable and in this case, *Explanation 2* to section 153 would be applicable, and the ratio and reasoning given in *Rural Electrification Corporation Ltd.* (supra) would apply with equal force. *Explanation 2* to section 153 applies when income is found to be relating to some other year and *Explanation 3* applies when income is found to be income of some other person. Otherwise, the two *Explanations* are identical and serve the same purpose.

Similar view has been taken by the Gujarat High Court in *Kalyan Ala Barot* v. *M. H. Rathod* [2010] 328 ITR 521 (Guj), wherein the effect of the two *Explanation*s read with sub-section (2) of section 150 were considered and it was held (page 529) :

'On a plain reading of sub-section (3) of section 153 of the Act, it is apparent that the same lifts the bar of limitation laid down under sub-section (1) and sub-section (2) thereof in respect of the classes of assessments, reassessments or recomputations enumerated thereunder. Thus, in the light of the provisions of section 153(3)(ii) the normal time limit for completion of assessments or reassessments, as contained in section 153(1) or section 153(2), shall have no application

where the assessment is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act.

The language employed in *Explanation 2* to section 153 makes it abundantly clear that under the said provision, when an order in appeal, revision or reference is made whereby any income is excluded from the total income of an assessee for an assessment year, then an assessment of such income for another assessment year shall be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order for the purpose of section 150 or section 153. *Thus, for the purpose of resorting to the exception provided under sub-section (3)(ii), it is not necessary that there should be any specific finding or direction contained in the said order with regard to assessment of income for another assessment year in light of the deeming provision in* Explanation 2 *below section 153 of the Act. The very fact that income has been excluded from the total income of the assessee for an assessment year by virtue of an order referred to in clause (ii) of sub-section (3) would be sufficient for the purpose of making an assessment of such income in another year and for the purpose of section 150 and section 153, the same would be deemed to have been made in consequence of or to give effect to any finding or direction contained in the said order . . .*

Another contention raised on behalf of the petitioner is that a finding in terms of section 150 of the Act can only be that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. *The expressions 'finding' as well as 'direction' can be only in the context of a finding necessary for giving relief in the assessment of the year under consideration.* That an order made in relation to a particular assessment year cannot be made the basis for reopening the concluded assessment of an earlier assessment year. *However, the said contention loses sight of* Explanation 2 *below section 153 which provides that where, by an order referred to in clause (ii) of sub-section (3), where any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.*

On a combined reading of sub-section (1) of section 150 and sub-section (3) of section 153, it is apparent that in cases falling under clause (ii) of sub-section (3) of section 153 read with Explanation 2 *thereunder, the provisions of sub-section (1) of section 150 would be applicable and the bar of limitation under section 149 would not be applicable*. While section 150(1) and section 153(3) contemplate issuance of notice under section 148 and completion of assessment, reassessment and recomputation respectively, in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision, Explanation 2 *to section 153(3) contains a deeming provision which provides that where by an order referred to in clause (ii) of sub-section (3) any income is excluded from the total income of an assessee for an assessment year, then an assessment of such income for another assessment year shall for the purposes of section 150 and section 153 be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order*. (emphasis[1] supplied)"

17 The petitioner has however argued that the dicta of the Supreme Court in *Murlidhar Bhagwan Das* (supra) under the Indian Income-tax Act, 1922 is applicable with equal force to section 150 of the 1961 Act, notwithstanding the amendments noted above. It is also argued that the Revenue cannot take recourse to the judgment of *P. P. Engineering* (supra) as it applies only to the situations that are covered by the *Explanation* to section 153. However, we find that subsequent to the decision of the Supreme Court in *Murlidhar Bhagwan Das* (supra), the position in law has undergone change, in view of the enactment of sub-section (2) to section 150 and *Explanations 2* and *3* added to section 153. Now, there cannot be any doubt that a finding in respect of a different year can also be used for the purpose of invoking the provisions of section 150 of the said Act. Our observations are not to be construed to mean that the ratio of the Supreme Court in *Murlidhar Bhagwan Das* (supra) has lost relevancy. However, certainly the observations made therein have to be examined in the light of the changed legal position. The *Explanation* inserted subsequent to the said judgment has to be weighed in the facts of each case. The *Explanation* has to be read so as to harmonize with, and clear up any ambiguity in the main provision. In this regard it is useful to refer to the decision of the Supreme Court in *S. Sundaram Pillai* v. *V. R. Pattabiraman* [1985] 1 SCC 591, the relevant portion of which reads as under :

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"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an *Explanation* to a statutory provision is—

'(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an *Explanation* cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the *Explanation*, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same'."

18 Undoubtedly, the situations contemplated by the *Explanation* do not exist in the present case, however, it is to be borne in mind that *Explanation 2* introduces a deeming concept and therefore, the scope of the section is enlarged. This, however, cannot be construed to mean that section 150 can be resorted to only for the situations which are covered by virtue of *Explanation 2* to section 153.

19 Before proceeding further, it would be necessary to first understand, the "finding" in question in the present case. The Income-tax Appellate Tribunal has, for the assessment year 2008-09, held that the assessee's Selaqui unit for which deduction under section 80-IC was sought, did not carry on any manufacturing activity and it was just a dropbox address. The assessee had transferred more than 20 per cent. of the total machinery employed at Selaqui unit from Kala Amb unit in violation of section 80-IC(4)(ii) of the Act. The relevant findings in the Income-tax Appellate Tribunal order read as under :—

"17. We are unable to agree with the learned Commissioner of Income-tax (Appeals) who has taken the affidavit filed by Shri R. S. Sidhu as a gospel truth even without insisting upon any evidence to support his findings. First of all, the affidavit of Shri R. S. Sidhu relied upon by the learned Commissioner of Income-tax (Appeals) is

undated. Secondly, the Commissioner of Income-tax (Appeals) has proceeded in haste in entertaining the undated affidavit in the evidence in violation of rule 46A of the Income-tax Rules, 1962 (for short 'the Rules') to believe the averment made by the assessee in the affidavit as gospel truth. Thirdly, there was no mention of telephone number, telefax and internet facility at the Selaqui unit because in the purchase order dated July 5, 2007 the telephone number of Kala Amb unit is given and the telephone number of Head Office, Delhi of the assessee has been given. Fourthly, documents transporting the machinery purchased from Grip Engineers Pvt. Ltd., and ABB, Faridabad are not tallying with the material receipt dated May 3, 2007 regarding transportation of 21 electrical motors through truck No. DL 1M 1252 whereas 21 electrical motors were alleged to have been transported by ABB through truck No. HR 35J 5393 on April 28, 2007. All these facts go to prove that the Selaqui unit was just a drop box address and no manufacturing activities are being carried out in the same.

18. The assessee stated to have purchased the machinery from M/s. Grip Engineers Pvt. Ltd., Ballabhgarh and ABB, Faridabad on April 23, 2007 and April 28, 2007 respectively but stated to have stored the same at Kala Amb unit for want of non-availability of the transit form to be issued by Uttarakhand Government. When the assessee alleged to have started manufacturing at Selaqui unit in the month of June 2007, it is difficult to believe as to why the order was placed 5 months in advance without getting the necessary transit form issued, which to our mind, does not require any extensive exercise, particularly when the Government is providing exemption to the new unit under section 80-IC, it cannot take five months to issue transit form.

19. Moreover, when this fact is examined in the light of the fact that no travelling allowance has been debited by the assessee to the profit and loss account during the year under assessment, it is difficult to believe that any manufacturing activities have been carried out at the Selaqui unit. Because earning the turnover of Rs. 11.11 crores with profit of Rs. 3.13 crores from the assembling/manufacturing unit is humanly not feasible without supervision of senior/junior functionaries of the assessee either from Kala Amb unit or from Head Office, Delhi nor any skilled worker has ever visited the Selaqui unit or prayed to be engaged. So, all these facts strengthen the findings returned by the Assessing Officer which have been overturned by the Commissioner of Income-tax (Appeals) on the basis of whims and fancies. Since the assessee has transferred tools and machinery more

than 20 per cent. of the total machinery employed at Selaqui unit from Kala Amb unit it is violation of section 80-IC(4)(ii) of the Act.

20. The factum of transfer of machinery by Grip Engineers Pvt. Ltd. Balabhgarh and ABB, Faridabad to the Kala Amb unit of the assessee on April 23, 2007 and April 28, 2007 respectively with which the assessee has alleged to have started manufacturing in the month of June 2007 is not to be seen in isolation, rather it is to be seen in the light of the connected facts and circumstances that the assessee has debited only an amount of Rs. 1,35,388 under the head wages, bonus, PF, ESI, etc., with which at the most only one worker can be hired and no expenditure has been debited to profit and loss account on account of travelling expense nor telephone, tele-fax and internet facility is proved to have been established at Selaqui unit. So we are of the considered view that new plant and machinery, even if assumed to be transferred by the assessee from Kala Amb unit to Selaqui unit, it was never put to use to carry out the manufacturing activities to qualify for exemption under section 80-IC."

20 We may note that the aforesaid order has been upheld by this court in I. T. A. No. 72 of 2019, decided on January 28, 2019 (*Intec Corporation* v. *Pr. CIT* [2019] 13 ITR-OL 279 (Delhi)), and the matter is stated to be pending challenge before the Supreme Court.

21 The petitioner has argued that since the deduction under section 80-IC of the Act has to be claimed on year to year basis, it is possible for the assessee to be denied deduction in one year, but to be allowed deduction in another year. In support of this submission reliance has been placed on, *CIT* v. *Seeyan Plywoods* [1991] 190 ITR 564 (Ker), *CIT* v. *Satellite Engineering Ltd.* [1978] 113 ITR 208 (Guj), *CIT* v. *Suessin Textile Bearing Ltd.* [1982] 135 ITR 443 (Guj), *HCL Technologies* v. *Asst. CIT* [2015] 377 ITR 483 (Delhi), *Deputy CIT* v. *Ace Multi Axes Systems Ltd.* [2018] 400 ITR 141 (SC). While, this position may be correct, however, one cannot ignore the fact that the finding given by the Income-tax Appellate Tribunal strikes at the foundation of the claim of the petitioner that Selaqui unit is entitled to deduction under section 80-IC of the Act for the immediate succeeding year in question. Since the Income-tax Appellate Tribunal categorically observed that the petitioner cannot claim deduction under section 80-IC of the Act, as it did not commence production at the Selaqui unit for the assessment year 2008-09, the petitioner cannot claim deduction under the same proviso without satisfying the Assessing Officer that for the assessment year 2009-10, he had in fact commenced production at the Selaqui unit. Moreover, one cannot also lose sight of the fact that during scrutiny

proceedings before the Assessing Officer for the year 2009-10, the assessee took benefit of the order of the Commissioner of Income-tax (Appeals) by submitting that its case for the present year is covered by the decision of the Commissioner of Income-tax (Appeals) for the assessment year 2008-09. The petitioner in its reply dated December 22, 2011 stated that any order passed by the Income-tax Appellate Tribunal will be binding as on that date. The relevant portion is recorded in the following words :

> "At the very outset, we would like to bring on record that the directions given by the Additional Commissioner of Income-tax, Range-23, New Delhi (copy of which has not been enclosed with your notice under reply) are prejudicial to the assessee inasmuch as the same are beyond the scope of the Act and the application under section 144A dated November 30, 2011 filed by the assessee. However, we assume that this must be in response to our application dated November 30, 2011 to him under section 144A of the Income-tax Act, 1961 seeking directions to you to follow the order of the learned Commissioner of Income-tax (Appeals)-XXIII, New Delhi (copy of which has been already placed on your record) in the assessee's own case for the assessment year 2008-09. That, as such, the Commissioner of Income-tax (Appeals)'s order before you till date the same is binding upon you. Your reason given to us for not following the said order being that you will be preferring an appeal to the Tribunal is academic in nature and as and when you do so the decision of the Tribunal would be binding as on that date."

22 In pursuance of the aforesaid reply and on consideration thereof, the Assessing Officer allowed the deduction of the assessee for the assessment year 2009-10 and accepted the return of income filed by the assessee. The acceptance of the deduction claimed by the assessee in the relevant assessment year was a direct consequence of the order passed by the Commissioner of Income-tax (Appeals) in the preceding assessment year, and the undertaking given by the petitioner to be bound by the order of the Income-tax Appellate Tribunal for the assessment year 2008-09. Pertinently, at that stage the petitioner did not claim that each year is to be assessed separately and, therefore, the finding of the Commissioner of Income-tax (Appeals) for the assessment year 2008-09 is not relevant for assessment of income for the assessment year 2009-10. The petitioner is now somersaulting in its submission and is clearly approbating and reprobating, which is not permissible. Thus, in view of the facts in the present case, where the petitioner categorically agreed to be bound by the order of the Income-tax Appellate Tribunal, the finding rendered by the Income-tax

Appellate Tribunal is sufficient and the Revenue would be entitled to avail of the benefit of section 150.

Additionally, the petitioner has harped that there was no ground for **23** reassessment of the assessment year 2009-10 and the subject matter of the appeal before the Income-tax Appellate Tribunal was confined to the assessment year 2008-09. The grounds of appeal, discussion and decisions relied upon before the Income-tax Appellate Tribunal, all concentrate on the said year only. Reliance was placed on *CIT* v. *Greenworld Corporation* [2009] 314 ITR 81 (SC), wherein an issue arose with respect to giving effect to the directions of the Commissioner of Income-tax under section 263 of the Act. While, deciding the said question, the court held, "a finding is held to be one, to which effect needs to be given, to comply with the order of the authority concerned". The relevant portion of the said decision reads as under (page 106 of 314 ITR) :

> *"Section 150(1) of the Act is an exception to the aforementioned provision. It brings within its ambit only such cases where reopening of the proceedings may be necessary to comply with an order of the higher authority. For the said purpose, the records of the proceedings must be before the appropriate authority. It must examine the records of the proceedings. If there is no proceeding before it or if the assessment year in question is also not a matter which would fall for consideration before the higher authority, section 150 of the Act will have no application . . .*
>
> This court noticed the development of law as also the fact that the decision of the Income-tax Officer given in a particular year does not operate as res judicata to opine (page 343 of 52 ITR) :
>
> 'The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing Tribunal within the scope of its jurisdiction. If the intention was to remove the period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-section (1) thereof'." (emphasis[1] supplied)

Further, reference has been made to the decision of *Marubeni India P.* **24** *Ltd.* v. *CIT* [2010] 328 ITR 306 (Delhi) to submit that the Income-tax Appellate Tribunal could not have given a finding in respect of an assessment year which is not the subject-matter of the appeal before it. However, the petitioner lost sight of the fact that it is not a finding in respect of the

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assessment year 2009-10, rather the aforesaid finding has a direct bearing on the assessment for the assessment year 2009-10. While it is true that in terms of section 254, while dealing with the proceedings arising out of the assessment year 2008-09, the Income-tax Appellate Tribunal did not have the jurisdiction to adjudicate on the ground not before it, however, the finding in this case cannot be considered as relevant and limited only to the assessment year 2008-09. The aforenoted findings would also be relevant for the assessment year 2009-10.

25 We are also conscious of the fact that it is only such findings — which are material to decide the subject-matter of the appeal that can form the basis of reopening under section 147. The bar of limitation would be lifted and section 150 can be invoked, only if there is such a finding. Reopening could be done "in consequence of or to give effect to" such a "finding". The findings of the Income-tax Appellate Tribunal in the aforenoted order are not incidental observations. These are categorical findings of fact which are germane for determination of the claim of the assessee, for deduction under section 80-IC of the Act. Section 150 also uses the expression "in consequence of", which means that there may be a situation that warrants reopening in view of the finding given by the appellate/revisional authority. These findings fall within the scope of section 150, as it is a finding, which was necessary for disposal of the appeal before the appellate authority for the assessment year 2008-09.

26 Adverting now to the ground of limitation raised by the petitioner, a plain reading of section 150 reveals that it deals with a situation where an assessment or reassessment for a particular year or for a particular person is necessitated by an order passed by the appellate or revisional authority or on a reference. In such cases, it may not be possible for the Revenue to adhere to the time limits prescribed under section 149, as the order of appeal, reference or revision or by a court, in a proceeding under any other law may be passed beyond the period contemplated under section 149. It is for this reason, the Legislature has not placed any time limit for making the assessment or reassessment in such circumstances and for this reason, section 150 begins with the non obstante clause. At the same time, it does not mean that the power under section 150(1) is uncanalised or unrestricted. The safeguard has been built under sub-section (2) of section 150. The entire object of section 150(2) is to bar the proceedings under sub-section (1) in the matter of assessment/reassessment or recomputation, which has become the subject-matter of the reference or revision by reasons of any other provisions limiting the time limit. Section 150(1) provides that the power to issue notice under section 148 in consequence of or giving effect

to any finding or direction of the appellate/revisional authority or the court, is subject to the provision contained in section 150(2), which provides that directions under section 150(1) cannot be given by the appellate/revisional authority or the court if on the date on which the order impugned in the appeal/revision was passed, the reassessment proceedings had become time barred. In other words, as per section 150(2), the appellate authority could give directions for the reassessment only in respect of an assessment year, which was within the limitation stipulated under section 148 in respect of which reassessment proceedings could be initiated on the date of passing of order under appeal. In this regard, it would be profitable to refer to the decision of *Parveen Kumari* v. *CIT* [1999] 237 ITR 339 (P&H) and *K. M. Sharma* v. *ITO* [2002] 254 ITR 772 (SC), wherein the court held as under (page 346 of 237 ITR) :

> "According to sub-section (2) of section 150 the provisions of sub-section (1) of that section shall not apply where, by virtue of any other provision limiting the time within which action for assessment or reassessment may be initiated, issuance of notice for such assessment or reassessment is barred on the date of the order, which is the subject-matter of appeal, reference or revision, in which the finding or direction is contained. It would, thus, mean that an appellate or revisional authority cannot give a direction for assessment or reassessment which goes to the extent of conferring jurisdiction upon the Assessing Officer if his jurisdiction had ceased due to the bar of limitation. If the issuing of a notice for assessment or reassessment for a particular assessment year had become time-barred at the time of the order, which was the subject-matter of the appeal, the provisions of section 150(1) cannot be invoked to the aid of the Revenue for making an assessment or reassessment . . .
>
> In the light of the provisions contained in sub-section (2) of section 150, it cannot be said that the notices issued by the Assessing Officer to the petitioners under section 148 of the Act on March 1, 1996, were within the period of limitation. Even if it is assumed that the order of assessment was the subject-matter of appeal before the Tribunal, that would also not help the Revenue. The orders of assessment in the cases of both the assessees for the assessment year 1978-79 were passed on January 30, 1989. Thus, the relevant date on which the period of limitation must be available is January 30, 1989. However, sub-section (2) of section 150 refers to the subject-matter of the appeal, reference or revision. In that light, it is actually the appellate order of the Commissioner which can be said to be the subject-matter

of appeal before the Tribunal. *In that view of the matter, the order of the Commissioner dated March 29, 1990, is the order which was the subject-matter of appeal before the Tribunal. The period of limitation should have been available on the date of the appellate order of the Commissioner*. Since the notices under section 148 have been issued by the Assessing Officer to both the petitioners on March 1, 1996, these notices are beyond the period of limitation as laid down in section 149(1)(b) read with section 150(2) of the Act." (emphasis[1] supplied)

27 The Legislature has designedly not placed any time limit under section 150, and reading a period of limitation into it, would be an incorrect approach. In the present case, the date relevant for deciding the question of limitation in terms of section 150(2), and the observations in *Parveen Kumari* (supra), would be the date of the order of the Commissioner of Income-tax (Appeals), which was passed on October 5, 2011 and was the subject-matter of appeal. Thus, the limitation of six years under section 149, must be alive on the date of passing of the order of Commissioner of Income-tax (Appeals). In the present case since, as on October 5, 2011, the time limit for reopening of assessment for the assessment year 2009-10 had not lapsed, the order of the Income-tax Appellate Tribunal was well within the limitation.

28 In view of the forgoing decision, we are of the view that the reopening of the assessment under section 147, read with section 150, was within the period of limitation.

29 Needless to say that during the reassessment proceedings, the assessee will be entitled to lead fresh material and evidence to prove his entitlement to claim deduction under section 80-IC for the assessment year 2009-10, before the Assessing Officer, and this order does not in any way abrogate or limit his rights to justify his claim before the Assessing Officer.

30 The present petition is dismissed in the above terms. The interim order made absolute vide order dated May 8, 2019, stands vacated.

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[2020] 424 ITR 195 (Bom)

[In the Bombay High Court]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

SUNSHINE IMPORT AND EXPORT PVT. LTD.

Ujjal Bhuyan and Milind N. Jadhav JJ.

March 4, 2020.

SS ▸ ITA 1961, ss 133A, 144
AY ▸ 2008-09, 2009-10
HF ▸ Assessee

Income-tax survey—Income from undisclosed sources—Rejection of books of account—Estimation of income—Statement of director recorded two thousand days after survey and not under oath—Not conclusive proof—Statement recorded cannot form basis for assessment—Finding that assessee proved genuineness of transactions—Income-tax Act, 1961, ss. 133A, 144.

The assessee-firm was a manufacturer and trader in precious stones and jewellery. A survey under section 133A of the Income-tax Act, 1961 was carried out in respect of the assessee. During the post-survey proceedings, statement of one of the directors of the assessee was recorded. He stated that the assessee provided only bills of entry and there were no actual transactions of purchases and sales. Subsequently, the statement of the other director was also recorded. The Assessing Officer held that the transactions of the assessee were not reliable and rejected the books of account of the assessee. He assessed commission of the assessee on account of import purchases at the rate of 2 per cent. and commission at the rate of 0.75 per cent. on sales bills and passed an order. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal found that the import of diamonds by the assessee was done through the customs authorities, that all the transactions in respect to purchase and sales were made through banking channels by way of account payee cheques, that there was not a single transaction by way of cash, that the parties to the transaction were reputed in the trade and that the sales were made to reputed exporters who were assessed to tax and their identities were known to the Department and were registered under the State tax laws. The Tribunal held that the statement of one of the directors recorded 2025 days after the survey under section 133A could not be the basis to bring into assessment any income without further supporting or corroborative evidence. On appeals :

Held, *dismissing the appeals, that the statement recorded under section 133A not being recorded on oath could not have any evidentiary value and no addition could be made on the basis of such statement. On verification of the documents and other materials on record the Tribunal was satisfied that the assessee was mainly engaged in the import of diamonds and sales in local markets to exporters who exported them. Thus, the Tribunal had found that the assessee had discharged the onus to prove that the transactions were genuine by furnishing the relevant documents, such as, copies of bank statements, ledger copies of various purchases, xerox copies of purchase invoices, relevant copies of daily stock register, confirmation letters, etc. On such basis the Tribunal had recorded a finding that the assessee was not engaged in issuing accommodation bills and acting as a dummy for importing diamond bills. The Tribunal had found that the survey party did not find any incriminating evidence and material that could establish the stand taken by the Assessing Officer. The order of the Tribunal holding that on the basis of the statement given by a director of the assessee the Assessing Officer could not have concluded that the assessee had issued accommodation bills and rejected the books of account, was justified.*

CIT *v.* S. KHADER KHAN SON [2008] 300 ITR 157 (Mad) *affirmed* in CIT *v.* S. KHADER KHAN SON [2013] 352 ITR 480 (SC) *followed*.

Cases referred to :

CIT *v.* Ajit Kumar (S.) [2008] 300 ITR 152 (Mad) (para 15)

CIT *v.* S. Khader Khan Son [2008] 300 ITR 157 (Mad) (para 15)

CIT *v.* S. Khader Khan Son [2013] 352 ITR 480 (SC) (para 17)

CIT *v.* Senniappan (G. K.) [2006] 284 ITR 220 (Mad) (para 15)

Paul Mathews and Sons *v.* CIT [2003] 263 ITR 101 (Ker) (para 15)

Pullangode Rubber Produce Co. Ltd. *v.* State of Kerala [1973] 91 ITR 18 (SC) (para 15)

Income Tax Appeal (IT) Nos. 937, 1121 and 1135 of 2017.

Sham Walve with *Pritish Chatterji*, Advocates, for the appellant.

Ms. Aasifa Khan, Advocate, for the respondent.

JUDGMENT

1 This order will dispose of Income Tax Appeal Nos. 937, 1121 and 1135 of 2017.

2 We have heard Mr. Sham Walve, learned standing counsel, Revenue for the appellant ; and Ms. Aasifa Khan, learned counsel for the respondent-assessee.

This appeal under section 260A of the Income-tax Act, 1961 (briefly "the Act" hereinafter) has been preferred by the Revenue assailing the order dated September 9, 2016 passed by the Income-tax Appellate Tribunal, "B" Bench, Mumbai ("the Tribunal" for short) in Income-tax Appeal No. 4347/Mum/2015 for the assessment year 2008-09. 3

Be it stated that Income-tax Appeal No. 937 of 2017 pertains to assessment year 2009-10, whereas Income-tax Appeal Nos. 1121 and 1135 of 2017 pertains to the assessment year 2008-09. All the appeals were disposed of by the Tribunal vide the common order dated September 9, 2016. 4

On the request of Mr. Walve, Income-tax Appeal No. 937 of 2017 is taken up as the lead appeal. 5

This appeal has been preferred by the Revenue projecting the following questions as substantial questions of law : 6

> "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that on the basis of the statement of the director Shri Saurabh N. Garg alone, the Assessing Officer cannot come to the conclusion that the assessee has issued accommodation bills and reject the books of account of the assessee ?
>
> (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal had failed to appreciate that the evidentiary value of the statement given by a director of the assessee-company could not be disputed and the assessment order was passed by the Assessing Officer on the basis of various circumstantial evidence which has been brought out in the assessment order and the Tribunal ought to have considered such circumstantial evidence while making its decision ?
>
> (iii) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse in the sense that the conclusion does not follow the facts found and thus, gives rise to a question of law ?
>
> (iv) Whether on the facts and in the circumstances of the case and in law, the Tribunal failed to appreciate the evidentiary value of the statement given by a director of the company and circumstantial evidence brought out in the assessment order while holding that the interest income is assessed as business income ignoring the fact that the said business is only of giving accommodation entries ?"

The respondent is an assessee under the Act engaged in the business of manufacturing and trading in precious and semi-precious stones and jewellery in the name and style of M/s. Sunshine Import and Export Private 7

Limited. The assessee is a company having two directors-Shri Paras Jain and Shri Saurabh Garg.

8 A survey under section 133A of the Act was carried out in respect of the respondent-assessee. During the post-survey proceedings, statement of one of the directors, i.e., Shri Saurabh Garg was recorded. In one of his statements he was reported to have stated that the respondent provided only bill entries and there was no actual transaction of purchase and sale. Subsequently, the statement of the other director-Shri Paras Jain was also recorded. From the statement of Shri Paras Jain, the Assessing Officer came to the conclusion that he was a person of no means and drew the inference that the respondent-assessee was engaged in the activity of issuing accommodation bills for the purchase and sale of diamonds coupled with acting as a dummy for importer. Holding the transactions as not reliable, the Assessing Officer rejected the books of account of the respondent. By the assessment order dated March 6, 2013 the Assessing Officer assessed 2 per cent. as the rate of commission of the respondent-assessee on account of import purchases, i.e., for acting as a dummy. That apart, commission at 0.75 per cent. on sales bills was assessed.

9 Aggrieved by the aforesaid order passed by the Assessing Officer, the respondent preferred an appeal before the Commissioner of Income-tax (Appeals)-49, Mumbai, also referred to as the first appellate authority hereinafter. By the appellate order dated May 29, 2015, the first appellate authority confirmed the action of the Assessing Officer.

10 Continuing to be aggrieved, the respondent preferred further appeal before the Tribunal. Similar appeals were preferred for the other assessment years. By the common order dated September 9, 2016, the Tribunal returned the finding that the assessee was not engaged in issuing the accommodation bills and acting as a dummy for importing the diamond bills. Therefore, the Assessing Officer was directed to delete the income as estimated by him and to accept the book results declared by the assessee.

11 Aggrieved, the Revenue is in an appeal before us raising the above questions for consideration.

12 The submissions made by the learned counsel for the parties have been considered.

13 At the outset, we may reproduce the relevant portion of the order passed by the Tribunal which is as under :

> "13. Further from the record we found that the assessee is mainly engaged in the import of diamonds and sales in local markets to exporters who export the goods. The import of diamonds is done through the customs authorities and banking channel in India. The

import of diamonds undergoes appraisal process by the appraisers appointed by the custom authorities. The officers appointed by Government of India verify physically each and every parcel of diamonds in order to ascertain the quality, quantity, rate, value and the place of origin vis a vis declared by the importers. Further all the transactions of purchases, sales, import is made through crossed account payee cheques and not a single payment was made to any party by way of cash. All the purchases and sales transactions are carried out with reputed parties of the diamond trade and all the payments received from the debtors are through crossed account payee cheques and all the payments made to the creditors are through crossed account payee cheques. The learned Assessing Officer cannot allegedly consider the import of goods as providing accommodation bill in the market when the physical delivery of goods were confirmed by the other arm of the Government authorities, i.e., Customs authorities. From the record we found that the sales were made to reputed exporters who are assessed to tax and their identities are known to the Income-tax Department. The customers are registered under the State Value Added Tax laws. The company has received payments against the sales proceeds by account payee cheques. The company has also purchased from local parties to whom the payments were made by account payee cheques. From the record we also found that to discharge the onus of proving the transactions as genuine and to substantiate that all the purchases and sales made are genuine the assessees have submitted the following documents and the submissions from time to time which was ignored by the Assessing Officer while making the reassessment :

(a) Copies of the bank statement for the relevant year.

(b) The ledger copies of various purchase parties for the assessment years 2008-09 and 2009-10.

(c) The Xerox copies of purchase invoices of parties for the assessment years 2008-09 and 2009-10.

(d) The relevant copies of the daily stock register.

(e) Confirmation from various sale parties.

(f) The details of interest received from various parties.

(g) The details of unsecured loan along with confirmation.

These documents prove that the assessee is not engaged in issuing accommodation bills and acting as a dummy for importing diamonds bills. Thus, the contention of the learned Assessing Officer that the

bills issued by the assessee are all accommodation bills is wrong. Just on the basis of the statement recorded he cannot come to the conclusion that the assessee has issued accommodation bills and reject the books of account of the assessee."

14 From the above, it is evident that on verification of documents and other materials on record the Tribunal was satisfied that the respondent was mainly engaged in the import of diamonds and sales in local markets to exporters who export the goods. The import of diamonds by the respondent was done through the customs authorities and through regular banking channels in India. The procedure governing trading in diamonds was discussed. It was also noted that all the transactions relating to the purchases and sales were made through account payee cheques and that there was not a single transaction by way of cash. The parties to the transaction were reputed in the trade ; sales were made to reputed exporters who were assessed to tax and their identities were known to the Income-tax Department. Besides they were registered under the State tax laws. Thus, the Tribunal noted that the assessee had discharged the onus of proving the transactions as genuine by furnishing relevant documents, such as, copies of the bank statements, the ledger copies of various purchases, the xerox copies of purchase invoices, relevant copies of daily stock register, confirmation letters, etc. On such basis the Tribunal recorded a clear finding of fact that the assessee was not engaged in issuing accommodation bills and acting as a dummy for importing diamond bills. In arriving at such a finding the Tribunal noted that the survey party did not find any incriminating evidence and material that could establish the stand taken by the Assessing Officer. There was no dispute to the fact that no incriminating evidence was found on the day of the survey. It was also noted that merely on the basis of statement of one of the directors, i.e., Shri Saurabh Garg that too recorded after 20-25 days of the survey could not be a basis for bringing into assessment and making any addition to the income without any further supporting or corroborative evidence. Statement recorded under section 133A of the Act not being recorded on oath cannot have any evidentiary value and no addition can be made on the basis of such statement.

15 In *CIT* v. *S. Khader Khan Son* [2008] 300 ITR 157 (Mad), the Madras High Court surveyed the law relating to statement recorded under section 133A of the Act and culled out the following legal principles (page 166) :

"From the foregoing discussion, the following principles can be culled out :

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who

made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the apex court in *Pullangode Rubber Produce Co. Ltd.* v. *State of Kerala* [1973] 91 ITR 18 (SC) ;

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide *Paul Mathews and Sons* v. *CIT* [2003] 263 ITR 101 (Ker) ;

(iii) The expression 'such other materials or information as are available with the Assessing Officer' contained in section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under section 133A, vide *CIT v. G. K. Senniappan* [2006] 284 ITR 220 (Mad) ;

(iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this court in T. C. (A) No. 2620 of 2006 (between *CIT v. S. Ajit Kumar* [2008] 300 ITR 152 (Mad) ;

(v) Finally, the word 'may' used in section 133A(3)(iii) of the Act, viz., 'record the statement of any person which may be useful for, or relevant to, any proceeding under this Act', as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under section 133A are not conclusive piece of evidence by itself."

Thus, the Madras High Court concluded that the statement recorded **16**
under section 133A of the Act is not given any evidentiary value and that the materials or information found in the course of the survey proceedings could not be a basis for making any addition ; besides the materials collected and the statement obtained under section 133A would not automatically bind upon the assessee.

The above decision of the Madras High Court has been affirmed by the **17**
Supreme Court by dismissing the civil appeal of the Revenue in *CIT* v. *S. Khader Khan Son* [2013] 352 ITR 480 (SC).

18 In view of the discussions made above, we see no reason to interfere with the order passed by the Tribunal. Consequently, the appeal fails and is accordingly dismissed. No cost.

19 In view of the above order, Income Tax Appeal Nos. 1121 and 1135 of 2017 are also dismissed.

[2020] 424 ITR 202 (Bom)

[IN THE BOMBAY HIGH COURT]

OLYMPIA INDUSTRIES LTD.

v.

UNION OF INDIA AND OTHERS

AKIL KURESHI and **S. J. KATHAWALLA** JJ.

July 9, 2019.

AY ▸ 1999-2000 to 2002-03

HF ▸ Department

LOSS—CARRY FORWARD—SICK INDUSTRIAL COMPANY—REHABILITATION SCHEME—OBJECTION RAISED BY CENTRAL BOARD OF DIRECT TAXES AT TIME OF FRAMING REHABILITATION SCHEME FOR TAX CONCESSION—SCHEME DID NOT CONTAIN ANY MANDATE TO DEPARTMENT TO GRANT TAX CONCESSION—INCOME-TAX ACT, 1961—SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985, S. 19.

Under section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985 where any waiver or concession is to be granted by the Central Government, State Government or the like under a rehabilitation scheme, the scheme would be circulated to such authority for its consent and only upon such consent being given, would such term in the scheme be binding on such Government or authority.

Due to consistent losses the assessee filed a reference before the Board for Industrial and Financial Reconstruction under the 1985 Act in the year 2002. In October 2006, the IDBI formulated a draft rehabilitation scheme and in the year 2009, the IDBI prepared the background notes in which in connection with the income-tax waivers, the following clause was inserted by the CBDT, (a) to exempt/grant relief to the assessee from the provisions of sections 41(1), 45, 72(3), 43B, 79, 80 read with sections 139, 115JB and the provisions of Chapter XVII of the Income-tax Act, 1961, and (b) to waive penal interest, simple interest, compound interest, liquidated damages on the

liability of the assessee, if any, as on the cut off date. On February 15, 2012, the Board sanctioned a draft scheme in connection with the tax waivers by the State as well as the Income-tax Department. On January 10, 2014, the Board declared that the assessee had ceased to be a sick industrial company, and was discharged from the purview of the Board with certain directions, one of them being that the unimplemented provisions of the sanctioned scheme should continue to be implemented by all concerned. The Department sent letters dated February 15, 2012 and September 28, 2016 to the assessee to provide the details and the documents with regard to the reliefs kept for its consideration under the scheme. The assessee did not reply to such letters. A reminder dated November 22, 2016 was sent to which the assessee responded by a communication dated December 26, 2016 and sent the necessary documents to the Department. The principal claim of the assessee was for being allowed to carry forward the loss for the assessment years 1999-2000 to 2002-03 totalling to Rs. 9.32 crores beyond the statutory period. Under a communication dated April 17, 2017, the Board refused to accept such a request. The assessee sought reconsideration of the Board's decision which was also rejected by an order dated November 2, 2017. It recorded that the Department had objected to grant of such reliefs under a letter dated January 13, 2012 at the time of preparation of the draft rehabilitation scheme, that no consent for granting the relief was given by the Department, without which the scheme would not bind the Department. The order rejecting the waiver recorded that no consent was given by the Department for such reliefs without which in view of section 19 of the 1985 Act, the Board could not have given directions for tax waiver. On a writ petition :

Held, *dismissing the petition, that according to the context in which the 0expression "to consider" had been used by the Board, the scheme did not contain any mandate to the Department to grant the tax concession requested by the assessee. In view of the stand of the Department raising specific objection at the time of framing of the scheme against grant of tax waiver, the Board could not have in the final scheme given directions for giving such benefits. In the scheme itself, this aspect had been discussed. the Scheme had brought about the purpose and intent of the use of the expression "to consider". In the context of the income-tax waiver, the Department was not willing to give any concession or tax waiver. It was in this context that the Board had noted that the expression "to consider" had already been used. Firstly, the Department had objected to any concession being granted. Secondly, before the Board, it was pointed out that without quantification, the Department would not be in a position to give any concession and thirdly, in this respect,*

the scheme envisaged was only to consider the request for tax concession. Therefore, the contention of the assessee that under the scheme, the direction was issued to the Department to grant the benefit and that all that was left to be done was to compute the benefit, could not be accepted.

UNION OF INDIA *v.* CIMMCO LTD. [2015] 193 Comp Cas 289 (Delhi) *distinguished*.

CIT *v.* TUBE INVESTMENTS OF INDIA LTD. [2012] 341 ITR 199 (Mad) (para 7) *and* UNION OF INDIA *v.* CIMMCO LTD. [2015] 193 Comp Cas 289 (Delhi) (para 7) *referred to*.

Writ Petition No. 3507 of 2018.

V. M. Chavda for the petitioner.

Akhileshwar Sharma for the respondents.

JUDGMENT

The judgment of the court was delivered by

1 AKIL KURESHI J.—The petitioner has challenged an order dated November 2, 2017 as at "exhibit A" to the petition passed by the Additional/Assistant Director of Income-tax (Recovery), New Delhi by which the petitioner's application for waiver of income-tax pursuant to a scheme framed by the Board for Industrial and Financial Reconstruction ("BIFR" for short) came to be rejected.

2 The brief facts are as under :

2.1 The petitioner is a company registered under the Companies Act. Since, the petitioner-company was making consistent loss, the company filed a reference before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") sometime in the year 2002. On April 17, 2002 the Industrial Development Bank of India ("IDBI" for short) was appointed as an operating agency under section 16(2) of the Sick Industrial Companies (Special Provisions) Act, 1985. The proceedings before the Board for Industrial and Financial Reconstruction were heard from time to time. In October 2006, the IDBI formulated Draft Rehabilitation Scheme. A joint meeting of the stakeholders was convened on November 26, 2009. The IDBI had prepared the background notes for such joint meeting in which in connection with the income-tax waivers, the following clause was inserted :

"11.3.1 *From Central Board of Direct Taxes*

(a) To consider to exempt/grant relief to the company from the provisions of sections 41(1), 45, 72(3), 43B, 79, 80 read with sections 139, 115JB and provisions of Chapter XVII of the Income-tax Act.

(b) To consider to waive penal interest, simple interest, compound interest, liquidated damages on the liability of the company, if any, as on cut off date."

On February 15, 2012, the Board for Industrial and Financial Reconstruction sanctioned a draft scheme in connection with the tax waivers by the State as well as the Income-tax Department. It was observed as under : 3

"2. In the hearing held today (February 15, 2012) the representative of IDBI (OA) submitted that they have received objections from the Industries and Mines Department of the Government of Gujarat saying that the State Government cannot grant any relief to the company since at present there is no policy for providing reliefs and concessions to the sick company. The IDBI (OA) referred to para 11.3 of the circulated DRS and said that no monitory relief has been sought by the company. The Bench observed that it is possible that the State Government comes up at any time with a new policy giving reliefs and concessions to the sick companies hence this para may not be deleted. The Bench considered it appropriate to prefix 'to consider' to this relief so as to enable the company to avail of the reliefs and concessions, if any, are provided by the State Government in future. Hence, the Bench directed that 'to consider' be prefixed to the para 11.3(a) in place of 'to grant'.

2.1 The learned advocate of DIT (R) referred to the Department's letter, dated February 15, 2012 stating that the company has not quantified any tax liability in the projected statement. The reliefs sought by the company can be considered only after the details are received from the company. The Bench noted that in sub-paras of (a) to (d) of 11.2.2 'to consider' has already been prefixed. The Bench further noted that the reliefs sought in sub-para (d) of para 11.2.2 cannot be granted as it is not at all admissible under the provisions of the Income-tax Act. The Bench further observed that details in respect of paras (a) to (c) can only be submitted by the company after the profit and loss accounts are finalised and accounts are audited and returns of income-tax are submitted by the company. In view of the aforesaid observations, the Bench is directed to delete sub-para (d) of para 11.2.2 and retain sub-paras (a) to (c) without any change."

On January 10, 2014, the Board for Industrial and Financial Reconstruction noted that the company had ceased to be a sick industrial company, and it was, therefore, discharged from the purview of the Board with certain directions, one of them being that unimplemented provisions of the sanctioned scheme shall continue to be implemented by all concerned. 4

5 It appears that on February 15, 2012, the Income-tax Department had written to the petitioner for providing details and documents with regard to the reliefs kept for consideration of the Department under the Scheme. The petitioner did not reply to such letter. Yet another letter was, therefore, written by the Department on September 28, 2016 and upon not receiving any response sent a reminder on November 22, 2016. Only thereupon, the petitioner under communication dated December 26, 2016 sent necessary documents to the Department. The principal claim of the petitioner was for being allowed to carry forward the loss for the assessment years 1999-2000 to 2002-03 totalling to Rs. 9.32 crores (rounded off) beyond the statutory period. Under communication dated April 17, 2017, the Central Board of Direct Taxes refused to accept such request for which the following reasons were cited :

> "11. The relief from the Revenue is allowed as a last resort. That is why the relief is kept for the consideration of the Revenue to be allowed only when it is a must for the success of a scheme sanctioned under the Sick Industrial Companies (Special Provisions) Act, 1985, 1985. It cannot be allowed as a matter of routine just because an industrial unit is facing a resource crunch. Therefore, the relief from the Revenue is allowed only when without the same a sanctioned scheme which is otherwise successful, would fail. That does not appear to be the scenario here. The cash flow of the company is constantly improving. Admittedly, there is no debt on the company and the DSCR is comfortable. The profits are steadily rising. In fact as per figures generated from the Bombay Stock Exchange (BSE) the nine months profits for the year ending December 2016 shows fivefold rise to Rs. 591.23 lakhs from Rs. 107.43 lakhs in the corresponding period of 2015. Recognizing this turnaround in business, the share price of the company reached all time high at Rs. 382 on February 2, 2017 and the share currently as on March 1, 2017 trades at Rs. 335 in BSE as against Rs. 100 on May 16, 2016. This clearly shows that the company is not in need of any help from the Revenue and the sanctioned scheme has successfully revived the sick company even without any relief from us. During the entire sanctioned scheme period starting from April 1, 2011 to March 31, 2017, the company has paid taxes only in the assessment year 2016-17 and would also pay the same in the assessment year 2017-18. Its reserves had increased to Rs. 12.99 crores as on March 31, 2016 and would rise meteorically by the end of this year as its nine months earning per share rises to Rs. 11.59 as on December 31, 2016 as compared to Rs. 2.65 on December 31, 2015.

All these details show that the company has successfully implemented the sanctioned scheme and needs compliment but no compensation in the form of any income-tax relief.

12. In the backdrop of the above facts, the competent authority, i.e., Central Board of Direct Taxes has not found your case fit for grant of any relief."

6 The petitioner sought review/reconsideration of the said decision which was also rejected by the impugned order dated November 2, 2017. It was recorded that the Department had objected to grant of such reliefs under letter dated January 13, 2012 at the time of preparation of the draft Rehabilitation Scheme. Thus, no consent for granting the relief was given by the Department, without which the scheme would not bind the Department.

7 In such background, the learned counsel for the petitioner submitted that the respondents have committed an error in rejecting the petitioner's claim for relaxation of the tax demands. The petitioner's principal claim was for carrying forward the lapsed unabsorbed business losses. This was also part of the scheme. The Department merely had to quantify the benefit. The directions contained in the scheme would bind the Department. The provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and consequently those made in the scheme would have effect notwithstanding any of the provisions contained in any other law. Learned counsel submitted that the words used "to consider" in this scheme carried the mandate to the Department to grant the benefit. In this context, learned counsel relied on the decision of the Delhi High Court in the case of *Union of India* v. *Cimmco Ltd.* (W. P. (C) No. 626 of 2014 and C. M. A. No. 1246 of 2014)—since reported in [2015] 193 Comp Cas 289 (Delhi) and that of the Madras High Court in the case of *CIT* v. *Tube Investments of India Ltd.* [2012] 341 ITR 199 (Mad). Learned counsel submitted that the entire philosophy beyond the Sick Industrial Companies (Special Provisions) Act, 1985 is that all stakeholders should make sacrifice so that a company which is sick, can be revived. This would be in the interest of labour as well as the lending financial institutions.

8 On the other hand, learned counsel for the Department opposed the petition contending that the petitioner had not shown any urgency in pursuing the scheme before the Department. Right from the year 2012, the Department had written several letters to the petitioner to supply necessary details but such details were not supplied. The claim of the petitioner is thus, highly belated. Further, there was no mandate in the scheme to the Department to grant the tax waiver. There was only a suggestion to

consider the same. The Department has examined the relevant aspects and come to the conclusion that the same cannot be granted.

9 Chapter II of Sick Industrial Companies (Special Provisions) Act, 1985 pertains to references, inquiries and schemes. Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 pertains to reference to the Board. Upon such reference being made under section 16, inquiry into working of sick industrial company would be undertaken. Section 17 pertains to powers of the Board to make suitable order on the completion of inquiry. Section 18 of Sick Industrial Companies (Special Provisions) Act, 1985 pertains to preparation and sanction of schemes. Sub-section (1) of section 18 envisages preparation of the draft scheme by the operating agency appointed by the Board. Under clause (a) of sub-section (3), the scheme prepared by the operating agency would be examined by the Board and the scheme with or without modification in draft format would be sent to the company and the operating agency. Under sub-section (4) of section 18, the Board would sanction the scheme which would come into effect from the specified date.

Section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985, pertains to rehabilitation. Relevant portion of this section reads thus :

> "19. *Rehabilitation by giving financial assistance.*—(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.
>
> (2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.
>
> (3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide

financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned."

As per sub-section (1) of section 19, a scheme may envisage either preventive, ameliorative or remedial measures by the Central Government, State Government, banks, etc. Under sub-section (2) of section 19, such scheme shall be circulated to provide financial assistance for the consent within 60 days from the date of circulation or within such extended period as the Board may allow. Sub-section (3) of section 19 provides that where in respect of any scheme, the consent under sub-section (2) is given by a person required by the scheme to provide financial assistance, the Board would sanction the scheme accordingly.

The crux of section 19 of the Sick Industrial Companies (Special Provi- **10**
sions) Act, 1985 is that where any waiver or concession is to be granted by the Central Government, State Government or the like under the scheme, the scheme would be circulated to such authority for its consent and only upon such consent being given, that such term in the scheme would be binding to such Government or authority.

In the impugned order dated November 2, 2017, the authority has made **11**
a reference to the letter dated January 13, 2012 under which the Department had objected to the grant of the reliefs of tax concession at the time of preparation of the scheme. It was in this background, the impugned order records that no consent was given by the Department for such reliefs without which in view of section 19 of the Act, the Board for Industrial and Financial Reconstruction could not have given directions for tax waiver. In this context, the expression "to consider" has to be understood. The petitioner has not disputed the existence of the said letter dated January 13, 2012 or that the said letter did not contain the Department's objection to grant of the relief. Learned counsel for the petitioner merely stated that the letter appears to have been written by the Department directly to the Board and the petitioner, therefore, had no knowledge about the same.

In any case, in view of the clear stand of the Department raising specific **12**
objection at the time of framing of the scheme against grant of tax waiver, the Board for Industrial and Financial Reconstruction could not have in the final scheme given directions for giving such benefits. As noted, in the scheme itself, this aspect has been discussed. We have reproduced the relevant portion of this final scheme. For better appreciation, we have also reproduced a paragraph pertaining to the State tax waiver in which the State Government contended before the Board that the Government of Gujarat has no policy for providing such relief of the State tax concession.

The Board, however, noted that it is possible that the State Government may come up with a new policy in the future. It was, therefore, that the Bench had considered it appropriate to prefix "to consider" to this relief so as to enable the company to avail of the benefits if provided by the State Government in future. In the words of the Board, therefore "Hence, the Bench directed that 'to consider' be prefixed to para 11.3 (a) in place of 'to grant' ". In the context of the income-tax concession, in para 2.1 of the said scheme, the reference was made to the Department's letter dated February 15, 2012 stating that the company had not quantified its tax liability in the projected statement and that the reliefs sought by the company can be considered only after the details are received from the company. In this context, the Board noted that at an appropriate place, the words "to consider" have already been prefixed.

13 The combined reading of paras 2 and 2.1 of the said scheme would clearly bring about the purpose and intent of use of the said expression "to consider". In the context of State tax, the Board clearly noted the stand of the State Government that there is no policy of the State Government to waive the taxes. The Board was, however, of the opinion that the expression "to consider" would enable the company to claim such benefits if in future, the Government policy changes. On the other hand, in the context of income-tax waiver, the Department contended that the company has not quantified the tax liability and therefore, the relief can be considered only after the details are received from the company. Without quantification, thus, the Department was not willing to give any concession or tax waiver. It was, in this context that the Board noted that expression "to consider" has already been used.

14 This discussion and the context in which the said expression has been used, makes it abundantly clear that the scheme did not contain any mandate to the Income-tax Department to grant the tax concession requested by the petitioner-company. Firstly, the Department had objected to any concession being granted. Secondly, before the Board, it was pointed out that without quantification, the Revenue would not be in a position to give any concession and thirdly, in this respect, the scheme envisaged only to consider the request for tax concession. We, therefore, cannot accept the contention of the petitioner that under the scheme, the direction was issued to the Income-tax Department to grant the benefit and that all that was left to be done was to compute the benefit.

15 The Delhi High Court in the case of *Cimmco Ltd.* (supra) was dealing with an entirely different situation. It was a case in which the sick company had requested for certain concessions from the Railway authorities in the

process of competing for tender for supplying wagons. In this regard, the court held that the concessions envisaged in section 19 of Sick Industrial Companies (Special Provisions) Act, 1985 were not necessarily confined to the financial concessions. It was the scheme under the Sick Industrial Companies (Special Provisions) Act, 1985 which required the railways to consider the bid of the company after excluding the period of closure. It was, in this context, the court held that this term in the scheme was not merely recommendatory. The facts are thus, clearly different.

16 The facts in the case of *Tube Investments of India* (supra) were that the assessee was a sick company in whose case the scheme under Sick Industrial Companies (Special Provisions) Act, 1985 was sanctioned. This scheme provided that the income-tax authorities may consider allowing deduction under section 43B of the Income-tax Act, 1961 on interest payable by the assessee to the bank and financial institutions even though the same had not been paid during the year under consideration. The main question before the court was whether this scheme would have overriding effect over the provisions of section 43B of the Income-tax Act which recognizes certain deductions only upon actual payment. The court referred to section 32(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and held that the scheme would have effect notwithstanding anything inconsistent therewith contained in any other law which would include the Income-tax Act also. As a side issue, the Revenue had also contended that the scheme merely prescribed consideration of the said benefit and gave no direction to the income-tax authorities to grant it. The court held that the scheme should be read as a whole and that the authority was therefore bound to grant such benefit. From the judgment, it is not clear whether the Income-tax Department had opposed granting of any such concession to the company when the scheme under Sick Industrial Companies (Special Provisions) Act, 1985 was being framed. In the present case, as noted, the Income-tax Department had objected to any tax waiver being granted in favour of the company.

17 In the result, we do not find any merits in the petition. The same is dismissed.

[2020] 424 ITR 212 (Karn)

[IN THE KARNATAKA HIGH COURT]

TOYOTA KIRLOSKAR MOTOR (P.) LTD.

v.

COMMISSIONER OF INCOME-TAX AND ANOTHER

DR. VINEET KOTHARI and **MRS. S. SUJATHA** JJ.

August 6, 2018.

AY ▸ 2008-09

HF ▸ Department

INTERNATIONAL TRANSACTIONS—APPEAL TO APPELLATE TRIBUNAL—DETERMINATION OF ARM'S LENGTH PRICE—TRIBUNAL FINDING THAT MANUFACTURING AND TRADING SEGMENTS WERE CONNECTED—REMAND TO APPLY COMBINED TRANSACTION APPROACH FOR DETERMINATION OF ARM'S LENGTH PRICE—JUSTIFIED—INCOME-TAX ACT, 1961.

Held, *that for the earlier assessment year, the Transfer Pricing Officer had originally made the transfer pricing analysis separately for the manufacturing and trading segments of the assessee, but the Tribunal took the view that on a comprehensive view of the matter, since the trading activity was integrally connected with the manufacturing activity of the assessee-company, a "combined transaction approach" was the more appropriate to be adopted. The Tribunal was justified in remanding the case to the Transfer Pricing Officer/Assessing Officer for undertaking such transfer pricing analysis for determining the arm's length price of the royalty payments made by the assessee-Indian company to the associated enterprises of Japan.*

GANAPATHI SUBRAYA BHAT *v.* LAND TRIBUNAL [2002] 4 KCCR 2328 (para 4) *and* HINDUSTAN UNILEVER LTD. *v.* ADDL. CIT [2013] 22 ITR (Trib) 737 (Mumbai) (para 3) *referred to*.

I. T. A. No. 58 of 2017.

S. S. Naganand, Senior Counsel with *U. R. Vikram*, Advocate, for the appellant.

K. V. Aravind, Advocate, for the respondents.

JUDGMENT

The judgment of the court was delivered by

1 DR. VINEET KOTHARI J.—This appeal has been filed by the appellant-assessee—M/s. Toyota Kirloskar Motor Pvt. Ltd., under section 260A of the Income-tax Act, 1961, raising purportedly certain substantial questions of

law arising from the order of the Income-tax Appellate Tribunal, Bangalore Bench "A", Bangalore, dated August 14, 2014 passed in I. T.(TP) A. No. 1595 (Bang) 2012 for the assessment year 2008-09.

The assessee is aggrieved only by the directions of the learned Tribunal **2** for remanding the case back to the Transfer Pricing Officer/Assessing Officer for undertaking the transfer pricing analysis with regard to royalty payments made by the assessee-Indian company to its associated enterprise, M/s. Toyota Motors Corporation, Japan and other associated companies. The relevant portion of the learned Tribunal remanding the case back to the Transfer Pricing Officer/Assessing Officer is quoted below for ready reference :

> "The total revenue if both segments are considered together would come to Rs. 4,843.97 crores and operating profit of Rs. 202.15 crores. Profit on sales which is the PLI adopted, would be 4.878 per cent. Learned Transfer Pricing Officer, himself at annexure-A of his order has given a finding that arithmetic mean of the PLI of the comparables considered by him for manufacturing segment after adjustment was 7.73 per cent. At annexure-F, he has given a finding that the PLI of the trading segment of the comparables was 6.42 per cent. Learned Transfer Pricing Officer has also given a finding that both these were within the plus- 5 per cent. range allowable under the Act. It is also not disputed that while computing the manufacturing segment results the Transfer Pricing Officer himself had accepted royalty as a part of cost. This is clear from the segmental result given by the Transfer Pricing Officer at para-3 of his order which is not reproduced here for brevity. Going by the methodology adopted by the learned Transfer Pricing Officer, the combined results as mentioned by us above, gave the assessee a PLI of 4.878 per cent. for international transactions. In such a scenario, considering the argument of learned Departmental representative, that arm's length price of the royalty payments though not 'nil' had a value which required to be properly fixed, a fresh look by the Transfer Pricing Officer/ Assessing Officer is required. The Assessing Officer/Transfer Pricing Officer has to see whether in a case where there is no arm's length price adjustment required for manufacturing/trading segment or combining both of them, a separate consideration of 'Royalty' for arm's length price adjustments is required and if so what could be the arm's length price assigned for it and the result thereof. Order of the Assessing Officer with regard to the arm's length price adjustment on Royalty is set aside and matter remitted back to him for

fresh consideration as per law. Needless to say he can obtain the required reports from the Transfer Pricing Officer for this purpose. Ground 7.8 to 7.12 of the assessee are treated as allowed for statistical purposes."

3 The need to remand the matter back to the Transfer Pricing Officer/ Assessing Officer arose in view of the fact that for the earlier assessment year, the Transfer Pricing Officer had originally made the transfer pricing analysis separately for manufacturing segment and trading segment of the assessee, but the Tribunal vide para-11 of the same order took a view that on a comprehensive view of the matter, since the trading activity was integrally connected with the manufacturing activity of the assessee-company, trading the spare parts also to be imported from out of India from its associated enterprise, instead of taking separate transfer pricing analysis for two different segments of the company, the "combined transaction approach" was more appropriate to be adopted. The said reasons as discussed by the learned Tribunal are also quoted below for ready reference for giving the background, in which, the aforesaid remand directions become necessary.

"11. We have perused the orders and heard the rival contentions. There is no dispute that in the impugned assessment year, the Transfer Pricing Officer had not disturbed the values of the international transactions with regard to the trading segment and manufacturing segment. After making his own analysis the Transfer Pricing Officer came to the conclusion that the segmental results were within the plus= 5 per cent. of the mean arithmetical margin of comparables. Only adjustment that he carried out was with respect to royalty payments effected by the assessee. In the first place what we find is that the Co-ordinate Bench of this Tribunal in its decision in the assessee's own case for the assessment year 2007-08 referred supra, had clearly held that segmented approach was not warranted in the assessee's case, since the trading and manufacturing transactions undertaken by the assessee were so interlinked and interconnected, requiring it to be evaluated together. We find that there was no change in the business model of the assessee for the impugned assessment year. Hence, the order of the Tribunal for the assessment year 2007-08 would be very relevant portion. Paras. 41 to 47 of the order of the Tribunal is reproduced hereunder :

'2. We have given a very careful consideration to the rival submissions. On the issue as to whether the international transactions

have to be considered separately or independently without aggregating them as part of the segment to which they relate, we find that the term 'international transaction' has been defined in section 92B of the Act to mean and include transactions between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money or any other transaction having bearing on the profits, income, losses or assets of such enterprise. Section 92 of the Act provides that income from international transactions between associated enterprises shall be computed having regard to arm's length price. Section 92C of the Act prescribes the methods of determining arm's length price, having regard to the most appropriate method which will be decided in accordance with the rules prescribed. Rule 10A(d) of the Income-tax Rules, 1962 ("the Rules") provides that "transaction" would include a number of closely linked transactions. Rule 10B(1)(d) of the Rules advocate profit split method of determining arm's length price where international transactions involve transfer of unique intangible or in multiple international transactions which are so inter-related that they cannot be evaluated separately for the purpose of determining arm's length price of any one transaction. It thus appears that the Act and the Rules contemplate determining arm's length price by aggregating international transactions which are multiple, interlinked or interrelated to each other and cannot be evaluated separately. To this extent the conclusions of the Transfer Pricing Officer regarding determination of arm's length price by taking segmental results without looking into as to whether the two segments are interlinked or interrelated cannot be sustained. As to what would be the most appropriate method in such cases is again dependent on rule 10B(2) and (3) of the Rules.

2. The OECD guidelines as well as the Australian Tax Officer (ATO) Taxation Rule 97/20 on International Transfer Pricing para. 2. 74(1) referred to by the assessee before the Revenue authorities which have been set out in the earlier part of this order seems to support "combined transaction approach" where the transactions are closely linked or continuous that they cannot be evaluated adequately on an individual basis. In such a situation, rather than assessing the arm's length price of the transactions individually, the transactions could be evaluated together using the most appropriate method.

43. The above being the legal position, it becomes necessary to examine the international transactions carried out by the assessee with its associated enterprises during the previous year which have been categorized into 2 segments by the Transfer Pricing Officer in his order and find out if they are interlinked or interconnected so that the transactions need to be evaluated together rather than individually. In this regard, we find that the submissions made by the assessee before the Transfer Pricing Officer as well as before the Dispute Resolution Panel have not been considered at all. The Transfer Pricing Officer proceeded on the basis that arm's length price of each transaction has to be examined independently/individually by placing reliance on the decisions of the Tribunal in the case of *Star India Ltd.* (supra) and *UKB(I) (P.) Ltd.* (supra). We agree with the submissions of the learned counsel for the assessee that these decisions have in fact accepted in principle that aggregation of transactions have to be done where they are interlinked but have on facts found that transactions were not interlinked and therefore held that arm's length price of transactions have to be determined individually. The following decisions relied upon by the learned counsel for the assessee also supports the plea of the learned counsel for the assessee :

(i) *Thyssen Krupp Industries* v. *Asst. CIT* (ITA No.7032/Mum/2011),

(ii) *Hindustan Unilever Ltd.* v. *Addl. CIT* [2013] 22 ITR (Trib) 737 (Mumbai) (ITA No. 7868/Mum/2010), and

(iii) *Deputy CIT* v. *CMA CGM Global India (P.) Ltd.* (ITA No.5979/Mum/2010).

44. The Dispute Resolution Panel without examining the submissions on behalf of the assessee has simply endorsed the findings of the Transfer Pricing Officer. With regard to the conclusions of the Dispute Resolution Panel, upholding the order of the Transfer Pricing Officer that the trading and manufacturing segment of the assessee are distinct and not inter-related warranting combined transaction approach, the learned counsel for the assessee drew our attention to the order of the Tribunal in the assessee's own case for the assessment year 2003-04 in I. T. A. No. 828/B/2010, wherein identical issue was considered and decided by this Tribunal as follows :

'14.5.2 Taking into consideration the submissions made and the facts and circumstances of the case, we agree with the submissions of the learned counsel for the assessee. While it is true that function, assets and risks of the trading and manufacturing segments generally differ, however circumstances may warrant combining both of them. It is only in the specific facts of the case that the combining of both segments is advisable. In the instant case of the assessee, the sale of spare parts is triggered as a result of the manufacturing activities, including warranty commitments. Therefore, we are of the view that it would not be in the fitness of things for the sale of spare parts and components to be considered in isolation from the sale of manufactured vehicles. This view is supported by the OECD T. P. Guidelines, 2010, relied on by the assessee. This view is also buttressed by the fact that the comparable companies are also trading in spare parts and components. On an overall consideration, it can be concluded that trading in spare parts is closely interlinked with the manufacturing segment of the assessee. We are of the view that no meaningful purpose would be served in segregating the trading and manufacturing segments, particularly when the assessee and the comparable companies are at par with regard to the nature and scale of combined activities. Needless to add that this finding/decision by its very nature has to be case-specific and year-specific as the decision is based on the facts and circumstances of this particular case and of this particular year and is not to be construed as laying down the principle in this regard. We, therefore, direct the Assessing Officer/Transfer Pricing Officer to compute the arm's length price at the entity/enterprise level by combining the trading and manufacturing segments.'

45. It is no doubt true that the Tribunal has observed that the ruling given in that year is based on the facts that prevailed in that year. We find that the facts in the present assessment year are also identical and there has been no change whatsoever in the business model of the assessee. In these circumstances, we are of the view that the decision rendered by the Tribunal would be applicable for this assessment year also. Respectfully following the decision of the Tribunal, we hold that the trading and manufacturing segment of the assessee are not distinct and are inter-related warranting combined transaction approach.

46. We have already seen in para 9 of this order that the Transfer Pricing Officer has arrived at the bifurcation of the manufacturing and

trading segmental operating results. In view of our conclusions that the trading and manufacturing segments are interlinked and therefore a combined transaction approach has to be adopted, we combine the results so arrived at by the Transfer Pricing Officer, which is given in para 9 of this order. If the segmental results are combined, the operating revenue of the assessee would be Rs. 3767.91 crores and the operating profit would be Rs. 94.34 crores. Thus, the operating profit margin on sales would be 2.517 per cent.

47. Even assuming that the adjustment on account of operational efficiency made by the Transfer Pricing Officer is to be accepted, then the combined margin after adjustment of the five comparables which is given in para-20 of this order, would be 7.10 per cent. If the arithmetic mean of the five comparables as above is tested as against the operating profit margin on sales of the assessee at 2.517 per cent., then the same would be within the (plus)/(minus) 5 per cent. range of the arithmetic mean and therefore no addition by way of adjustment to the arm's length price can be made. In this view of the matter, we are of the view that the addition sustained by the Dispute Resolution Panel deserves to be deleted and is hereby deleted. Gr. No. 12 is accordingly allowed."

4 The contention raised by the learned senior counsel for the appellant-assessee Mr. S. S. Naganand before us is that remand in these circumstances is only academic because for the previous assessment years, the Tribunal's findings in this regard have already been upheld by this court while dismissing the Revenue's appeals filed before this court in I. T. A. No. 172 of 2013 (*CIT* v. *Toyota Kirloskar Motors Pvt. Ltd.*) for the assessment year 2003-04 and I. T. A. No. 525/2014 for the assessment year 2007-08.

He also relied upon the decision of this court in the case of *Ganapathi Subraya Bhat* v. *Land Tribunal* [2002] 4 KCCR 2328, in which, the case under Karnataka Land Reforms Act, 1961, the Co-ordinate Bench of this court held that the remand to the Land Tribunal in the facts and circumstances of the case would only be academic and therefore, was not required to be made.

5 Learned counsel for the respondent-Revenue supported the impugned order of the learned Tribunal before us.

6 Having heard the learned counsel, we are of the opinion that no substantial question of law arises out of the said order with remand directions of the learned Tribunal. The exercise of transfer pricing analysis on the "combined transaction approach" and not on different segment basis,

deserves to be undertaken and in our opinion, the learned Tribunal was justified in remanding the case back to the Transfer Pricing Officer/Assessing Officer for undertaking such transfer pricing analysis for determining the arm's length price of the royalty payments made by the assessee-Indian company to the associated enterprises of Japan.

The factual exercise of determination of arm's length price, whether it results in any transfer pricing adjustments or not, is not an issue before us at this stage. It is for the authority concerned to look into these facts and figures by undertaking the requisite exercise of transfer pricing analysis on the basis of comparables selected by the authorities in accordance with the parameters available with them. 7

We also do not find the aforesaid judgment of this court in *Ganapathi Subraya Bhat* (supra) relied upon by the learned senior counsel is of any help to the assessee, as the facts and context in which the Co-ordinate Bench of this court found that the remand was not justified are not available in the present set of facts. 8

We do not feel here that this remand direction would be entirely an academic exercise only and the Transfer Pricing Officer/Assessing Officer should be allowed to undertake this exercise in the present case and therefore, we are not inclined to interfere with the findings of the learned Tribunal in any manner and no substantial question of law arises out of the said order of the learned Tribunal requiring our consideration for further interference in the present appeal. 9

The appeal filed by the assessee is accordingly dismissed. No costs. 10

[2020] 424 ITR 219 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

AMI INDUSTRIES (INDIA) P. LTD.

UJJAL BHUYAN and MILIND N. JADHAV JJ.

January 29, 2020.

SS ▸ ITA 1961, s 68
AY ▸ 2010-11
HF ▸ Assessee

CASH CREDITS—BURDEN OF PROOF—ASSESSEE MUST PROVE IDENTITY OF CREDITORS, GENUINENESS OF TRANSACTIONS AND CREDITWORTHINESS

OF LENDERS—FINDING THAT BURDEN HAD BEEN DISCHARGED—ADDITION UNDER SECTION 68 NOT VALID—INCOME-TAX ACT, 1961, S. 68.

It is now well-settled that under section 68 of the Income-tax Act, 1961, the assessee is required to prove the identity of the creditor, the genuineness of the transaction and the creditworthiness of the creditor. It is also a settled proposition that the assessee is not required to prove the source of the source.

Held, *that the identity of the creditors was not in doubt. The assessee had furnished the permanent account numbers, copies of the income-tax returns and bank accounts of the three creditors in which the share application money was deposited in order to prove the genuineness of the transactions. In so far as the creditworthiness of the creditors was concerned, the Tribunal recorded that the bank accounts of the creditors showed that the creditors had funds to make payments of share application money and in this regard, resolutions were also passed by the board of directors of the three creditors. Though the assessee was not required to prove the source of the source, none the less, the Tribunal took the view that the Assessing Officer had made inquiries through the Investigation Wing of the Department of Kolkata and collected all the materials which proved the source of the source. The first appellate authority had returned a clear finding of fact that the assessee had discharged its onus of proving the identity of the creditors, the genuineness of the transactions and the creditworthiness of the creditors which finding of fact stood affirmed by the Tribunal. The Revenue had not been able to show any perversity in the findings of fact by the authorities below. The additions under section 68 were not valid.*

PR. CIT *v.* NRA IRON AND STEEL PVT. LTD. [2019] 412 ITR 161 (SC) *distinguished.*

CIT (PR.) *v.* NRA IRON AND STEEL PVT. LTD. [2019] 412 ITR 161 (SC) (para 10) *and* GAURAV TRIYUGI SINGH *v.* ITO [2020] 423 ITR 531 (Bom) (para 15) *referred to.*

Income-tax Appeal No. 1231 of 2017.

Suresh Kumar, Standing Counsel with *Ms. Sumandevi Yadav* and *Ms. Priyanka Tiwari* for the appellant.

Riyaz Padvekar with *Tanzil Padvekar* for the respondent.

JUDGMENT

1 Heard Mr. Suresh Kumar, learned standing counsel, Revenue for the appellant and Mr. Padvekar, learned counsel for the respondent-assessee.

2 This appeal under section 260A of the Income-tax Act, 1961 ("the Act" for short), is preferred by the Revenue against the order dated August 26,

2016 passed by the Income-tax Appellate Tribunal, Mumbai "A" Bench, Mumbai ("Tribunal" for short) in Income-tax Appeal No. 5181/Mum/2014 for the assessment year 2010-11.

The appeal has been preferred on the following three questions stated to be substantial questions of law : 3

"(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in directing the deletion of sum brought to tax by the Assessing Officer as unexplained income under section 68 of the Act in respect of moneys credited in the books as share application money of Rs. 34,00,00,000 ?

(ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that the assessee proved identity, creditworthiness and genuineness of moneys credited in the books as share application money of Rs. 34,00,00,000 just by submitting the permanent account number, acknowledgment of income-tax returns filed and bank statements ?

(iii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs. 34,00,00,000 ignoring the facts brought out by the Assessing Officer that return of the investing company shows no creditworthiness and that investing company merely transferred share application money received from other parties to the assessee-company ?"

From the above, it is evident that the issue involved in this appeal is the addition of share application money by the Assessing Officer to the income of the assessee under section 68 of the Act which additions have been deleted by the first appellate authority and confirmed by the Tribunal. 4

In the assessment proceedings, the Assessing Officer noted that the assessee had disclosed funds from three Kolkata based companies as share application money. The details were as under : 5

	(Rs. in crores)
Parasmani Merchandise Pvt. Ltd.	13.50
Ratanmani Vanijya Pvt. Ltd.	2.00
Rosberry Merchants Pvt. Ltd.	8.50
Total	34.00

5.1 The Assessing Officer issued notice to the assessee on the ground that whereabouts of the above companies were doubtful and their identity could not be authenticated. Thus, genuineness of the companies became questionable. The Assessing Officer accordingly proposed to treat the share

application money as unexplained cash credit in the hands of the assessee under section 68 of the Act and issued notice to the assessee.

6 After considering the reply submitted by the assessee, the Assessing Officer, vide the assessment order dated March 28, 2013 passed under section 143(3) of the Act treated the aforesaid amount of Rs. 34 crores as money from unexplained sources and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

7 Aggrieved by the aforesaid order, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals)-1, Mumbai, i.e., the first appellate authority. In the appeal proceedings, the assessee sought leave of the first appellate authority to produce additional evidence which was granted by the first appellate authority. After hearing the matter, the first appellate authority vide the order dated June 18, 2014 held that the assessee had discharged its burden under section 68 of the Act by proving the identity of the creditors ; genuineness of the transactions ; and creditworthiness of the creditors. Consequently, the first appellate authority set aside the addition made by the Assessing Officer.

8 In appeal before the Tribunal by the Revenue, the Tribunal vide the order dated August 26, 2016 confirmed the order passed by the first appellate authority by holding that no addition could be made under section 68 of the Act and that factual findings of the first appellate authority required no interference.

9 It is against this order of the Tribunal that the Revenue is in appeal before us.

10 Mr. Suresh Kumar, learned standing counsel, Revenue has taken us through the assessment order and submits therefrom that it cannot be said that assessee had discharged the burden to prove creditworthiness of the creditors. His further contention is that the assessee is also required to prove the source of the source. In this connection, he has placed reliance on a decision of the Supreme Court in *Pr. CIT* v. *NRA Iron and Steel P. Ltd.* [2019] 412 ITR 161 (SC) ; [2019] 103 taxmann.com 48 (SC). He, therefore, submits that the finding returned by the Tribunal is wholly erroneous and requires to be interfered with by this court.

11 Per contra, Mr. Padvekar, learned counsel for the respondent submits that from the facts and circumstances of the case, it is quite evident that the assessee had discharged its burden to prove identity of the creditors, genuineness of the transactions and creditworthiness of the creditors. He submits that the legal position is very clear inasmuch as the assessee is only required to explain the source and not source of the source. The decision of the Supreme Court in *NRA Iron and Steel P. Ltd.* (supra) is not the case

law for the aforesaid proposition. In fact, the said decision nowhere states that the assessee is required to prove source of the source.

11.1 Referring to the orders passed by the authorities below, Mr. Padvekar submits that in the present case, the Investigation Wing of the Department had carried out detailed investigation at Kolkata and found the source of the credit to be genuine. This report of the Investigation Wing was not taken into consideration by the Assessing Officer. Therefore, the lower appellate authorities were justified in deleting the additions made by the Assessing Officer. Being a finding of fact, no substantial question of law arises in the appeal. Therefore, the appeal should be dismissed.

The submissions made by the learned counsel for the parties have been considered. Also perused the materials on record. **12**

Section 68 of the Act deals with cash credits. As per section 68, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income-tax for the corresponding assessment year. **13**

Section 68 of the Act has received considerable judicial attention through various pronouncements of the courts. It is now well settled that under section 68 of the Act, the assessee is required to prove the identity of the creditor ; genuineness of the transaction ; and creditworthiness of the creditor. In fact, in *NRA Iron and Steel P. Ltd.* (supra), the Supreme Court surveyed the relevant judgments and culled out the following principles (page 180 of 412 ITR) : **14**

> "11. The principles which emerge where sums of money are credited as share capital/premium are :
>
> (i) The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and creditworthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the Assessing Officer, so as to discharge the primary onus.

(ii) The Assessing Officer is duty bound to investigate the creditworthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

(iii) If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack creditworthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by section 68 of the Act."

15 It is also a settled proposition that the assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in *Gaurav Triyugi Singh* v. *ITO* [2020] 423 ITR 531 (Bom), I. T. A. No. 1750 of 2017 decided on January 22, 2020.

16 Having noted the above, we may now advert to the orders passed by the authorities below.

17 In so far as the order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their creditworthiness. In that view of the matter, the Assessing Officer took the view that funds aggregating to Rs. 34 crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under section 68 of the Act.

18 In the first appellate proceedings, it was held that the assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by many documents, such as, share application form, etc. The first appellate authority also noted that there was no requirement under section 68 of the Act to explain the source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that non-responding to notice would not ipso facto mean that the creditors had no creditworthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and creditworthiness of the creditors were available, without any infirmity in such evidence and the explanation required under section 68 of the Act having been discharged, the Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

In appeal, the Tribunal noted that before the Assessing Officer, the **19**
assessee had submitted the following documents of the three creditors :

(a) Permanent account number of the companies ;

(b) Copies of income-tax return filed by these three companies for the assessment year 2010-11 ;

(c) Confirmation letter in respect of share application money paid by them ; and

(d) Copy of bank statement through which cheques were issued.

The Tribunal noted that the Assessing Officer had referred the matter to **20**
the Investigation Wing of the Department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the Investigation Wing was received, the Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the Investigation Wing, it was mentioned that the companies were in existence and had filed income-tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted the creditworthiness of the three creditors. Finally, the Tribunal held as under :

"5.7 As per the provisions of section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following :—

(a) Identity of the creditor

(b) Genuineness of the transaction

(c) Creditworthiness of the party :

(i) In this case, the assessee has already proved the identity of the share applicant by furnishing their permanent account number, copy of the income-tax return filed for assessment year 2010-11.

(ii) Regarding the genuineness of the transaction, the assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii) Regarding creditworthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their board of directors.

(iv) Regarding source of the source, the Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, the assessee need not prove the source of the source.

(v) The Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent the company's own income from undisclosed sources.

Accordingly, no addition can be made under section 68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21 From the above, it is seen that identity of the creditors was not in doubt. The assessee had furnished the permanent account number, copies of the income-tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far creditworthiness of the creditors were concerned, the Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the board of directors of the three creditors. Though, the assessee was not required to prove source of the source, none the less, the Tribunal took the view that the Assessing Officer had made inquiries through the Investigation Wing of the Department at Kolkata and collected all the materials which proved source of the source.

22 In *NRA Iron and Steel P. Ltd.* (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked creditworthiness. It is in these circumstances, the Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

23 Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that the assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and creditworthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. The appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost. 24

[2020] 424 ITR 227 (Karn)

[In the Karnataka High Court]

COMMISSIONER OF INCOME-TAX AND ANOTHER

v.

JSW STEEL LIMITED

(formerly known as Jindal Vijayanagar Steel Limited)

Alok Aradhe and Ravi V. Hosmani JJ.

February 13, 2020.

SS ▸ ITA 1961, ss 43A, 115JB(2)(h), 234B
AY ▸ 2005-06
HF ▸ Assessee/Department

Business loss—Change in rate of exchange of foreign currency—Effect of section 43A—Loss on settlement of forward contracts—Deductible—Income-tax Act, 1961, s. 43A.

Company—Book profits—Computation of book profits—Change in provision with retrospective effect—Not challenged by assessee—Provision to be given effect to and interest can be levied under section 234B—Income-tax Act, 1961, ss. 115JB(2)(h), 234B.

Section 43A of the Income-tax Act, 1961, as it stood before the amendment required an assessee to revalue the foreign exchange liability at the end of every previous year and provide for the increase or decrease as a result of fluctuation in rates of foreign exchange. The adjustment had to be made even in a case where the payment was not actually made and the adjustments had to be made on the basis of the liability as on the last day of the previous year. By way of an amendment in the year 2002, the requirement of making of payment was inserted.

For the assessment year 2005-06, the Assessing Officer held that the assessee in its depreciation working had already adjusted an amount of Rs. 64,29,52,121 on account of foreign exchange gains as provided under section 43A on payment basis and that the assessee had not made any payments and purchased the assets. He further held that the assessee had only entered

into forward contracts with dealers for future purchase of plant and machinery at a specified rate to safeguard its interest from future foreign exchange rate fluctuation. He further held that the provisions of section 43A did not apply to the case of the assessee. The loss claimed by the assessee to the tune of Rs. 39,78,92,211 on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee was disallowed by the Assessing Officer. This was upheld by the Commissioner (Appeals). The Tribunal, inter alia, held that adjustment of the liability had to be allowed even in a case where the payment was not actually made. It further held that such adjustment can be made only in the previous year in which the foreign account was settled by the assessee. On appeal :

Held, *(i) that the assessee even under the unamended provisions was entitled to the benefit of the loss claimed by the assessee to the tune of Rs. 39,78,92,211 on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee.*

(ii) That clause (h) of Explanation 1 *below section 115JB(2) of the Act has been incorporated with effect from April 1, 2001. The retrospective operation of the provision had not been challenged by the assessee and therefore, it had to be given effect. Hence, interest could be levied under section 234B.*

Order of the Appellate Tribunal in JSW STEEL LTD. *v.* ASST. CIT [2010] 5 ITR (Trib) 31 (Bang) *affirmed*.

Cases referred to :

CIT (Asst.) *v.* Elecon Engineering Co. Ltd. [2010] 322 ITR 20 (SC) (paras 3, 4)

CIT *v.* Jupiter Bio-Science Ltd. [2013] 352 ITR 113 (Karn) (para 5)

CIT (Joint) *v.* Rolta India Ltd. [2011] 330 ITR 470 (SC) (para 4)

JSW Steel Ltd. *v.* Asst. CIT [2010] 5 ITR (Trib) 31 (Bang) (para 3)

Star India P. Ltd. *v.* CCE [2006] 280 ITR 321 (SC) (para 5)

I. T. A. No. 384 of 2010.

K. V. Aravind, Advocate, for the appellants.

A. Shankar, Senior Counsel, for *Venkatesh K. Pani*, Advocate, for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 ALOK ARADHE J.—This appeal which has been preferred under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act", for

short) by the Revenue has been admitted by a Bench of this court vide order dated March 26, 2012 on the following substantial questions of law :

"(i) Whether the Tribunal was correct in holding that a sum of Rs. 39,78,92,211 should be treated as a depreciation loss as claimed by the assessee as arising due to forward contracts as these contracts stood terminated during the current assessment year and the corresponding amount was deemed to be added to the value of the assets even when these assets had not been acquired or payments made?

(ii) Whether the Tribunal was correct in proceeding to hold that no interest under section 234B of the Act can be levied on the amount of tax payable under section 115JB(2) of the Act as clause (h) to *Explanation 1* to section 115JB(2) of the Act was inserted with retrospective effect by Finance Act, 2008 which could not have been anticipated during the current assessment year 2005-06 and consequently reading the provision which was not within its jurisdiction ?"

2 The facts leading to the filing of the appeal briefly stated are that the assessee is engaged in the business of manufacturing and selling of pellets, hot/cold rolled coils, sheets, plates and slag cement. The assessee filed its return of income for the assessment year 2005-06 on October 29, 2005 declaring nil income. Thereafter, the assessee filed a revised return on March 6, 2007. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued to the assessee. The Assessing Officer by an order dated December 31, 2007 it was held that the assessee in the income-tax depreciation working has already adjusted an amount of Rs. 64,29,52,121 on account of foreign exchange gains as provided under section 43A of the Act on payment basis and that the assessee had not made any payments and purchased the assets. It was further held that the assessee had only entered into forward contracts with the dealers for future purchase of plant and machinery at a specified rate to safeguard its interest from future foreign exchange fluctuation. It was further held that the provisions of section 43A of the Act do not apply to the case of the assessee. The loss claimed by the assessee to the tune of Rs. 39,78,92,211 on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee was disallowed by the Assessing Officer.

3 The aforesaid order passed by the Assessing Officer was upheld by the Commissioner of Income-tax (Appeals) by an order dated July 10, 2009. Being aggrieved, the assessee as well as the Revenue filed appeals before the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal" for short). The Tribunal by order dated May 31, 2010 (*JSW Steel Ltd.* v.

Asst. CIT [2010] 5 ITR (Trib) 31 (Bang), inter alia, held that adjustment of the liability has to be allowed even in a case where the payment was not actually made. It was further held that such adjustment can be made only in the previous year, in which the foreign account was settled by the assessee. It was also held that the case of the assessee is squarely covered by a decision of the Supreme Court in the case of *Asst. CIT* v. *Elecon Engineering Co. Ltd.* [2010] 322 ITR 20 (SC). It was further held that even though section 43A was incorporated in the year 2002, however, the dispute in this case pertains to the assessment year 2004-05 and therefore, the assessee had no occasion to add back the deferred tax provision to compute the book profits under section 115JB of the Act and the assessee could not have paid advance tax retrospectively. It was also held that the law does not command to do anything, which is impossible to do. Accordingly, it was held that the Assessing Officer as well as the Commissioner of Income-tax (Appeals) erred in allowing the assessee to deduct Rs. 25 crores from computation of book profits under section 115JB of the Act. Accordingly, the order of the Commissioner of Income-tax (Appeals) was reversed. Being aggrieved, the Revenue has filed this appeal.

4 Learned counsel for the Revenue while inviting the attention of this court to para 8 of the decision in the case of *Elecon Engineering Company Ltd* (supra) submitted that under the unamended provision, an assessee was required to acquire an asset before the change in the rate of exchange and since, in the instant case, no actual cost has been incurred by the assessee therefore, the assessee was not entitled to the benefit to unamended provision. It is further submitted that the Tribunal grossly erred in holding that the case of the assessee is covered by a decision in the case of *Elecon Engineering Company Ltd* (supra) and in holding that amended provisions, viz., section 43A of the Act apply to the fact situation of the case. It is further submitted that the decision in the case of *Elecon Engineering Company Ltd* (supra) was rendered in the peculiar facts of the case. In this connection, our attention has been invited to para 11 of the aforesaid decision. It is further submitted that interest under section 234B of the Act was leviable on the amount of tax as *Explanation 1(h)* to section 115JB(2) was incorporated with effect from April 1, 2007. In support of his submissions, reliance has been placed on the decision of the Supreme Court in *Asst. CIT* v. *Elecon Engineering Co. Ltd.* [2010] 322 ITR 20 (SC) and *Joint CIT* v. *Rolta India Ltd.* [2011] 330 ITR 470 (SC).

5 On the other hand, the learned counsel for the assessee submitted that the Revenue has already adjusted an amount of Rs. 64,29,52,121 on account of foreign exchange gains as per section 43B of the Act and the entire material was produced before the Assessing Officer with regard to

the expenses incurred by the assessee. It is further submitted that irrespective of the decision of the Supreme Court in *Elecon Engineering Company Ltd.* (supra), the assessee is entitled to succeed as in any case, the amount of loss has to be treated as revenue expenditure. Our attention has been invited to para 6 of the order passed by the Tribunal and it has been submitted that adjustments have to be allowed even in a case where the payment was not actually made. It is further submitted that the aforesaid adjustments have to be made on the basis of the liability as on the last date of the previous year. It is also urged that the assessee cannot be asked to pay advance tax with retrospective effect. In support of the aforesaid submission, reliance has been placed on the Division Bench decision of this court in *CIT* v. *Jupiter Bio-Science Ltd.* [2013] 352 ITR 113 (Karn) and *Star India P. Ltd.* v. *CCE* [2006] 280 ITR 321 (SC).

We have considered the submissions made by learned counsel for the parties and have perused the record. Section 43A as it is stood before the amendment required an assessee to revalue the foreign exchange liability at the end of every previous year and provide for the increase or decrease as a result of foreign exchange fluctuation. The aforesaid adjustment has to be made even in a case where the payment was not actually made and the adjustments have to be made on the basis of the liability as on the last day of the previous year. By way of an amendment in the year 2002, the requirement of making of payment was inserted. The assessee even under unamended provision is entitled to benefit of the loss claimed by the assessee to the tune of Rs. 39,78,92,211 on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee. We agree with the view taken by the Tribunal on this issue. Accordingly, the first substantial question of law is answered against the Revenue and in favour of the assessee. 6

The Supreme Court in the case of *Star India P. Ltd.* (supra) has held that liability to pay interest arising on default is in the nature of quasi-punishment and even though it is permissible for the Legislature to retrospectively legislate yet, such retrospectivity is normally not permissible to create an offence retrospectively. It is true that the assessee could not have paid advance tax in the case of a deferred tax liability in respect of the assessment year 2005-06, when the amendment was brought into force in 2008. However, it is pertinent to mention here that clause (h) of *Explanation 1* below section 115JB(2) of the Act has been incorporated with effect from April 1, 2001. The retrospective operation of the aforesaid provision has not been challenged by the assessee and therefore, the aforesaid provision has to be given effect to. The Tribunal clearly acceded to its jurisdiction in holding that no interest could be levied under section 234B of the Act. In the 7

result, the second substantial question of law is answered in favour of the Revenue and against the assessee.

In view of preceding analysis, the appeal is allowed in part.

[2020] 424 ITR 232 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

EVERLON SYNTHETICS PVT. LTD.

M. S. SANKLECHA and **NITIN JAMDAR** JJ.

November 4, 2019.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2006-07
HF ▸ Assessee

REASSESSMENT—NOTICE—VALIDITY—BENEFIT RECEIVED FROM BANK DUE TO ONE TIME SETTLEMENT WITH BANK ON ACCOUNT OF OVERDRAFT FACILITY—TREATED AS CAPITAL AND REVENUE RECEIPTS—ASSESSING OFFICER RAISING QUERIES AND ACCEPTING EXPLANATION OF ASSESSEE IN SCRUTINY ASSESSMENT—NOTICE BASED ON AUDIT REPORT—NO NEW TANGIBLE MATERIAL AVAILABLE—REASSESSMENT BASED ON CHANGE OF OPINION—IMPERMISSIBLE—INCOME-TAX ACT, 1961, ss. 147, 148.

The assessee was a manufacturer and was engaged in the business of management consultancy. The Assessing Officer accepted the nil income return filed by the assessee for the assessment year 2006-07 and passed an order under section 143(3) of the Income-tax Act, 1961. Thereafter, a notice was issued under section 148 to reopen the assessment. The Assessing Officer recorded reasons that the assessee during the previous year had received relief on account of overdraft and other facilities, that part of the amount was transferred to revenue receipt but part of the amount was transferred to capital reserve and not offered to tax that as the money was received by the assessee in the course of carrying on its business it had become the assessee's own money, and that the relief on overdraft was to be treated as cessation of liability and taken as income of the previous year to assessment year 2006-07 under section 41. The objections raised by the assessee were rejected. The Commissioner (Appeals) held that the notice for reopening the assessment was without jurisdiction as it was based on mere change of opinion. The Tribunal found that the issue of one time settlement with the bank and the treatment given to the benefit received on account of such settlement, was a

subject matter of consideration by the Assessing Officer, that the issue of one time settlement was enquired into by the Assessing Officer and that the assessee had furnished all the details in its letter explaining that the settlement to the extent of Rs. 1.37 crores being on capital account, was transferred to capital reserve account and the balance of Rs. 2.06 crores was on revenue account. The Tribunal confirmed the order of the Commissioner (Appeals). On appeal by the Department :

Held, *dismissing the appeal, that the issue of the notice under section 148 for reopening the assessment under section 147on the same facts which were considered earlier, amounted to a change of opinion and was without jurisdiction. The reopening notice was not based on any fresh tangible material but proceeded on the material already on record with the Assessing Officer and considered before passing the order under section 143(3). Both the Commissioner (Appeals) and the Tribunal had found on the facts that during the regular assessment proceedings, the Assessing Officer had the occasion to consider the one time settlement by the assessee with its bank. It was found that during the scrutiny assessment proceedings, queries were raised and the assessee had filed a detailed response giving complete details to the Assessing Officer of the one time settlement and the manner in which it was treated. This finding of fact was not shown to be perverse in any manner. No question of law arose.*

GKN SINTER METALS LTD. *v.* MS. RAMAPRIYA RAGHAVAN, ASST. CIT [2015] 371 ITR 225 (Bom) (para 9) *and* CIT *v.* NIRMA CHEMICALS WORKS P. LTD. [2009] 309 ITR 67 (Guj) (para 9) *referred to.*

Income Tax Appeal No. 1039 of 2017.

Sham Walve, for the appellant.

Ms. Sanjukta Chowdhary, for the respondent.

JUDGMENT

This appeal under section 260A of the Income-tax Act, 1961 (the Act), challenges the order dated May 23, 2016, passed by the Income-tax Appellate Tribunal (the Tribunal). The impugned order dated May 23, 2016 is in respect of the assessment year 2006-07. **1**

The Revenue urges the following question of law, for our consideration : **2**

> "Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in quashing the reopening of the assessment holding that the assessment has been reopened on the basis of 'change of opinion' and affirming the order of the Commissioner of Income-tax (Appeals) ?"

3 The respondent is engaged in the business of manufacture of polyester and texturised/twisted yarn and management consultancy. For the subject assessment year, the respondent filed its return of income on November 29, 2006. The Assessing Officer completed the assessment on November 24, 2008 under section 143(3) of the Act, accepting the "nil" return of income which was filed by the respondent.

4 Thereafter, on March 28, 2011, a notice was issued under section 148 of the Act to the respondent, seeking to reopen the assessment for the assessment year 2006-07. The reasons in support of the reopening notice as communicated to the petitioner reads as under :

> "The assessee-company during the previous year had received relief amounting to Rs. 3,44,02,155 on account of overdraft and other facilities. Out of this amount, Rs. 2,06,82,471 was transferred to revenue receipt and an amount of Rs. 1,37,19,684 was transferred to capital reserve. The amount of Rs. 1,37,19,684 is not offered by the assessee-company considering it as capital receipt, neither it is brought under taxation in the course of the assessment. As the money was received by the assessee-company in the course of carrying on its business the same has become the assessee-company's own money, and relief on overdraft on the same should be treated as cessation of liability and taken as income of the previous year under consideration under section 41 . . ."

5 The respondent objected to the reopening notice on the ground that, it was based on "change of opinion" and, therefore, without jurisdiction. However, the same was not accepted by the Assessing Officer. This resulted in the assessment order dated August 30, 2011 under section 143(3) read with section 147 of the Act, adding the sum of Rs. 1.37 lakhs to the income of the respondent by holding it to be a revenue receipt.

6 In appeal, the Commissioner of Income-tax (Appeals) (CIT(A)) records a finding of fact that during the course of regular scrutiny proceedings under section 143(3) of the Act, the issue of the respondent's one time settlement with the bank and the consequential relief granted by the bank was discussed and deliberated by the Assessing Officer. In fact, the queries raised by the Assessing Officer with regard to the one time settlement and the respondent by its communication dated November 11, 2008 responded with complete details of the one time settlement with its bankers, including the details of relief/waiver obtained. The Commissioner of Income-tax (Appeals) upheld the settlements to the extent of Rs. 2.06 crores as revenue receipt, as reflected in the profit and loss account and the fact that the amount of Rs. 1.37 crores was transferred to the capital account was

deliberated upon by the Assessing Officer before passing an order dated November 24, 2008 under section 143(3) of the Act. Thus, the Commissioner of Income-tax (Appeals) held that the reopening notice is without jurisdiction as it was based on a mere change of opinion.

7 Being aggrieved, the Revenue filed an appeal to the Tribunal. The Tribunal found that the issue of one time settlement with the bank and the treatment being given to the benefit received on account of the settlement, was a subject matter of consideration by the Assessing Officer. On facts, it found that, during the regular assessment proceedings, this issue of one time settlement was enquired into by the Assessing Officer and the appellant had furnished all the details in its letter dated November 11, 2008, explaining that the settlement to the extent of Rs. 1.37 crores being on capital account, was transferred to capital reserve account and the balance of Rs. 2.06 crores was on revenue account. Further, the Tribunal negatived the contention of the Revenue that there was no consideration by the Assessing Officer of one time settlement as the assessment order dated November 24, 2011 under section 143(3) of the Act does not discuss this issue. It also records the fact that the impugned notice was only on the basis of audit objection and the Assessing Officer had not applied his mind before issuing a reopening notice and merely acted on the dictates of the audit party. In the above circumstances, the Tribunal by the impugned order dated May 23, 2016 upheld the view of the Commissioner of Income-tax (Appeals) that the reopening notice dated March 28, 2011 is without jurisdiction.

8 Mr. Walve, learned counsel appearing for the Revenue submits that, the issue of one time settlement finds no mention in the assessment order dated November 24, 2008 passed under section 143(3) of the Act. Thus, no opinion was formed by the Assessing Officer, while passing the regular assessment order. Therefore, there was no bar on him in issuing the reopening notice. It is, thus, submitted that, the issue requires consideration and the appeal be admitted.

9 We find that both the Commissioner of Income-tax (Appeals) and the Tribunal have found on facts that during the regular assessment proceedings, the Assessing Officer had occasion to consider the one time settlement by the petitioner with its bankers. It found that during the scrutiny assessment proceedings, queries were raised and the petitioner filed a detailed response on November 11, 2008, giving complete details to the Assessing Officer of the one time settlement and the manner in which it was treated. This finding of fact is not shown to be perverse in any manner. The reopening notice is not based on any fresh tangible material but

proceeds on the material already on record with the Assessing Officer and also considered before passing the order dated November 24, 2008 under section 143(3) of the Act. The submission of Mr. Walve that consideration of an issue by the Assessing Officer must be reflected in the assessment order, is in the face of the decision of this court in *GKN Sinter Metals Ltd.* v. *Ms. Ramapriya Raghavan, Asst. CIT* [2015] 371 ITR 225 (Bom), which approved the view of the hon'ble Gujarat High Court in *CIT* v. *Nirma Chemicals Works P. Ltd.* [2009] 309 ITR 67 (Guj), to the effect that an assessment order cannot deal with all the queries which the Assessing Officer had raised during the assessment proceedings. The Assessing Officer restricts himself only to deal with those issues where he does not agree with the assessee's submission and gives reasons for it. Otherwise, it would be impossible to complete all the assessments within the time limit available. Thus, the court held that once a query is raised during the assessment proceedings and the assessee has responded to the query, to the satisfaction of the Assessing Officer, then there has been due consideration of the same. Therefore, issuing of the reopening notice on the same facts which were considered earlier, clearly amounts to change of opinion and thus, without jurisdiction.

10 Therefore, the question as proposed does not give rise to any substantial question of law. Consequently, not entertained.

11 Accordingly, the appeal is dismissed.

[2020] 424 ITR 236 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

GRASIM INDUSTRIES LTD.

AKIL KURESHI and **M. S. SANKLECHA** JJ.

December 18, 2018.

SS ▸ ITA 1961, ss 32, 37, 260A
HF ▸ Assessee

BUSINESS EXPENDITURE—CAPITAL OR REVENUE EXPENDITURE—EXPENDITURE ON ACQUISITION OF TECHNICAL KNOW-HOW—PROVISION PRESCRIBING DEPRECIATION ON INTANGIBLE ASSETS—NOT TO BE INVOKED TO DECIDE WHETHER EXPENDITURE ON CAPITAL OR REVENUE ACCOUNT—INCOME-TAX ACT, 1961, SS. 32, 37.

APPEAL TO HIGH COURT—INCOME-TAX—GENERAL PRINCIPLES—RULE OF CONSISTENCY—TAXABILITY OF PROFITS OF OVERSEAS BRANCHES OF ASSESSEE—DEPARTMENT HAVING ACCEPTED ORDER OF TRIBUNAL FOR EARLIER YEARS—PRECLUDED FROM RAISING POINT FOR LATER YEAR BEFORE COURT—INCOME-TAX ACT, 1961, S. 260A.

APPEAL TO APPELLATE TRIBUNAL—CONTENTION RAISED FOR FIRST TIME BEFORE TRIBUNAL—NOT BARRED AS LONG AS MATERIAL EXISTS ON RECORD—INCOME-TAX ACT, 1961.

The assessee had received a subsidy. It did not raise the contention before the authorities below that such subsidy was towards capital account and, therefore, not taxable but raised it before the Tribunal. The Tribunal relied upon its order in the assessee's case for the assessment year 1999-2000 and restored the issue to the Assessing Officer. On appeal by the Department :

Held, *dismissing the appeal, that as long as the material existed on record, a contention raised by the assessee for the first time before the Tribunal was not to be barred. It was always open to the assessee to contend before the Assessing Officer by pointing out the relevant clauses of the subsidy that in law the subsidy cannot be treated to be towards revenue account. It would be equally open for the Revenue to oppose such a contention if so advised. The Assessing Officer and the Revenue authorities would have to take a decision in accordance with law.*

The assessee incurred expenditure for acquiring technical advice, assistance and information for running the business and to produce more products and to run the business more efficiently. Before the Assessing Officer, the assessee produced the separate terms of agreement for providing such know-how, showing that the same would be valid for a period of five years from the date of commencement of the regular production. The assessee claimed that the expenditure was revenue in nature. The Tribunal upheld this claim. On appeal :

Held, *that clause (ii) of section 32(1) merely granted depreciation on the listed intangible assets, in the absence of which, the assessee would not be entitled to such depreciation. This provision however, could not be pressed into service to examine whether certain expenditure for acquisition of know-how or similar intangible asset was revenue or capital expenditure.*

Held also, *that on the issue of the Assessing Officer's attempt to tax the profits of the assessee's units situated in the U. S. A. and the U. K., the Department having accepted the order of the Tribunal in the earlier assessment years it was not open to it to pick a certain year for carrying the*

challenge further before the Assessing Officer. The Commissioner (Appeals) and the Tribunal had referred to the earlier orders in the case of the assessee and the Double Taxation Avoidance Agreement between the respective countries to conclude that such income was not taxable in the hands of the assessee in India.

[The Supreme Court has dismissed the special leave petition filed by the Department against this judgment : See [2019] 417 ITR (St.) 57*—Ed.]*

Cases referred to :

Alembic Chemical Works Co. Ltd. *v.* CIT [1989] 177 ITR 377 (SC) (para 6)

CIT *v.* Modipon Ltd. [2018] 400 ITR 1 (SC) (para 11)

CIT *v.* Pruthvi Brokers and Shareholders P. Ltd. [2012] 349 ITR 336 (Bom) (para 5)

CIT *v.* Reliance Industries Ltd. [2011] 339 ITR 632 (Bom) (para 3)

CIT (Deputy) *v.* Reliance Industries Ltd. [2005] 273 ITR (AT) 16 (Mum) [SB] (para 2)

CIT *v.* Service Station Equipment Pvt. Ltd. [1981] 132 ITR 130 (Bom) (para 6)

CIT *v.* Tata Engg. and Locomotive Co. Pvt. Ltd. [1980] 123 ITR 538 (Bom) (para 6)

Income Tax Appeal No. 778 of 2015.

Anil Singh, Assistant Solicitor General, along with *P. C. Chhotaray* and *Ms. Gitika Gandhi* for the appellant.

Jehangir Mistri, Senior Counsel, along with *Atul Jasani* for the respondent.

JUDGMENT

1 The Revenue is in appeal against the judgment dated October 22, 2014 of the Income-tax Appellate Tribunal ("the Tribunal" for short).

2 The following questions were presented for our consideration :

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the technical know-how expenditure (technical assistance fees) is revenue expenditure ignoring the fact that as per amended provisions of section 32, technical know-how is an intangible asset and the fee for obtaining the same is a capital expenditure and not revenue expenditure ?
>
> (b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the profit of the U. S.

and U. K. branches is not taxable in India and should be excluded from the taxable profit of the assessee ?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restoring the issue of taxability of the sales tax exemption benefit of Rs. 58 crores availed of by the assessee to the file of the Assessing Officer for deciding afresh after considering the decision of the Special Bench of the Income-tax Appellate Tribunal in the case of *Deputy CIT* v. *Reliance Industries Ltd.* [2004] 88 ITD 273 (Mum) [SB] ; [2005] 273 ITR (AT) 16 (Mum) [SB], which has not been accepted by the Revenue ?

(d) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in entertaining the additional ground without appreciating that the assessee had treated the amount of sales tax exemption benefit of Rs. 58 crores as revenue receipt and had included this amount in the returned income and it had been taxed accordingly and the assessee did not raise this issue before the Commissioner of Income-tax (Appeals) and the issue had attained finality ?"

We will first address question Nos. (c) and (d), which are different ele- 3
ments of the same issue. The respondent-assessee had received a subsidy. It is undisputed that up to the level of the Income-tax Appellate Tribunal, the assessee did not raise a contention that such subsidy was towards capital account and, therefore, not taxable. However, before the Tribunal such a contention was raised. The Tribunal by the impugned judgment relied upon its earlier judgment for the assessment year 1999-2000 in the case of this very assessee and restored the issue back to the Assessing Officer. In the earlier order, the Tribunal had remanded the issue to the file of the Assessing Officer "to decide the issue afresh after considering the decision of Special Bench of the Tribunal in the case of *Reliance Industries Ltd.* (supra)". Thus, the Tribunal remanded the issue back to the Assessing Officer to be decided in the light of the Special Bench judgment in the case of *Reliance Industries Ltd.* The Revenue's grievance in this respect is two fold. It was contended that the issue was raised for the first time before the Tribunal and the same should not have been permitted. Secondly, the view of the Tribunal in the case of *Reliance Industries Ltd.* was challenged before the High Court. The High Court in a judgment dated April 15, 2009 in Income Tax Appeal No. 1299 of 2008 (*CIT* v. *Reliance Industries Ltd.* [2011] 339 ITR 632 (Bom)) had held that no question of law in this respect arises and thereby confirmed the judgment of the Tribunal. It was pointed out that against this judgment of the High Court, the Department had

approached the Supreme Court and the Supreme Court had held that a question of law did arise. The Supreme Court framed a question and placed the matter back before the High Court. We are informed that this appeal is still pending.

4 On the other hand, learned counsel for the assessee firstly contended that the Tribunal had merely remanded the issue back to the Assessing Officer. In earlier orders, the Revenue had approached the court against similar orders of the Tribunal. The High Court on two occasions, in the order dated September 27, 2016 and November 22, 2016 passed in Income Tax Appeal Nos. 475 of 2014 and 102 of 2014 respectively had not entertained the challenge of the Revenue. In any case, it was contended that the facts on record are available and the Tribunal has merely asked the Assessing Officer to take a decision on the assessee's contention.

5 As long as the material exists on record, a contention raised by the assessee for the first time before the Tribunal, cannot be barred. So much is clear from series of judgments of various courts including of this court in the case of *CIT* v. *Pruthvi Brokers and Shareholders P. Ltd.* [2012] 349 ITR 336 (Bom). It is not the case of the Revenue that the assessee in the context of its contention on the nature of the subsidy, desired to produce additional evidence. It is true that the judgment of this court confirming the order of the Tribunal in the case of *Reliance Industries Ltd.* has been partially reversed by the Supreme Court. A question of law has been framed and placed for consideration of the High Court. However, this does not mean that the judgment of the Tribunal as on today stands reversed or stayed. In any case, quite apart from the judgment in the case of *Reliance Industries Ltd.* of the Special Bench of the Tribunal, it is always open for the assessee to contend before the Assessing Officer by pointing out the relevant clauses of the subsidy that in law the subsidy cannot be treated to be towards revenue account. It would be equally open for the Revenue to oppose such a contention if so advised. The Assessing Officer and the Revenue authorities would have to take a decision in accordance with law. These questions, therefore, are not considered.

6 Coming to question No. (a), the same pertains to the Revenue's objection to a technical know-how expenditure incurred by the assessee being treated as a revenue expenditure. The record would suggest that the assessee had incurred the expenditure for acquiring technical advice, assistance and information for running the business and to produce more products and to run the business more efficiently. Before the Assessing Officer, the assessee had produced the separate terms of agreement for providing such know-how, showing that the same would be valid for a period of 5 years

from the date of commencement of the regular production. The assessee had relied upon the decisions of this court in the case of *CIT* v. *Tata Engg. and Locomotive Co. Pvt. Ltd.* [1980] 123 ITR 538 (Bom) and in the case of *CIT* v. *Service Station Equipment Pvt. Ltd.* [1981] 132 ITR 130 (Bom), besides others. The Assessing Officer did not dispute the applicability of the ratio of the said decisions. He however recorded that such decisions were rendered prior to the amendment in section 32 of the Income-tax Act, 1961 by virtue of the Finance Act, 1998, which provides that such technical know-how in the nature of intangible asset would be eligible for depreciation. The counsel for the assessee had placed reliance on the judgment of the Supreme Court in the case of *Alembic Chemical Works Co. Ltd.* v. *CIT* [1989] 177 ITR 377 (SC) before us in this context.

Upon hearing counsel for the parties, we find that the Commissioner of **7**
Income-tax (Appeals) (CIT(A)) has correctly appreciated the legal position. As noted, the Assessing Officer also did not seriously dispute that the expenditure was in the nature of revenue expenditure. The only objection of the Assessing Officer was that by virtue of the amendment in section 32, this position would no longer be valid. We notice that by virtue of such amendment in sub-section (1) of section 32, the Legislature recognized and granted depreciation at the prescribed date on know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998. Thus, clause (ii) of sub-section (1) of section 32 merely grants depreciation on the listed intangible assets, in the absence of which, the assessee would not be entitled to such depreciation. This provision however, cannot be pressed into service to examine whether certain expenditure for acquisition of know-how or similar intangible asset is revenue or capital expenditure. It would depend on the nature of expenditure. If it is a capital expenditure, it will be eligible for depreciation in terms of section 32(1) of the Act. If it is revenue expenditure and expended wholly or exclusively for the purpose of the business, in any case, the assessee would be entitled to deduction thereof. Question (a) is therefore not entertained.

Question (b) concerns the Assessing Officer's attempt to tax the income **8**
in the hands of the assessee in relation to the assessee's units situated in the U. S. A. and the U. K. The Commissioner of Income-tax (Appeals) and the Tribunal referred to the earlier orders in the case of this very assessee and the Double Taxation Avoidance Agreement between the respective countries to come to the conclusion that such income was not taxable in the hands of the assessee in India. We notice that such an issue was carried

by the Revenue before the High Court in earlier years in Tax Appeal Nos. 475 of 2014 and 1102 of 2014. In both years, the Revenue's ground was rejected. We may refer to one such order passed by this court on September 27, 2016 in Income Tax Appeal No. 475 of 2014. The court dealt with the following question raised by the Revenue, which reads as under :

"1. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that profit of the assessee's branch in the U. S. A., viz., Birla Consultancy Software Services is not taxable in India without examining the facts of the case and without appreciating the fact as per article 24(2) of the Double Taxation Avoidance Agreement only deduction in respect of taxes on income paid in USA should be allowed as deduction from the tax payable in India, and therefore this decision of the Tribunal is perverse on facts ?"

9 The court in this context opined as under :

"3. *Re. Question No. (1)* :

(a) The impugned order of the Tribunal dismissed the Revenue's appeal on the above issue by following its order in the case of the same respondent-assessee for the assessment years 1996-97 and 1997-98.

(b) On specifically being asked, Mr. Suresh Kumar, learned counsel appearing for the Revenue, states that nothing is available on record to indicate any challenge by the Revenue to the order of the Tribunal for the assessment years 1996-97 and 1997-98 before any higher forum. It therefore follows that the orders of the Tribunal on the above issue for the assessment years 1996-97 and 1997-98, have been accepted by the Revenue. Therefore, the Revenue can have no grievance with the impugned order of the Tribunal as it merely follows its earlier orders which have been accepted. Further, no distinguishing features in the present assessment year from that existing in the assessment years 1996-97 and 1997-98 have been brought to our notice which would justify our taking a different view on this issue for the subject assessment year.

(c) In the above view, question No. (1) as proposed by the Revenue does not give rise to any substantial question of law. Thus, not entertained."

10 Similar situation obtained in Income Tax Appeal No. 1102 of 2014 which pertains to the assessee and concerns the assessment year 2000-01. This court, therefore, repeatedly held that the Revenue had accepted the position which arose in the earlier assessment years. Without pointing out any

distinction in the facts, it was not open for the Revenue to pick a certain year for carrying the challenge further before the High Court.

The learned counsel for the Revenue however relied on the decision of **11** the Supreme Court in the case of *CIT* v. *Modipon Ltd.* [2018] 400 ITR 1 (SC) in which it was observed as under (page 7 of 400 ITR) :

> "We have considered the submissions made on behalf of the parties. Notwithstanding the acceptance by the Revenue of the practice adopted by the assessee-Modipon Ltd. in all the assessment years except for the ones under dispute as enumerated above and the absence of any challenge to the decisions of the Delhi and the Punjab and Haryana High Courts, the present challenge would still be entertainable so long as it discloses a substantial question of law or an issue impacting public interest or the same has the potential of recurrence in future. The Revenue cannot be shut out from the present proceedings merely because of its acceptance of the practice of accounting adopted by the assessee or its acceptance of the decision of the two High Courts in question. An adjudication of the question(s) arising cannot be refused merely on the above basis. We will, therefore, have to proceed to answer the merits of the challenge made by the Revenue in the present appeals."

In the present case, however, the facts are that the earlier decisions of **12** the Commissioner of Income-tax (Appeals) and the Tribunal were rendered against this very assessee under substantially similar if not identical circumstances. Some of these decisions were accepted by the Revenue without challenge. It is not the case of the Revenue that on account of low tax effect or some such other reasons, the matter was not carried further in those years. In two earlier years, i. e., for the assessment years 1999-2000 and 2000-01, the Revenue filed appeals before the High Court. The High Court turned down the appeals mainly on the ground that no distinguishing feature was presented and no reasons were cited for carrying selective matters in appeal. Under the circumstances, we do not find that such issue could be considered, in the present year.

In the result, the tax appeal is dismissed. **13**

[2020] 424 ITR 244 (Guj)

[IN THE GUJARAT HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

WESTERN AGRI SEEDS LTD.

J. B. PARDIWALA and **BHARGAV D. KARIA** JJ.

January 20, 2020.

SS ▸ ITA 1961, ss 37, 40A(2)
AY ▸ 2011-12
HF ▸ Assessee

BUSINESS EXPENDITURE—DISCOUNT AND RATE DIFFERENCE—EXCESSIVE AND UNREASONABLE PAYMENTS—DELETION OF DISALLOWANCE JUSTIFIED ON FACTS—INCOME-TAX ACT, 1961, SS. 37, 40A(2).

CAPITAL OR REVENUE EXPENDITURE—LICENCE FEES—ACQUISITION OF NON-TRANSFERABLE SUB-LICENCE FOR EFFECTIVELY INCREASING BUSINESS—NO ASSET CREATED—REVENUE—INCOME-TAX ACT, 1961, S. 37.

The assessee acquired a sub-licence to use a technology to test the produce and sell genetically modified hybrid cotton plant seeds. The Tribunal found that the sub-licence was non-transferable and enabled the assessee to effectively increase its business but no asset was created. The Tribunal held that the non-refundable up-front fee itself was not capital expenditure but was required to be paid for acquiring licence from the main company which was used for the purposes of business and hence the expenditure incurred by the assessee was treated as revenue expenditure. On appeal :

Held, *dismissing the appeal, (i) that the Tribunal was right in upholding the order of the Commissioner (Appeals) deleting the disallowances on account of discount and rate difference and the disallowance made under section 40A(2).*

(ii) That the Tribunal was right in upholding the order of the Commissioner (Appeals) treating the sub-licence fee expenses as revenue expenditure.

CIT *v.* J. K. SYNTHETICS LTD. [2009] 309 ITR 371 (Delhi) (paras 3, 4) *referred to.*

R/Tax Appeal No. 835 of 2019.

Mrs. Mauna M. Bhatt for the appellant.

JUDGMENT[1]

The judgment of the court was delivered by

J. B. PARDIWALA J.—This tax appeal under section 260A of the Income-tax Act, 1961 (for short, "the Act, 1961") is at the instance of the Revenue and is directed against the order passed by the Income-tax Appellate Tribunal, Ahmedabad "B" Bench, dated March 27, 2019 in I. T. A. No. 2796/Ahd/2014 for the assessment year 2011-12. 1

The Revenue has proposed the following questions as the substantial questions of law involved in this appeal : 2

> "(A) Whether the Appellate Tribunal has erred, considering the facts and circumstances of the case and in law, in upholding the order of the Commissioner of Income-tax (Appeals) for deleting the disallowance on account of discount and rate difference to Rs. 2,31,95,051 ?
>
> (B) Whether the Appellate Tribunal has erred, considering the facts and circumstances of the case and in law, in upholding the order of the Commissioner of Income-tax (Appeals) for deleting the disallowance made under section 40A(2) to Rs. 1,55,06,080 ?
>
> (C) Whether the Appellate Tribunal has erred, considering the facts and circumstances of the case and in law, in upholding the order of the Commissioner of Income-tax (Appeals) for deleting the addition of sub licence fee expenses of Rs. 27,57,500 ?"

For the reasons recorded by us today, while dismissing the Tax Appeal No. 834 of 2019, this tax appeal stands dismissed so far as the questions Nos. (A) and (B) respectively, as proposed by the Revenue, are concerned. The question No. (C), as proposed, is one relating to deletion of the addition of sub Licence fee expenses to the tune of Rs. 27,57,500. In this regard, the Tribunal, while concurring with the finding recorded by the Commissioner of Income-tax (Appeals) held as under : 3

> "Heard the respective parties, perused the relevant materials available on record. It appears that the appellant has acquired sub-licence for using Monsanto technology and such sub-licence is non-transferable. Such licence is provided to the assessee to test produce and sell genetically modified hybrid cotton plant seeds in the territory of the appellant for effectively increasing its business ; no asset, however, is created. While holding such expenses as revenue expenditure the learned Commissioner of Income-tax (Appeals) relied upon the judgment passed by the hon'ble Delhi High Court in the matter of

1. Oral judgment.

CIT v. *J. K. Synthetics Ltd.* reported in [2009] 309 ITR 371 (Delhi) wherein it was held that since under the agreement the assessee has obtained a technical assistance and acquired some technical information which was a know-how related to process of manufacture, then it is not a transfer of the ownership of the know-how and to be treated as revenue expenditure. The judgment passed by the Co-ordinate Bench, in the case of *Urja Products Ltd.* was also mentioned in the order passed by the learned Commissioner of Income-tax (Appeals) wherein similar issue has been decided in favour of the appellant. The non-refundable up-front fee itself does not mean a capital expenditure but the same is required to be paid for acquiring licence from the main company which is used for the purposes of business and hence the entire expenditure incurred by the appellant is treated as revenue expenditure. We, therefore, find no infirmity in the order passed by the learned Commissioner of Income-tax (Appeals) in deleting such addition of Rs. 27,57,500 as made by the learned Assessing Officer. We, therefore, do not hesitate to confirm the same so as to warrant inference. The question is accordingly answered in the affirmative that is in favour of the assessee and against the Revenue. Consequently the appeal fails and is accordingly dismissed."

4 Thus, we take notice of the fact that the Tribunal has relied upon the decision of the Delhi High Court in the case of *CIT* v. *J. K. Synthetics Ltd.* (supra), wherein the Delhi High Court has taken the view that when under the agreement the assessee has obtained a technical assistance and acquired some technical information which was a know-how related to process of manufacture, then it is not a transfer of the ownership of the know-how and to be treated as revenue expenditure.

5 We are in complete agreement with the finding recorded by the Tribunal as regards the proposed question No. (C) is concerned.

6 In the result, this appeal fails and is hereby dismissed so far as the third question, as proposed by the Revenue, is concerned.

[2020] 424 ITR 247 (Guj)

[In the Gujarat High Court]

GUJARAT CO-OPERATIVE MILK MARKETING FEDERATION LTD.

v.

INCOME-TAX OFFICER

Akil Kureshi and **B. N. Karia** JJ.

May 9, 2018.

SS ▸ ITR 1962, r 3(e)
AY ▸ 2000-01, 2001-02
HF ▸ Assessee

Deduction of tax at source—Salary—Perquisites—Law applicable—Prior to amendment rule 3(e) applicable for free educational facilities for children of employees—Reimbursement of educational expenses of employees amounting to less than one thousand rupees per child per month—Reimbursement would not amount to perquisite—Tax not deductible on such reimbursement—Income-tax Act, 1961—Income-tax Rules, 1962, r. 3(e).

Rule 3(e) of the Income-tax Rules, 1962 considers the provision of free educational benefits to the children of the employees to be a perquisite. The rule was amended in 2001 for the subsequent period to include even concessional facility.

Held, *that the children of the employees of the assessee studied in school paying fees at a subsidized rate. The recurring deficit of the school was recouped by contributions made by the assessee based on the number of students representing the employees' wards. The burden borne per child per month had never crossed Rs. 1,000 by the assessee, and therefore, there would be no question of any perquisite arising in the hands of the employees of the assessee, and therefore, deduction of tax at source would be not permissible for the assessment years 2000-01 and 2001-02. The assessee could not be said to be a defaulter in respect of the amount and liable under section 201(1) or to make payment of interest leviable under section 201(1A).*

CIT (TDS) *v.* Director, Delhi Public School [2011] 14 taxmann.com 45 (P&H) (para 12) *referred to*.

R/Tax Appeal Nos. 894 and 895 of 2007.

B. S. Soparkar for *Mrs. Swati Soparkar*, Advocates, for the appellant.

Mrs. Mauna M. Bhatt, Advocate, for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 B. N. KARIA J.—These two appeals are preferred under section 260A of the Income-tax Act, 1961 ("the Act" for brevity), challenging an order dated October 4, 2006 passed by the Income-tax Appellate Tribunal, Ahmedabad ("the Tribunal" for brevity) in respect of the assessment years 2000-01 and 2001-02.

2 Since the issue involved in both these tax appeals is similar, the facts are being extracted from Tax Appeal No. 894 of 2007.

The appellant-assessee in both these appeals is a co-operative milk marketing federation, having its dairy at Anand. It had filed its return for the assessment years 2000-01 and 2001-02 on September 30, 2005.

3 The Assessing Officer upon verification of the return of income noticed that the assessee has not treated the amount paid towards part payment of tuition fees of children of its employees made to Anandalaya Education Society, which imparts education and therefore, it amounts to perquisite to that extent in the hands of the employees of the assessee, as per the provisions of section 17(2) of the Act, and hence, liable for deduction of tax at source.

4 Drawing attention of the assessee to the said provision read with rule 3(e) of the Income-tax Rules, 1962 ("the Rules" for brevity), the Assessing Officer issued a notice under section 201(1) and 201(1A) read with sections 192 and 194 of the Act on October 5, 2005 calling upon the appellant-assessee to explain why tax to the extent of short/no deduction of tax should not be recovered from the assessee under section 201(1) of the Act. In response to which, the assessee tendered its reply, inter alia, contending that the contribution to Anandalaya Education Society was a concessional education facility given to the employees to facilitate education of their children, no perquisite arose in the hands of the employees, and therefore, no tax was deducted at source. It was pointed out that by virtue of a new rule 3 which came to be inserted with retrospective effect from April 1, 2001, exemption limit of Rs. 1,000 was available for the assessment year 2002-03 onwards, and therefore, contribution for the financial year 2001-02 (i.e., the assessment year 2002-03) would not give rise to perquisite in the hands of the employees. Distinction was sought to be drawn by the assessee between "free" and "concessional" education, emphasizing that education may be purely free or free to the extent of concession given. The assessee drew the attention of the Assessing Officer by producing a tabular

chart explaining that in each year, the assessee had incurred burden to the extent of Rs. 1,000 per child per month.

This reply did not find favour with the Assessing Officer, who ordered **5** issuance of demand notice in the sum of Rs. 1,65,868 and interest thereon under section 201(1A) of the Act. This gave rise to filing of first appeal before the Commissioner of Income-tax (Appeals).

Before the Commissioner (Appeals), it was pointed out by the assessee **6** that the Assessing Officer had presumed that the appellant had contributed amounts to Anandalaya Education Society for the purpose of meeting educational expenses in respect of children of its employees, whereas, the fact being that the contributions were made for recouping deficiency which the institute suffered for providing educational facilities to the wards of employees of the appellant-assessee. And therefore, in no way, such amounts paid to Anandalaya could be termed as contributions made towards free or concessional educational facilities to the wards of the employees of the appellant. The attention of the Commissioner of Income-tax (Appeals) was also drawn towards the provisions of rule 3(e) of the Rules to point out that the appellant met only a part of educational expenditure, and therefore, the said provision would not apply in the facts and circumstances of the case.

The Commissioner of Income-tax (Appeals) also did not accept the plea **7** of the assessee by upholding the order of the Assessing Officer passed under section 201(1) and 201(1A) of the Act. Resultantly, the appellant-assessee moved the Tribunal against a consolidated order of the Commissioner of Income-tax (Appeals) dated May 31, 2006. The Tribunal vide impugned order dated October 4, 2006 upheld the order of the Commissioner of Income-tax (Appeals) and thereby dismissed the appeals preferred by the assessee, giving rise to these tax appeals.

This court vide oral order dated April 3, 2008, admitted these appeals for **8** consideration of the following questions of law :

> "(a) Whether in the facts and circumstances of the case, the contribution made by the appellant to the Anandalaya Education Society towards the deficit of education expenses of children of the appellant's employees is perquisite in the hands of the employees pursuant to the provisions of section 17(2)(iii) and (iv) of the Income-tax Act read with rule 3 of the Income-tax Rules, 1962 ?
>
> (b) Whether in the facts and circumstances of the case, the Income-tax Appellate Tribunal was right in law in confirming the action of the respondent in levying penalty and penal interest under section 201(1) and 201(1A) of the Act by holding that the contribution

made by the appellant to the Anandalaya Education Society towards the deficit of education expenses of children of appellant's employees is perquisite in the hands of the employees pursuant to the provisions of section 17(2)(iii) and (iv) of the Income-tax Act read with rule 3 of the Income-tax Rules, 1962 ?"

9 We have heard learned counsel for the respective parties and perused the record.

10 Learned counsel Shri B. S. Soparkar appearing for the appellant-assessee submitted that the Tribunal has erred in upholding the order of the Commissioner of Income-tax (Appeals) and in dismissing the appeal of the assessee. He contended that the Tribunal has committed an error in holding that the assessee is incurring expenditure for providing educational facilities to the wards of its employees only, and therefore, the contribution made by the appellant will squarely fall within the ambit of rule 3(e) of the Rules and could in no way be taxed as a perquisite in the hands of the employees. The counsel submitted that the contributions made to Anandalaya were to recoup the deficiency suffered by the said society for meeting the educational requirements and therefore, the same ought not to have been treated as contribution for meeting the education expenditure of the children of the appellant's employees. The counsel emphasized that the contribution made by the appellant to the said society could not be treated as a perquisite in the hands of the employees of the appellant, as the same could not be said to be the value of benefit to the employees resulting from provisions of "free education" facility within the meaning of rule 3(e) of the Rules, which eventually covers only "free education facility" and not "the educational facility at concessional rate".

11 The counsel drew attention of this court to rule 3(e) of the Rules which, prior to amendment made vide Income-tax (22nd Amendment) Rules, 2001, covers only free educational facilities for the members of household of assessee and not the concessional educational facilities, which is specifically included in substituted rule 3(5) inserted vide Income-tax (22nd Amendment) Rules, 2001 to contend that the contributions to Anandalaya towards deficit of education expenses of children of appellant's employees is not perquisite in the hands of the employees, pursuant to the provisions of section 17(2)(iii) and (iv) of the Act read with rule 3 of the Rules. The counsel lastly contended to set aside the order of the Tribunal in confirming the order of levy of penalty and penal interest under section 201(1) and 201(1A) of the Act.

12 On the other hand, learned counsel for the Revenue besides supporting the order passed by the Commissioner of Income-tax (Appeals) as well as

the Tribunal, relied on the decision of *CIT (TDS)* v. *Director, Delhi Public School* reported in [2011] 14 taxmann.com 45 (P&H). The counsel for the Revenue submitted that the assessee had made payment of part of fees of children of its employees to Anandalaya Education Society for educational fees which would attract section 17(2) of the Act and therefore, the assessee is liable for tax deducted at source as perquisite in the hands of the employees. Learned counsel for the Revenue drew attention of this court to section 17(2)(iii) and 17(2)(iv) of the Act to contend that the school run by the society has never given any concession in fees to its students, but on the contrary has recovered full fees (in part from the students/children of the employees of the assessee and part from the assessee, in case of children of its employees). It is submitted that these were paid in part by the employer and part by the employees, and therefore, the arguments advanced by the assessee that rule 3(e) refers to free as well as concessional educational facility would not be applicable to the facts of this case. That, the issue of free or concessional education would arise only where it is being offered as free/concessional facility granted by the institute and provided by the assessee. Here, there is no issue of free or concessional facility provided by the employer. That, provisions of rule 3(e) would not be applicable in the case of the assessee for the year under consideration. That, the assessee has taken false shelter of rule 3(e) and 3(5) which are not at all applicable to the case of the assessee. Hence, it was requested by the learned counsel for the Revenue to dismiss the appeal.

Having considered facts of the case, the submissions made by learned counsel for the respective parties, it appears from the record that as per the chart below, the assessee has shown its income and expenditure in detail. **13**

Financial year of deficit	*No. of students*	*Total deficit contributed (Rs.)*	*Contributed per student per month (Rs.)*
1999-2000	55	5,91,030	896
2000-2001	62	6,43,126	864
2001-2002	58	6,36,202	914
2002-2003	63	6,72,903	890
2003-2005	61	7,32,122	1,000

If we peruse the aforesaid chart, it is not in dispute that the children of the employees of appellant-assessee are studying in Anandalaya Education Society and are paying fees at a subsidised rate. It is equally true that the recurring deficit of the society is being recouped by the contributions made by the assessee based on number of students representing the employees' **14**

wards, and it is under these circumstances that the assessee contributed Rs. 5,91,030 and Rs. 6,43,126 for the assessment years 2000-01 and 2001-02 respectively. Thus, the burden borne per child per month has never crossed Rs. 1,000 by the assessee, and therefore, there would be no question of any perquisite arising in the hands of the employees of the assessee, and therefore, deduction of tax at source would also be not permissible. The contribution as shown in the chart cannot be said to be perquisite in the hands of the employees for any of the years mentioned above.

15 Learned advocate for the assessee drew the attention of this court to the provisions of rule 3(e) of the Rules, which is reproduced hereunder :

> "Rule 3(e). The value of the benefit to the assessee resulting from the provision of free education facilities for any member of his household shall be determined as the sum equal to the amount of the expenditure incurred by the employer in that behalf, but where the educational institution itself is maintained and run by the employer for the benefit of all his employees as a group, the value of the perquisite to the assessee shall be determined with reference to the reasonable cost of such education in a similar institution in or near the locality ."

16 From the wordings of rule 3(e) above, it can be said that it would be applicable only for free educational facilities, as nothing is mentioned therein of concessional educational facilities. Contributions to the Anandalaya Education Society is towards the deficit of the fees towards wards of the employees, and therefore, rule 3(e) would not apply to the facts of this case and hence, no perquisite would arise in the hands of the employees for the assessment years in question. The legislation amended the said rule only for subsequent period to include even concessional education facility. Therefore, rule 3(2) read with section 17 of the Act cannot be said to have been violated and the assessee cannot be held liable to recover tax under section 201(1) to the extent the tax is due from its employees. Hence, the findings of the Tribunal that the assessee has failed to deduct tax at source on such contributions in terms of the provisions of section 192 read with section 17 of the Income-tax Act appears to be not correct or legal. The assessee cannot be said to be a defaulter of the amount and liable under section 201(1) of the Income-tax Act or to make payment of interest leviable under section 201(1A) of the Act. The judgment relied upon by the learned counsel for the Revenue would not be applicable to the facts of the case on hand.

17 In the result, the tax appeal is allowed. The judgment of the Income-tax Appellate Tribunal, Ahmedabad dated October 4, 2006 passed in I. T. A.

Nos. 1825 and 1826 for the assessment year 2000-01 and 2001-02 is hereby quashed and set aside.

[2020] 424 ITR 253 (Guj)

[In the Gujarat High Court]

ENGINEERING PROFESSIONAL CO. PVT. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

J. B. Pardiwala and **Bhargav D. Karia** JJ.

January 7, 2020.

SS ▸ ITA 1961, ss 44AB, 44AD, 144 ; Constn of India, art 226
AY ▸ 2004-05
HF ▸ Assessee/Remanded

Writ—Availability of alternative remedy—Not bar to entertaining petition when there is infirmity in order passed by Assessing Officer—Constitution of India, art. 226.

Presumptive taxation—Construction business—Assessee filing audit report with return of income under section 44AB—Section 44AD not applicable—Tribunal remanding matter to Assessing officer for considering afresh assessee's claim to lower profit and not at 8 per cent.—Proper—Income-tax Act, 1961, ss. 44AB, 44AD, 144.

The assessee was in construction business. For the assessment year 2004-05, a best judgment assessment was made under section 144 of the Income-tax Act, 1961 in view of the provisions of section 44AD. The Commissioner (Appeals) dismissed the appeal filed by the assessee. The Tribunal declined to condone the delay of 329 days in filing the appeal by the assessee. The assessee filed a writ petition against the order of the Tribunal. The High Court condoned the delay on the ground that the assessee was prevented by reasonable and sufficient cause in filing the appeal on time. It further held that the order was passed ex parte under section 144, that the authority ought not to have applied the profit rate of 8 per cent. following the guidelines of section 44AD, that as the return was accompanied by the audit report under section 44AB, the provisions of section 44AD were not applicable and remanded the matter to the Tribunal. On remand, the Tribunal directed the Assessing Officer to verify the claim of lower rate of profit and decide the issue afresh. The Assessing Officer passed a fresh order under section 143(3) read with section 254

directing allowance of credit for prepaid taxes after verification, charge of interest under sections 234A, 234B, 234C and 234D and issue of notice under section 274 read with section 271(1)(c). On a writ petition :

Held, *allowing the petition, (i) that having regard to the basic infirmity in the order passed by the Assessing Officer, the petition could not be dismissed only on the ground that the assessee had an alternative efficacious remedy of filing an appeal before the Commissioner (Appeals). Although the Act provided a complete machinery for obtaining relief in respect of any improper orders passed by the Department, the remedy under the statute must be effective and not a mere formality with no substantial relief. When a statutory forum was created by law for the redressal of grievance, a writ petition should not be entertained ignoring the statutory dispensation. But this would not apply if the court was convinced that on the face of it, the order in question was not sustainable in law. The matter was to be considered on the merits while overruling the preliminary objection raised on behalf of the Department. The directions issued by the Tribunal were plain and simple as it took the view that section 44AD was not applicable and directed the assessee to attend the assessment proceedings and justify its case on lower rate of profit in accordance with its books of account.*

CIT *v.* CHHABIL DASS AGARWAL [2013] 357 ITR 357 (SC) *followed*.

(ii) That if the appeal had been dismissed by the Tribunal without there being any direction remitting the matter to the Assessing Officer, the effect would have been that the Tribunal had accepted that the case would fall within the provisions of section 44AD thereby justifying the application of 8 per cent. rate of profit. The Assessing Officer had created a new liability for the assessee contrary to the directions issued by Tribunal. The order passed by the Assessing Officer was not sustainable. The matter was remitted to the Assessing Officer for fresh consideration of the issue as specifically directed by the Tribunal and reconsideration of the issue with regard to the assessee's claim for the lower rate of profit and not at the rate of 8 per cent. [Matter remanded.]

MCORP GLOBAL P. LTD *v.* CIT [2009] 309 ITR 434 (SC) *distinguished*.

Cases referred to :

Abraham (C. A.) *v.* ITO [1961] 2 SCR 765 (para 14)

Attorney General of Trinidad and Tobago *v.* Gordon Grant and Co. Ltd. [1935] AC 532 (PC) (para 14)

Collector of Central Excise (Asst.) *v.* Dunlop India Ltd. [1985] 1 SCC 260 (para 14)

CIT *v.* Chhabil Dass Agarwal [2013] 357 ITR 357 (SC) (para 14)

Gandhi (H. B.), Excise and Taxation Officer-cum-Assessing Authority *v.* Gopi Nath and Sons [1992] Supp (2) SCC 312 (para 14)

GKN Driveshafts (India) Ltd. *v.* ITO [2003] 259 ITR 19 (SC) (para 14)

Harbanslal Sahnia *v.* Indian Oil Corporation Ltd. [2003] 2 SCC 107 (para 14)

Hukumchand Mills Ltd. *v.* CIT [1967] 63 ITR 232 (SC) (para 17)

K. S. Rashid and Son *v.* Income-tax Investigation Commission [1954] 25 ITR 167 (SC) (para 14)

K. S. Venkataraman and Co. (P.) Ltd. *v.* State of Madras [1966] AIR 1966 SC 1089 (para 14)

Kerala State Electricity Board *v.* Kurien E. Kalathil [2000] 6 SCC 293 (para 14)

Mafatlal Industries Ltd. *v.* Union of India [1997] 5 SCC 536 (para 14)

MCorp Global P. Ltd *v.* CIT [2009] 309 ITR 434 (SC) (para 17)

Municipal Council, Khurai *v.* Kamal Kumar [1965] 2 SCR 653 (para 14)

Munshi Ram *v.* Municipal Committee, Chheharta [1979] 118 ITR 488 (SC) (para 14)

Muthusami (S. T.) *v.* K. Natarajan [1988] 1 SCC 572 (para 14)

Neville *v.* London Express Newspapers Ltd. [1919] AC 368 (HL) (para 14)

Nivedita Sharma *v.* Cellular Operators Association of India [2011] 14 SCC 337 (para 14)

Pratap Singh *v.* State of Haryana [2002] 7 SCC 484 (para 14)

Punjab National Bank *v.* O. C. Krishnan [2001] 6 SCC 569 (para 14)

Rajasthan State Road Transport Corporation *v.* Krishna Kant [1995] 5 SCC 75 (para 14)

Ram and Shyam Co. *v.* State of Haryana [1985] 3 SCC 267 (para 14)

Ramendra Kishore Biswas *v.* State of Tripura [1999] 1 SCC 472 (para 14)

Sangram Singh *v.* Election Tribunal, Kotah [1955] AIR 1955 SC 425 (para 14)

Secretary of State *v.* Mask and Co. [1940] AIR 1940 PC 105 (para 14)

Sheela Devi *v.* Jaspal Singh [1999] 1 SCC 209 (para 14)

Shivgonda Anna Patil *v.* State of Maharashtra [1999] 3 SCC 5 (para 14)

Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha *v.* State of Maharashtra [2001] 8 SCC 509 (para 14)

Siliguri Municipality *v.* Amalendu Das [1984] 2 SCC 436 (para 14)

State of H. P. *v.* Gujarat Ambuja Cement Ltd. [2005] 6 SCC 499 (para 14)

State of U. P. *v.* Mohd. Nooh [1958] AIR 1958 SC 86 (para 14)

Sudhakar Reddy (L. L.) *v.* State of A.P. [2001] 6 SCC 634 (para 14)

Thansingh Nathmal *v.* Superintendent of Taxes [1964] AIR 1964 SC 1419 (para 14)

Tin Plate Co. of India Ltd. *v.* State of Bihar [1998] 8 SCC 272 (para 14)

Titaghur Paper Mills Co. Ltd. *v.* State of Orissa [1983] 2 SCC 433 (para 14)

Union of India *v.* Guwahati Carbon Ltd. [2012] 11 SCC 651 (para 14)

Union of India *v.* T. R. Varma [1957] AIR 1957 SC 882 (para 14)

Veerappa Pillai (G.) *v.* Raman and Raman Ltd. [1952] AIR 1952 SC 192 (para 14)

Veluswami Thevar (N. T.) *v.* G. Raja Nainar [1959] AIR 1959 SC 422 (para 14)

Venkatasubbiah Naidu (A.) *v.* S. Chellappan [2000] 7 SCC 695 (para 14)

Whirlpool Corporation *v.* Registrar of Trade Marks [1998] 8 SCC 1 (para 14)

Wolverhampton New Waterworks Co. *v.* Hawkesford, 141 ER 486 (para 14)

R/Special Civil Application No. 1997 of 2019.

Ms. Vaibhavi K. Parikh for the petitioner.

Mrs. Kalpana K. Raval, Standing Counsel, for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

1 J. B. PARDIWALA J.—Rule returnable forthwith. Ms. Raval, the learned standing counsel appearing for the Revenue waives service of notice of rule for and on behalf of the Revenue.

2 By this writ application under article 226 of the Constitution of India, the writ applicant (assessee) has prayed for the following reliefs :

> "(a) quash and set aside the impugned assessment order dated December 27, 2018 at annexure 'A' to this petition ;
>
> (b) pending the admission, hearing and final disposal of this petition, to stay the implementation and operation of the assessment order dated December 2, 2018 at annexure 'A' to this petition ;

1. Oral judgment.

(c) any other and further relief deemed just and proper be granted in the interest of justice ;

(d) to provide for the cost of this petition."

The facts giving rise to this writ application may be summarised as under : 3

3.1 The writ applicant seeks to challenge the order passed by the respondent under section 143(3) read with section 254 of the Income-tax Act, 1961 (for short, "the Act, 1961") for the assessment year 2004-05. The assessee is a company incorporated under the Companies Act, 1956. The assessee is in the business of construction. The return of income for the year under consideration was filed on November 1, 2004 declaring total income at Rs. 11,16,785 (rupees eleven lakh sixteen thousand seven hundred eighty five only) and the same was processed under section 143(1) of the Act.

3.2 The case of the assessee came to be selected for scrutiny and various details were called for by the Assessing Officer. In such circumstances, the best judgment assessment came to be framed under section 144 of the Act vide order dated December 8, 2006 assessing the income of the assessee at Rs. 1,25,93,920 (Rupees one crore twenty five lakh ninety three thousand nine hundred twenty only) in view of the provisions of section 44AD of the Act.

3.3 The writ applicant challenged the assessment order dated December 8, 2006 by preferring an appeal before the Commissioner of Income-tax (Appeals). The said appeal came to be dismissed by the Commissioner of Income-tax (Appeals) vide order dated December 31, 2007.

3.4 The writ applicant, thereafter, thought it fit to carry the matter before the Income-tax Appellate Tribunal, but, by the time, the writ applicant could prefer the appeal, there was already a delay of 329 days in filing such appeal. The Income-tax Appellate Tribunal declined to condone the delay. In such circumstances, the writ applicant came before this court by filing the Tax Appeal No. 1465 of 2011. The Tax Appeal No. 1465 of 2011 came to be allowed by this court vide order dated December 11, 2012 and the matter was remitted to the Appellate Tribunal. The order passed by this court dated December 11, 2012 referred to above reads as under :

"1. Learned counsel Mr. Sudhir Mehta appears for the respondent in response to our notice of final disposal issued on September 18, 2012.

2. The assessee has challenged the decision of the Income-tax Appellate Tribunal dated August 5, 2011 by which the appeal of the

present appellant came to be dismissed on the ground that there was a delay of 329 days in filing the appeal and the assessee, despite several opportunities, had not filed any application explaining such delay and seeking condonation thereof.

3. The counsel for the appellant submitted that the assessee is engaged in the business of construction as civil contractor and persons responsible for the assessee-company need to continuously travel in relation with their work, due to which, instructions could not be immediately supplied to the counsel for filing the application for condonation of delay. She submitted that before the Tribunal request was made for granting one more opportunity. However, the Tribunal, considering the passage of time, proceeded to dismiss the appeal only on the ground that there was delay in presenting the appeal and no condonation was sought.

4. Having perused the order of the Tribunal and having heard the counsel for the parties, we are of the opinion that the appellant, of course, subject to certain strict conditions, is required to be granted one last opportunity of filing application for condonation of delay before the Tribunal.

5. Under the circumstances, the order of the Tribunal is reversed. The proceedings are placed back before the Tribunal to permit the appellant to file an application for condonation of delay. This shall, however, be subject to the following conditions that the appellant :

(1) shall deposit a sum of Rs. 5,000 with the Gujarat State Legal Services Authority latest by December 31, 2012 ;

(2) shall file an appropriate application for condonation of delay before the Tribunal also latest by the said date. The appeal is disposed of accordingly."

3.5 The Appellate Tribunal partly allowed the appeal preferred by the writ applicant herein holding as under :

"6. We have carefully perused the contents of the application for condonation of delay along with the affidavit. In our considered opinion, the assessee was prevented by reasonable and sufficient cause for not filing the appeal on time. Therefore, in the interest of justice and fair play, the delay is condoned.

7. Coming to the merits of the case, we find that the assessment order was made ex parte under section 144 of the Act which was confirmed by the learned Commissioner of Income-tax (Appeals).

8. A perusal of the order of the authorities below shows that because of non-attendance by the assessee, the Assessing Officer proceeded by applying rate of 8 per cent. following the guidelines of section 44AD of the Act.

9. In our considered opinion and the understanding of the facts in issue, since e-return was accompanied with audit report under section 44AB of the Act the provisions of section 44AD are not applicable.

10. Therefore, in the interest of justice, we deem it fit to restore the issue to the file of the Assessing Officer. The assessee is directed to attend the assessment proceedings and justify its claim of lower rate of profit in accordance with its books of account. The Assessing Officer is directed to verify the same and decide the issue afresh after giving a reasonable and fair opportunity of being heard to the assessee.

11. In the result, the appeal filed by the assessee is treated as allowed for statistical purpose."

Thus, the Appellate Tribunal took into consideration the following : **4**

(a) The assessment order was ex parte under section 144 of the Act.

(b) The authority ought not to have proceeded by applying the rate of 8 per cent. following the guidelines of section 44AD of the Act.

(c) As the return was accompanied with the audit report under section 44AB of the Act, the provisions of section 44AD would not be applicable.

In such circumstances referred to above, the Appellate Tribunal thought **5** it fit to direct the Assessing Officer to reconsider the claim of the assessee of lower rate of profit in accordance with its books of account. The direction issued by the Tribunal is very specific. The Tribunal directed the Assessing Officer to verify the claim of lower rate of profit and decide the issue afresh after giving reasonable opportunity of hearing to the writ applicant.

On the matter being remitted to the Assessing Officer, the Assessing **6** Officer appears to have travelled beyond the scope of the issue on which the Tribunal remitted the matter. In the fresh assessment order, the Assessing Officer held as under :

"12 After discussion and on the basis of the data made available on record, the total income of the assessee for the year under consideration is assessed as under :

Computation of income		
		In Rs.
Total income as per return of income		11,18,785
Add :		
On account of disallowance of sundry creditors as discussed in para 8	33,03,66,066	
On account of disallowance of unexplained expenses as discussed in para 9	84,83,340	
On account of unexplained investment as discussed in para 10	19,85,627	
On account of disallowance of depreciation as discussed in para 10.3	94,317	
On account of disallowance of trade payable as discussed in para 11	1,28,38,395	5,37,67,745
Assessed income		5,48,84,530

13. Assessed under section 143(3) read with section 254 of the Income-tax Act, 1961. Give credit for prepaid taxes, after the verification. Charged interest under section 234A, under section 234B, 234C and234D of the Income-tax Act, 1961 as applicable. Issued show-cause notice under section 274 read with section 271(1)(c) of the Act. Issued demand notice and challan accordingly."

7 Being dissatisfied with the order passed by the Assessing Officer, the assessee is here before this court with the present writ application.

• *Submissions on behalf of the writ applicant*

8 Mr. Hemani, the learned senior counsel assisted by Ms. Vaibhavi K. Parikh, the learned counsel appearing for the writ applicant vehemently submitted that the impugned order passed by the Assessing Officer is without jurisdiction. The learned senior counsel would submit that what cannot be done directly could not have been done indirectly. It is submitted that the order of the Tribunal remitting the matter, more particularly, the last part of the direction is very specific and clear. According to the learned senior counsel, the Assessing Officer was asked to look into the claim of the assessee with regard to the lower rate of profit and while undertaking such exercise, the Assessing Officer appears to have travelled much beyond the issue upon which he was asked to look into. This is the principal and

the only argument of the learned senior counsel while assailing the order passed by the Assessing Officer.

In such circumstances referred to above, the learned senior counsel **9** appearing for the writ applicant prays that there being merit in this petition, the same be allowed and the impugned order be quashed and set aside and the Assessing Officer may be asked to once again look into the matter in accordance with the original directions of the Tribunal.

• *Submissions on behalf of the Revenue*

On the other hand, Ms. Raval, the learned standing counsel appearing **10** for the Revenue has vehemently opposed this writ application. Ms. Raval would submit that no error, not to speak of any error of law could be said to have been committed by the Assessing Officer in passing the impugned order. Ms. Raval has raised a preliminary objection with regard to the maintainability of this writ application. According to Ms. Raval, the writ applicant ought to have preferred a statutory appeal before the Commissioner of Income-tax (Appeals) and could not have come straight before this court invoking the extraordinary jurisdiction under article 226 of the Constitution of India.

Ms. Raval, without prejudice to her preliminary objection as regards the **11** alternative remedy available to the writ applicant, further submitted that the direction of the Appellate Tribunal is being misconstrued or rather misinterpreted. According to her, it would not be correct to interpret the order of the Tribunal to the extent of only asking the Assessing Officer to consider the claim of the writ applicant of lower rate of profit. The learned standing counsel would submit that once the Tribunal takes the view that section 44AD would not be applicable, the entire assessment would be vast open and it would be within the jurisdiction of the Assessing Officer to look into other aspects also of the matter.

In such circumstances referred to above, the learned standing counsel **12** prays that there being no merit in this writ applicant, the same be rejected.

Having heard the learned counsel appearing for the parties and having **13** gone through the materials on record, the following two questions fall for our consideration :

> "(1) Whether we should entertain this writ application in view of the fact that there is an alternative remedy available to the writ applicant by preferring an appeal before the Commissioner of Income-tax (Appeals) ?
>
> (2) If we take the view that this writ application is maintainable, then whether the impugned order passed by the Assessing Officer is sustainable in law ?"

14 Having regard to the basic infirmity in the impugned order passed by the Assessing Officer, we are of the view that we should not reject this writ application only on the ground that the writ applicant has an alternative efficacious remedy of preferring an appeal before the Commissioner of Income-tax (Appeals). In this context, we may refer to a decision of the Supreme Court in the case of *CIT* v. *Chhabil Dass Agarwal* [2013] 357 ITR 357 (SC). We rely upon the observations made in paras 15 to 20. The same reads thus (page 374 of 357 ITR) :

> "Before discussing the fact proposition, we would notice the principle of law as laid down by this court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing of the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under article 226. (See *State of U. P.* v. *Mohammad Nooh*, AIR 1958 SC 86 ; *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa* [1983] 2 SCC 433 ; *Harbanslal Sahnia* v. *Indian Oil Corporation Ltd.* [2003] 2 SCC 107 ; *State of H. P.* v. *Gujarat Ambuja Cement Ltd.* [2005] 6 SCC 499).
>
> 16. The Constitution Benches of this court in *K. S. Rashid and Son* v. *Income-tax Investigation Commission* [1954] 25 ITR 167 (SC) ; AIR 1954 SC 207 ; *Sangram Singh* v. *Election Tribunal, Kotah*, AIR 1955 SC 425 ; *Union of India* v. *T. R. Varma*, AIR 1957 SC 882 ; *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86 and *K. S. Venkataraman and Co. (P.) Ltd.* v. *State of Madras*, AIR 1966 SC 1089 have held that though article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or procedure required for decision has not been adopted.

(See : *N. T. Veluswami Thevar* v. *G. Raja Nainar*, AIR 1959 SC 422 ; *Municipal Council, Khurai* v. *Kamal Kumar* [1965] 2 SCR 653 ; *Siliguri Municipality* v. *Amalendu Das* [1984] 2 SCC 436 ; *S. T. Muthusami* v. *K. Natarajan* [1988] 1 SCC 572 ; *Rajasthan State Road Transport Corporation* v. *Krishna Kant* [1995] 5 SCC 75 ; *Kerala State Electricity Board* v. *Kurien E. Kalathil* [2000] 6 SCC 293 ; *A. Venkatasubbiah Naidu* v. *S. Chellappan* [2000] 7 SCC 695 ; *L. L. Sudhakar Reddy* v. *State of A.P.* [2001] 6 SCC 634 ; *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha* v. *State of Maharashtra* [2001] 8 SCC 509 ; *Pratap Singh* v. *State of Haryana* [2002] 7 SCC 484 and *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC) ; [2003] 1 SCC 72.

17. In *Nivedita Sharma* v. *Cellular Operators Association of India* [2011] 14 SCC 337, this court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows :

'12. In *Thansingh Nathmal* v. *Superintendent of Taxes*, AIR 1964 SC 1419, this court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed : (AIR page 1423, paragraph 7).

"7. . . The High Court does not, therefore, act as a court of appeal against the decision of a court or Tribunal, to correct errors of fact, and does not by assuming jurisdiction under article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another Tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa* [1983] 2 SCC 433 this court observed (SCC pages 440-41, paragraph 11) :

"11. . . . It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 141 ER 486 in the following passage (ER page 495) :

". . . There are three classes of cases in which a liability may be established founded upon a statute . . . But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville* v. *London Express Newspapers Ltd.* [1919] AC 368 (HL) and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago* v. *Gordon Grant and Co. Ltd.* [1935] AC 532 (PC) and *Secretary of State* v. *Mask and Co.*, AIR 1940 PC 105, it has also been held to be equally applicable to enforcement of rights, and has been followed by this court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In *Mafatlal Industries Ltd.* v. *Union of India* [1997] 5 SCC 536 B. P. Jeevan Reddy J. (speaking for the majority of the larger Bench) observed : (SCC page 607, paragraph 77)

'77. . . . So far as the jurisdiction of the High Court under article 226—or for that matter, the jurisdiction of this court under article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under article 226/article 32, the court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'

(See *G. Veerappa Pillai* v. *Raman and Raman Ltd.*, AIR 1952 SC 192 ; *Asst. Collector of Central Excise* v. *Dunlop India Ltd.* [1985] 1 SCC 260 ; *Ramendra Kishore Biswas* v. *State of Tripura* [1999] 1 SCC 472 ; *Shivgonda Anna Patil* v. *State of Maharashtra* [1999] 3 SCC 5 ; *C. A. Abraham* v. *ITO* [1961] 2 SCR 765 ; *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa* [1983] 2 SCC 433 ; *H. B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath and Sons* [1992] Supp (2) SCC 312 ; *Whirlpool Corporation* v. *Registrar of Trade Marks* [1998] 8 SCC 1 ; *Tin Plate Co. of India Ltd.* v. *State of Bihar* [1998] 8 SCC 272 ; *Sheela Devi* v. *Jaspal Singh* [1999] 1 SCC 209 and *Punjab National Bank* v. *O. C. Krishnan* [2001] 6 SCC 569)

18. In *Union of India* v. *Guwahati Carbon Ltd.* [2012] 11 SCC 651, this court has reiterated the aforesaid principle and observed :

'8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this court in *Munshi Ram* v. *Municipal Committee, Chheharta* [1979] 118 ITR 488 (SC) ; [1979] 3 SCC 83. In the said decision, this court was pleased to observe that (page 494 of 118 ITR) :

'23. . . . when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking remedy are excluded.'

19. Thus, while it can be said that this court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal's* case, *Titagarh Paper Mills'* case and other similar judgments that the High Court will not entertain a petition under article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

20. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue authorities and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income-tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co.* v. *State of Haryana* 1985] 3 SCC 267, this court has noticed that if an appeal is from 'Caesar to Caesar's wife' the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High

Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the instant case."

15 Thus, the dictum of law, as laid in the aforesaid decision, is that although the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, yet the remedy under the statute, however, must be effective and not a mere formality with no substantial relief. It is true that when a statutory forum is created by law for redressal of grievance, a writ petition should not be entertained ignoring the statutory dispensation. But, such principles, in a given case, may be given a go-bye, if the court is convinced that on the face of it, the impugned order is not sustainable in law. We are of the view that we should look into the matter on merits while overruling the preliminary objection raised on behalf of the Revenue.

16 We are convinced that the impugned order passed by the Assessing Officer is not sustainable in law. We once again fall back on the directions issued by the Appellate Tribunal. The directions are plain and simple. The Tribunal takes the view that section 44AD of the Act is not applicable. It directed the assessee to attend the assessment proceedings and justify its case on lower rate of profit in accordance with its books of account. The Assessing Officer was directed to verify the same and decide the issue afresh (the Tribunal says that "decide the issue afresh" means the issue with regard to the claim of lower rate of profit).

17 Mr. Hemani, the learned senior counsel appearing for the writ applicant invited our attention to a decision of the Supreme Court in the case of *MCorp Global P. Ltd* v. *CIT* [2009] 309 ITR 434 (SC) wherein the Supreme Court has observed as under (page 437 of 309 ITR) :

> "In the case of *Hukumchand Mills Ltd.* v. *CIT* reported in [1967] 63 ITR 232 (SC) this court has held that under section 33(4) of the Income-tax Act, 1922 (equivalent to section 254(1) of the 1961 Act), the Tribunal was not authorized to take back the benefit granted to the assessee by the Assessing Officer. The Tribunal has no power to enhance the assessment."

18 The whole idea in relying upon the aforesaid decision of the Supreme Court is that the Tribunal could not have done two things : first it could have allowed the appeal and quashed and set aside the order of the Assessing Officer or it could have dismissed the appeal of the writ applicant.

19 If the appeal would have been dismissed without there being any direction of remitting the matter to the Assessing Officer, then the effect would

have been as if the Tribunal has accepted that the case would fall within section 44AD of the Act thereby justifying 8 per cent. rate of profit. Here is a case where the Assessing Officer, by its impugned order, has absolutely created new liability for the writ applicant and that too, contrary to the directions issued by the Appellate Tribunal.

For the foregoing reasons, we are convinced that the impugned order **20** passed by the Assessing Officer is not sustainable in law.

In the result, this writ application succeeds and is hereby allowed. The **21** impugned order passed by the Assessing Officer is hereby quashed and set aside. The matter is remitted to the Assessing Officer for fresh consideration of the issue as specifically directed by the Appellate Tribunal. We once again clarify that the Assessing Officer now needs to reconsider the issue with regard to the claim of the writ applicant for lower rate of profit and not at the rate of 8 per cent. Rule is made absolute to the aforesaid extent.

[2020] 424 ITR 267 (Bom)

[IN THE BOMBAY HIGH COURT]

NATIONAL REFINERY PVT. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

M. S. SANKLECHA and **NITIN JAMDAR** JJ.

November 6, 2019.

SS ▸ ITA 1961, s 37
AY ▸ 2005-06, 2007-08, 2008-09, 2009-10
HF ▸ Department

BUSINESS EXPENDITURE—LEGAL EXPENSES—PART OF LEGAL EXPENSES DISALLOWED ON GROUND THAT IT WAS INCURRED TO DEFEND ITS DIRECTORS AND SHAREHOLDERS IN INDIVIDUAL CAPACITIES IN RESPECT OF COMPLAINTS FILED BY ANOTHER GROUP OF SHAREHOLDERS—CONCURRENT FINDINGS OF FACT BASED ON MATERIAL ON RECORD—NO EVIDENCE PRODUCED BY ASSESSEE TO CONTROVERT FINDINGS—DISALLOWANCE OF PART OF LEGAL EXPENSES AS NOT INCURRED FOR PURPOSE OF BUSINESS—PROPER—INCOME-TAX ACT, 1961, S. 37.

During the scrutiny assessment under section 143(3) of the Income-tax Act, 1961, the Assessing Officer found that the legal expenses claimed under section 37 by the assessee were in connection with complaints filed by one group of shareholders against the other group of shareholders and directors.

He disallowed part of the legal expenses claimed on the ground that they were not incurred for the purpose of business of the assessee. The Commissioner (Appeals) upheld the order of the Assessing Officer . The Tribunal found that there was a dispute between two groups of shareholders, primarily for the management and control of the assessee-company, that the entire dispute between the various groups of shareholders was only to acquire the management and control of the assessee and, therefore, the expenses were not incurred for and on behalf of the assessee but for the individual benefit of the directors and shareholders so as to retain control and management of the assessee and that the assessee was in no way involved in the legal proceedings taken against the directors and shareholders in their individual capacities. The Tribunal concurred with the view of the Commissioner (Appeals) and the Assessing Officer and dismissed the appeal filed by the assessee. On further appeals :

Held, *dismissing the appeals, that all the authorities had found on the facts that the legal expenses incurred by the assessee were not for the purpose of carrying out its business and, therefore, were not allowable as expenditure under section 37. The assessee was in no way involved in the legal proceedings taken against the directors and shareholders in their individual capacities. The Assessing Officer as well as the Commissioner (Appeals) had recorded the fact that the details of the nature of the legal expenses were not forthcoming from the assessee. The court while admitting the criminal writ petition had observed that the complaints had been filed so as to settle personal scores between the parties. On the facts the view taken by the authorities including the Tribunal was a plausible view and not perverse. No questions of law arose.*

Income Tax Appeal Nos. 1166, 1172, 1169 and 1170 of 2017.

Vipul B. Joshi along with *Ms. Namrata Kasale* for the appellant.

None appeared for the respondent.

JUDGMENT

1 These four appeals under section 260A of the Income-tax Act, 1961 (Act) challenge the impugned order dated September 28, 2016 passed by the Income-tax Appellate Tribunal (Tribunal). The impugned order dated September 28, 2016 is a common order relating to the assessment years 2005-06, 2007-08, 2008-09 and 2009-10. Thus, the four appeals.

2 The appellant-assessee has urged the following identical questions of law in all the four appeals :

"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in disallowing the claim of legal expenses ?

(ii) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal disallowing legal expenses is justified when the Tribunal has proceeded on erroneous factual basis that it was not shown that the directors/shareholders were subjected to legal proceedings in connection with the activities carried out by them during the normal course of carrying on business of the appellant-company ?

(iii) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse inasmuch as it is based on extraneous, impermissible and irrelevant considerations, while ignoring the relevant material and considerations ?

(iv) Without prejudice to the above and in any event, whether on the facts and in the circumstances of the case and in law, the Tribunal ought to have allowed appropriate proportion out of the legal expenses claimed, instead of disallowing the entire expenses ?"

Although multiple questions have been raised, the basic issue is the disallowance of legal expenses claimed to be incurred by the appellant-company in all the four assessment years under section 37(1) of the Act. As the facts (save the amount of legal expenses claimed in each of the assessment years) and the law applicable are identical in all the four appeals, at the request of the parties the facts in Income Tax Appeal No. 1166 of 2017 relating to the assessment year 2005-06 are being referred to as representative of facts in all the four appeals. It is agreed between the parties that the view taken on the above fact will equally apply in the other three appeals.

The appellant-assessee is engaged in the business of melting, assaying, **3**
refining and fabrication of precious metals. For the assessment year 2005-06 the appellant filed on October 30, 2005 its return of income declaring an income of Rs. 12.36 lakhs. During scrutiny, the Assessing Officer noticed that legal expenses to the extent of Rs. 11.72 lakhs out of Rs. 16.50 lakhs had been claimed in connection with the complaints filed by one group of shareholders against the other group of shareholders/directors. The Assessing Officer found on facts that the above expenses were incurred not by the company for the purpose of carrying out its business but for the purpose of defending its directors/shareholders in respect of the complaints filed against them by another group of shareholders. Thus, holding in its order dated December 31, 2017 passed under section 143(3) of the Act that

the legal expenses of Rs. 11.72 lakhs cannot be allowed under section 37 of the Act and added the same to determine the taxable income.

4 Being aggrieved with the order dated December 31, 2017, the respondent filed an appeal to the Commissioner of Income-tax (Appeals) (CIT(A)) amongst other issues, one was the issue of disallowance of legal expenses of Rs. 11.72 lakhs. By an order dated December 10, 2009, the Commissioner of Income-tax (Appeals) dismissed the respondent's appeal on the issue of legal expenses. This on a finding of fact that there was a dispute inter se between its shareholders over the management and control of the appellant-company. Thus, the litigation expenses incurred by the appellant to the extent of Rs. 11.72 lakhs was not for carrying out its business but expenses incurred for one group, i.e., directors/shareholders in their individual capacity and these expenses had nothing to do with the running of the appellant-company. Further, it also upheld the observation of the Assessing Officer that the appellant had not furnished details of the legal expenses and nature of services rendered by the professionals. In the above circumstances, the order dated December 31, 2017 of the Assessing Officer to the extent of disallowing of Rs. 11.72 lakhs as legal expenses under section 37 of the Act was upheld.

5 Being aggrieved by the order dated December 10, 2009, the appellant filed a further appeal to the Tribunal. By the impugned order dated September 28, 2016, the Tribunal on facts found that there was a dispute between two groups of shareholders, primarily for the management and control of the appellant-company. It found that the appellant has not shown that the concerned directors/shareholders for whom the legal expenses were incurred, were subjected to legal proceedings only in view of their conduct in carrying out the appellant's business. Further, it holds that there is nothing on record to indicate that the directors/shareholders on whom legal expenses were incurred by the appellant were subjected to legal proceedings in connection with their activity of carrying out the business of the appellant-company. Thus, upheld the view of the lower authority that these expenses were not to be allowed as an expenditure under section 37 of the Act for carrying out the business of the appellant-company.

6 Being aggrieved by the impugned order dated September 28, 2016 which is a common order for all the four subject assessment years, the appellant has filed three appeals.

7 Mr. Joshi, learned counsel appearing in support of the appeals submits that these legal expenses have been incurred by the appellant-company in protecting the shareholders/directors as well as the company in criminal

proceedings as well as the proceedings before the Company Law Board. It is submitted that these expenses were incurred to ensure the good name of the company and for the purpose of carrying out its business. This it is submitted is evident from the fact that proceedings were also commenced against its auditors and company secretary. Thus, the appeals require admission.

We find that all the authorities under the Act have come to a finding of **8**
fact that the legal expenses incurred by the appellant-company was not for the purpose of carrying out its business and, therefore, was not allowable as expenditure under section 37 of the Act. It held that these legal expenses were incurred so as to protect the directors/shareholders of the company in respect of the complaints filed against them in their individual capacity and not in respect of their conduct in the course of carrying on the business of the appellant-company. In fact, the complaint filed before the Chief Metropolitan Magistrate Court has been made against the directors/shareholders in their individual capacities. The entire dispute between the various groups of shareholders was only to acquire the management and control of the appellant-company and, therefore, these expenses are not expenses incurred for and on behalf of the company but expenses incurred for the directors/shareholders for their individual benefit so as to retain control and management of the appellant-company. The Tribunal has observed the fact that legal proceedings were also commenced against its auditors/ company secretary were only on off-shoot of the inter se dispute between the different shareholders of the appellant-company. In fact, this court while admitting a criminal writ petition bearing No. 2052 of 2004 on April 27, 2005, did inter alia observe that the complaints have been filed so as to settle personal scores between the parties. It thus noticed that the appellant-company was in no way involved in the legal proceedings taken against the directors/shareholders in their individual capacities. Moreover, it is pertinent to note that the Assessing Officer as well as the Commissioner of Income-tax (Appeals) recorded the fact that the details of the nature of the legal expenses was not forthcoming from the appellant. In the aforesaid facts, the view taken by the authorities under the Act including the Tribunal, is a plausible view on facts and cannot be said to be perverse. In these circumstances, the questions as proposed in all the four appeals do not give rise to any substantial question of law. Thus, not entertained.

Therefore, the four appeals are dismissed. No order as to costs. **9**

[2020] 424 ITR 272 (Mad)

[IN THE MADRAS HIGH COURT]

COMMISSIONER OF INCOME-TAX (LTU)

v.

CHOLAMANDALAM MS GENERAL INSURANCE CO. LTD.

T. S. SIVAGNANAM and **N. SATHISH KUMAR** JJ.

January 28, 2019.

SS ▸ ITA 1961, ss 32, 115JB
AY ▸ 2006-07 to 2009-10
HF ▸ Assessee

DEPRECIATION—RATE OF DEPRECIATION—UNINTERRUPTED POWER SUPPLY SYSTEM IS PART OF COMPUTER AND ENTITLED TO DEPRECIATION AT 60 PER CENT.—INCOME-TAX ACT, 1961, S. 32.

COMPANY—MINIMUM ALTERNATE TAX—INSURANCE BUSINESS—ACCOUNTS PREPARED IN ACCORDANCE WITH INSURANCE ACT, 1938 AND REGULATIONS OF IRDA—SECTION 115JB NOT APPLICABLE—INCOME-TAX ACT, 1961, S. 115JB.

On appeals whether the Tribunal was justified and correct in holding that, (i) the UPS was the part of computer and entitled for depreciation at the rate of 60 per cent., and (b) the provisions of section 115JB of the Income-tax Act, 1961 which enables the companies to compute the book profit may not be applicable to insurance companies :

Held, *dismissing the appeals, (i) that the Tribunal was justified and correct in holding that the UPS was the part of computer and entitled to depreciation at the rate of 60 per cent. The Tribunal had considered the submissions of the assessee and had found that the applicability of the provisions of Schedule VI of the Companies Act was excluded in respect of the insurance companies.*

CIT, LTU *v.* ROYAL SUNDARAM ALLIANCE INSURANCE CO. LTD. [2020] 423 ITR 122 (Mad) *followed*.

(ii) That the provisions of section 115JB of the Income-tax Act, 1961 which enables the companies to compute the book profit may not be applicable to insurance companies.

ORIENTAL INSURANCE CO. LTD. *v.* DEPUTY CIT [2018] 407 ITR 658 (Delhi) *followed*.

Order of the Appellate Tribunal in DEPUTY CIT *v.* CHOLAMANDALAM MS GENERAL INSURANCE CO. LTD. [2012] 12 ITR (Trib)-OL 540 (Chennai) *affirmed.*

[*The Supreme Court has granted special leave to the Department to appeal against this judgment* : see [2019] 418 ITR (St.) 9]

Cases referred to :

CIT (Deputy) *v.* Cholamandalam MS General Insurance Co. Ltd. [2012] 12 ITR (Trib)-OL 540 (Chennai) (para 1)

CIT, LTU *v.* Royal Sundaram Alliance Insurance Co. Ltd. [2020] 423 ITR 122 (Mad) (para 4) referred to.

Oriental Insurance Co. Ltd. *v.* Deputy CIT [2018] 407 ITR 658 (Delhi) (para 10)

Tax Case Appeal Nos. 93 to 100 of 2019 and C. M. P. Nos. 1921, 1922, 1924, 1927 to 1929, 1936 and 1941 of 2019.

M. Swaminathan, Senior Standing Counsel assistant by *Ms. V. Pushpa*, Junior Standing Counsel, for the appellant.

Sandeep Bagmar for the respondent.

JUDGMENT

The judgment of the court was delivered by

T. S. Sivagnanam J.—These appeals by the Revenue under section 260A of the Income-tax Act, 1961 (for short, the Act) challenge a common order passed by the Income-tax Appellate Tribunal, Chennai "A" Bench (hereinafter called the Tribunal) dated July 31, 2018 in ITA. Nos. 1620, 1676, 1350, 1621, 2276, 2372 and 1759/Chny/2011 as well as 1366/Chny/2013 (*Deputy CIT* v. *Cholamandalam MS General Insurance Co. Ltd.* [2012] 12 ITR (Trib)-OL 540 (Chennai)). 1

The issues relate to the assessment years from 2006-07 to 2009-10. In all these appeals, the following common substantial questions of law are raised for consideration : 2

> "(i) Whether the Tribunal was justified and correct in holding that UPS is a part of the computer and entitled for depreciation at 60 per cent. ? and
>
> (ii) Whether the Tribunal was justified and correct in holding that the provisions of section 115JB of the Act, which enables the companies to compute book profit may not be applicable to insurance companies ?"

We have heard Mr. M. Swaminathan, learned senior standing counsel, assisted by Ms. V. Pushpa, learned junior standing counsel for the appellant and Mr. Sandeep Bagmar, learned counsel accepting notice for the respondent. 3

4 The first substantial question of law was decided by us in T. C. (A) No. 41 of 2019, etc., cases by a common judgment dated January 18, 2019 (*CIT, LTU* v. *Royal Sundaram Alliance Insurance Co. Ltd.* [2020] 423 ITR 122 (Mad)), the relevant portion of which, reads as follows (page 126) :

> "This issue has been decided by us against the Revenue in T. C. (A). No. 23 of 2019 dated January 18, 2019. Following the same, the appeals filed by the Revenue on this ground are dismissed and the above substantial question of law is answered in favour of the assessee."

5 Following the said decision, the first substantial question of law is answered in favour of the assessee and against the Revenue to the extent indicated above.

6 So far as the second substantial question of law is concerned, in the very same decision, we decided the question against the Revenue and in favour of the assessee therein, the relevant portion of which reads as follows (page 126 of 423 ITR) :

> "We have perused the order passed by the Commissioner of Income-tax (Appeals) (CIT(A)) as well as the Tribunal. As rightly pointed out by the Tribunal, the insurance companies prepare profit and loss account as per the guidelines issued by the Insurance Regulatory and Development Authority of India and not as per Part II and III of Schedule VI of the Companies Act. Furthermore, the applicability of Schedule VI of the Companies Act was specifically excluded in respect of insurance companies. The Revenue has not been able to dislodge before us by way of an appeal. We find that the conclusion arrived at by the Tribunal in this regard is proper and valid. Accordingly, the appeals filed by the Revenue on this ground are dismissed and consequently, the above substantial question of law is answered in favour of the assessee."

7 Mr. M. Swaminathan, learned senior standing counsel for the appellant has drawn our attention to the assessment order for the year 2007-08 dated December 16, 2010 and by referring to the factual statement made therein, it is submitted that the assessee themselves declared their income under section 115JB of the Act and that therefore, it will not lie in the mouth of the assessee now to contend that the said provision is inapplicable.

8 At the first blush, the argument of the learned senior standing counsel appears to be impressive. However, on a cursory reading of the assessment order as well as the order passed by both the Commissioner of Income-tax (Appeals) as well as the Tribunal, it is evidently clear that the assessee, at no point of time, accepted the applicability of section 115JB of the Act. In fact, their contention was that the said section is not applicable to insurance companies. This is evident from paragraph B(1) of the assessment order

dated December 16, 2010 wherein such a contention was dealt with by the Assessing Officer. In any event, there can be no estoppel against a statute.

We have also perused the order passed by the Commissioner of Income- **9**
tax (Appeals) dated July 28, 2011 relevant to the assessment year 2007-08 wherein also identical contention was raised by the assessee and both before the Assessing Officer as well as before the Commissioner of Income-tax (Appeals), the assessee was not successful. But, before the Tribunal, the assessee was successful in the sense that the Tribunal considered the submissions and noted that the applicability of the provisions of Schedule VI to the Companies Act was excluded in respect of the insurance companies.

In the decision in the case of *Oriental Insurance Co. Ltd.* v. *Deputy CIT* **10**
reported in [2018] 407 ITR 658 (Delhi), an identical question was considered by the High Court of Delhi wherein it was held as follows (page 674 of 407 ITR) :

> "Turning now to I. T. A. No. 447 of 2015, the question concerns the applicability of section 115JB of the Act to insurance companies. The Income-tax Appellate Tribunal has permitted the assessee to raise this question since, in a large number of judgments of the Income-tax Appellate Tribunal, the question has been answered in favour of the assessee.
>
> It is plain, from a reading of section 44 read with the First Schedule of the Act that insurance companies are required to prepare accounts as per the Insurance Act and the regulations of the IRDA and not as per Parts II and III of Schedule VI to the Companies Act. The assessee prepares its accounts as per the IRDA principles. The IRDA regulations govern the preparation of the auditor's report.
>
> Consequently, the question framed in I. T. A. No. 447 of 2015 is answered in the affirmative, i.e., in favour of the assessee and against the Revenue by holding that section 115JB of the Act does not apply to insurance companies."

In the light of the above discussions, we are of the firm view that the deci- **11**
sion taken by us in T. C. A. No. 41 of 2019 etc. cases dated January 18, 2019 does not call for any change and our view is also supported by the decision of the Delhi High Court in the case of *Oriental Insurance Co. Ltd.* [2018] 407 ITR 658 (Delhi). For the above reasons, the second substantial question of law is also decided against the Revenue and in favour of the assessee.

Accordingly, the above tax case appeals fail and are dismissed. No costs. **12**
Consequently, the connected C. M. Ps. are also dismissed.

[2020] 424 ITR 276 (All)

[IN THE ALLAHABAD HIGH COURT]

COMMISSIONER OF INCOME-TAX

v.

CHHATA SUGAR COMPANY LTD.

MS. BHARATI SAPRU and **DINESH KUMAR SINGH** JJ.

July 16, 2018.

SS ▸ ITA 1961, s 145A
AY ▸ 1997-98
HF ▸ Department

METHOD OF ACCOUNTING—VALUATION OF STOCK—EXCISE DUTY PAYABLE MUST BE INCLUDED—INCOME-TAX ACT, 1961, S. 145A.

The object of stock valuation is the correct determination of the profit and loss resulting from a year's trading. The true value of closing stock would include the amount of any tax duty, cess or having fully paid, payable or incurred by the assessee to bring the goods to the place of their location and condition as on the date of valuation which is evident from the provisions of section 145A of the Income-tax Act, 1961. The provisions of section 145A of the Act were introduced by the Finance (No. 2) Act of 1988 with effect from April 1, 1999 are in fact clarificatory in nature and, therefore, they would be applicable even for assessment years prior to assessment year 1999-2000. Excise duty becomes payable the moment excisable goods are manufactured as the taxable event under section 3 of the Cental Excise Act, 1944 is manufacturing or production of the excisable goods. It would be immaterial whether the assessee has paid the excise duty or not for the purposes of arriving at the correct valuation of the closing stock. Even if the excise duty has not been paid and the assessee has postponed its payment, the valuation of the goods will not get affected. The accounting system of the assessee would be of no consequence to arrive at the true and correct valuation of the closing stock.

Cases referred to :

Chainrup Sampatram *v.* CIT [1953] 24 ITR 481 (SC) (para 10)

CCE *v.* Fiat India Pvt. Ltd. [2012] 16 GSTR 569 (SC) (para 9)

CIT *v.* British Paints India Ltd. [1991] 188 ITR 44 (SC) (para 10)

CIT *v.* English Electric Co. of India Ltd. [2000] 243 ITR 512 (Mad) (para 6)

Krishi Discs (P.) Ltd. *v.* CIT [2013] 32 taxmann.com 136 (All) (para 11)

Minister of National Revenue *v.* Anaconda American Brass Ltd. [1956] 30 ITR 84 (PC) (para 10)

Mohammed Meerakhan (P. M.) *v.* CIT [1969] 73 ITR 735 (SC) (para 10)

Patrick (Inspector of Taxes) *v.* Broadstone Mills Ltd. [1954] 25 ITR 377 (CA) (para 10)

Russell *v.* Town and County Bank [1888] 13 AC 418 ; 4 TLR 500 (para 10)

Whimster and Co. *v.* IRC [1925] 12 Tax Cases 813 (para 10)

Income Tax Appeal No. 140 of 2007.

C. S. C., *Krishna Agarwal* for the appellant.

R. B. Khare and *Rajendra Kumar Srivastava* for the respondent.

JUDGMENT

The present income-tax appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act") has been filed by the Revenue against the order dated October 31, 2006 passed by the Income-tax Appellate Tribunal, Agra in I. T. A. No. 388/Agr. 2003 on an appeal filed by the Revenue against the order of the Commissioner of Income-tax (Appeals)-I, Agra, dated June 16, 2003 in respect of the assessment year 1997-98. 1

The following two questions of law have been framed by the Revenue for answering by this court : 2

> "(i) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is legally correct in holding that in the assessee's case excise duty payable at Rs. 2,59,82,452 could not be added in the value of closing stock ?
>
> (ii) Whether the Tribunal is legally correct in not appreciating that the excise duty incurred means excise duty payable and it becomes payable on completion of manufacture although the goods may be in the bonded warehouse and is, therefore, liable to be included in the value of closing stock ?"

The respondent, M/s. Chhata Sugar Company is a limited company engaged in the manufacture and sale of sugar. The respondent filed return of income for the assessment year 1997-98 on November 28, 1997 showing loss of Rs. 30,18,43,756. The return was processed under section 143(1) of the Act on March 13, 1999. During the assessment proceedings, the respondent filed a revised return of declaring loss of Rs. 7,17,01,310. The assessment was finally completed under section 143(3) of the Act vide order dated February 24, 2000 at a total loss of Rs. 7,15,13,989. 3

4 The Assessing Officer after examining the return inter alia noticed that while valuing the closing stock of sugar and molasses, the respondent had not included the Central excise duty, cess duty, etc., and, therefore, the value of the closing stock was shown at lower figure in the trading account. The Assessing Officer, therefore, issued a notice under section 154 of the Act on March 8, 2002 to the respondent. The respondent filed his response to the show-cause notice on March 15, 2002. After considering the reply of the respondent, the facts of the case and legal position, the proceedings under section 154 of the Act were filed by the Assessing Officer. Thereafter, the Assessing Officer for initiation of the proceedings under section 147 of the Act issued notice to the assessee under section 148 of the Act on March 19, 2002. The Assessing Officer finalised the assessment under section 148/143(3) of the Act at a loss of Rs. 4,35,67,823 making inter alia addition of Rs. 2,59,82,452 being the amount of excise duty not included in the value of closing stock of the finished goods.

5 Aggrieved by the said assessment order, the assessee filed an appeal contesting the addition of Rs. 2,59,82,452 only before the Commissioner of Income-tax (Appeals)-I, Agra and had also challenged the reopening of assessment order under section 147 of the Act and notice under section 148 of the Act. The Commissioner of Income-tax (Appeals)-I, Agra vide order dated June 16, 2003 held that the excise duty was a part of cost of finished goods and was, therefore, includible in the value of closing stock. The Commissioner of Income-tax (Appeals)-I, Agra further held that section 145A of the Act which was inserted, with effect from April 1, 1999 was of clarifactory in nature and it would be applicable for the earlier assessment years as well. However, in further discussion the Commissioner of Income-tax (Appeals)-I, Agra directed the Assessing Officer to determine whether the excise duty had been paid/incurred or not and recompute the value of closing stock accordingly.

6 The Revenue preferred an appeal against the aforesaid order of the Commissioner of Income-tax (Appeals)-I, Agra on the ground that the Commissioner of Income-tax (Appeals)-I, Agra had erred in directing the Assessing Officer to recompute whole income by allowing the incurred excise duty under section 43B of the Act in the finished goods which were added by the Assessing Officer in the valuation of the stock, ignoring the fact that the assessee had not credited any liability for the same and the Assessing Officer had not made any addition out of "outgoings" but it was a result of assessing at the correct valuation of the closing stock of the finished goods. However, the Tribunal vide impugned order dated October 31, 2006 in a cursory manner held that the excise duty was payable on

goods lying in the bonded warehouse and, therefore, the assessee did not incur any cost on account of excise duty payable which can be added towards closing stock. The Tribunal also held that the assessee's case was squarely covered by the decision of the Madras High Court in the case of *CIT* v. *English Electric Co. of India Ltd.* [2000] 243 ITR 512 (Mad).

Heard Sri Krishna Agarwal, learned counsel for the Revenue but no one has appeared on behalf of the respondent-assessee despite case having been called twice. 7

This appeal is of the year 2007. Therefore, we have decided to answer the questions and decide the appeal. 8

Learned counsel for the assessee, Sri Krishna Agarwal submits that the assessee was following the mercantile system of accounting. The excise duty becomes payable as soon as excisable goods are manufactured or produced. The excise duty is payable on these goods whether or not the goods are sold. The sale or ownership of the goods is not a relevant factor for the liability of payment of excise duty. The taxable event is manufacture of excisable goods which is very clear from the provisions of section 3 of the Central Excise Act, 1944. In support of the aforesaid submission, learned counsel has placed reliance on the judgment of the Supreme Court in the case of *CCE* v. *Fiat India Pvt. Ltd.* [2012] 16 GSTR 569 (SC) ; [2012] 283 ELT 161 (SC). Para 23 of the aforesaid judgment is extracted hereinbelow (page 586 of 16 GSTR) : 9

> "Section 3 of the Act is the charging provision. The taxable event for attracting excise duty is the manufacture of excisable goods. The charge of incidence of duty stands attracted as soon as taxable event takes place and the facility of postponement of collection of duty under the Act or Rules framed thereunder can in no way effect the incidence of duty. Further, the sale or ownership of the end-products is also not relevant for the purposes of taxable event under the Central excise. Since excise is a duty on manufacture, duty is payable whether or not goods are sold. Duty is payable even when goods are used within the factory or goods are captively consumed within the factory for further manufacture. Excise duty is payable even in case of free supply or given as replacement. Therefore, sale is not a necessary condition for charging excise duty."

Learned counsel for the Revenue further submits that the Assessing Officer is duty bound under the provisions of the Act while exercising his statutory powers to arrive at the correct taxable income. Under section 145 of the Act, the Assessing Officer needs to make computation in such manner as to deduce the correct profits and gains of an assessee for the 10

assessment year. Learned counsel has placed reliance on the judgment of the Supreme Court in support of the aforesaid submission in the case of *CIT* v. *British Paints India Ltd.* [1991] 188 ITR 44 (SC) ; [1991] 54 Taxman 499 (SC). Paras 16 to 21 of the aforesaid judgment are extracted hereinbelow (page 55 of 188 ITR) :

"The Income-tax Act does not contain any specific provision for the valuation of stock. Income, profits and gains must, however, be computed in the manner provided by the Act. It is the duty of the officer to determine the profits and gains of a commercial adventure according to the correct principle of accounting. In doing so, he might, dependent on the nature of the business and its special character, allow certain adjustments, but his primary purpose and duty is to deduce the correct income, profits and gains, and this he cannot do without taking into account the value of the stock-in-trade at the beginning and at the end of the year and by ascertaining the difference between them : See *P. M. Mohammed Meerakhan* v. *CIT* [1969] 73 ITR 735 (SC) ; [1969] 2 SCC 25.

The object of stock valuation is the correct determination of the profit and loss resulting from a year's trading. It is the true result of the trading activity of that year that must be disclosed by the books :

'. . . the profits are the profits realised in the course of the year. What seems an exception is recognised where a trader purchased and still holds goods or stocks which have fallen in value. No loss has been realised. Loss may not occur. Nevertheless, at the close of the year he is permitted to treat these goods or stocks as of their market value.' (*Whimster and Co.* v. *IRC* [1925] 12 TC 813, 827).

As stated by Patanjali Sastri, C. J., in *Chainrup Sampatram* v. *CIT* [1953] 24 ITR 481 (SC) ; [1954] SCR 219 ; AIR 1953 SC 509 (page 485 of 24 ITR) :

'. . . It is wrong to assume that the valuation of the closing stock at market rate has, for its object, the bringing into charge any appreciation in the value of such stock. The true purpose of crediting the value of unsold stock is to balance the cost of those goods entered on the other side of the account at the time of their purchase, so that the cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions on which there have been actual sales in the course of the year showing the profit or loss actually realised on the year's trading . . .'

In the words of Singleton L.J. in *Patrick (Inspector of Taxes)* v. *Broadstone Mills Ltd.* [1954] 25 ITR 377 (CA) (page 395) :

'(1) One cannot arrive at the profits of the year without taking into account the value of the stock one has at the beginning of, and at the end of, the accounting year. (2) The figures for stock are just as important as any other figures. Values may have to be estimated when market price is taken, but any departure from accuracy is reflected in the trading account. (3) Stock should be taken either at cost price or at market price, whichever is the lower . . .'

Lord Herschell in *Russell* v. *Town and County Bank* [1888] 13 AC 418, 424 ; 4 TLR 500 (HL) observes (AC page 424) :

'The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts . . .'

What is the profit of a trade or business is a question of fact and it must be ascertained, as all facts must be ascertained, with reference to the relevant evidence, and not on doctrines or theories : 'no assumption need be made unless the facts cannot be ascertained, and then only to the extent to which they cannot be ascertained. There is no room for theories as to flow of costs . . .' (*Minister of National Revenue* v. *Anaconda American Brass Ltd.* [1956] 30 ITR 84 (PC) ; [1956] AC 85).

Section 145 of the Income-tax Act, 1961 confers sufficient power upon the officer — nay it imposes a duty upon him — to make such computation in such manner as he determines for deducing the correct profits and gains. This means that where accounts are prepared without disclosing the real cost of the stock-in-trade, albeit on sound expert advice in the interest of efficient administration of the company, it is the duty of the Income-tax Officer to determine the taxable income by making such computation as he thinks fit.

Any system of accounting which excludes, for the valuation of the stock-in-trade, all costs other than the cost of raw material for the goods in process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a

self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee has been found to be such that income cannot properly be deduced therefrom. It is, therefore, not only the right but the duty of the Assessing Officer to act in exercise of his statutory power, as he has done in the instant case, for determining what, in his opinion, is the correct taxable income."

11 He further submits that the issue in the present case is covered by the judgment of this court in the case of *Krishi Discs (P.) Ltd.* v. *CIT* [2013] 32 taxmann.com 136 (All). In the aforesaid judgment, it has been held that the excise duty has to be included in the value of the closing stock of the relevant assessment year.

12 We have considered the submissions of learned counsel for the Revenue.

13 The assessee was adopting the mercantile system of accounting. The true value of closing stock would include the amount of any tax, duty, cess or having fully paid, payable or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation which is evident from the provisions of section 145A of the Act. It is also to be noted that the provisions of section 145A of the Act were introduced by the Finance (No. 2) Act of 1988, with effect from April 1, 1999 which are in fact clarifactory in nature and, therefore, it would be applicable even for the assessment years prior to the assessment year 1999-2000. Thus, the provisions of section 145A would be applicable for the assessment year in question.

14 Excise duty becomes payable, the moment excisable goods are manufactured as the taxable event under section 3 of the Cental Excise Act is manufacturing or production of the excisable goods. It would be immaterial whether the assessee has paid the excise duty or not for the purposes of arriving at the correct valuation of the closing stock. Even if the excise duty has not been paid and the assessee has postponed its payment, the valuation of the goods will not get affected. Accounting system of the assessee would be of no consequence to arrive at the true and correct valuation of the closing stock.

15 We, therefore, answer the questions in the affirmative, i.e., in the favour of the Revenue and set aside the order passed by the Income-tax Appellate Tribunal.

16 The appeal is, thus, allowed.

[2020] 424 ITR 283 (Ker)

[IN THE KERALA HIGH COURT]

ANDOORKONAM SERVICE CO-OPERATIVE BANK LTD.

v.

INCOME-TAX OFFICER AND OTHERS

C. K. ABDUL REHIM and **T. V. ANILKUMAR** JJ.

January 20, 2020.

SS ▸ ITA 1961, ss 80P(4), 226(3)(iii)
HF ▸ Assessee/Directions

RECOVERY OF TAX—MODE OF RECOVERY—GARNISHEE PROCEEDINGS—GUIDELINES—RECOVERY EFFECTED ON SAME DAY WHEN NOTICE ISSUED TO GARNISHEE AND WITHIN TWO DAYS OF AMOUNT BECOMING DUE—MERELY FORWARDING NOTICE TO ASSESSEE AFTER EFFECTING RECOVERY NOT SUFFICIENT—ASSESSING OFFICER NOT CONDUCTING ENQUIRY INTO WHETHER ASSESSEE ENTITLED ON FACTS TO BENEFIT UNDER SECTION 80P(4)—ORDER OF SINGLE JUDGE MODIFIED—INCOME-TAX ACT, 1961, ss. 80P(4), 226(3)(iii).

The assessee was a co-operative bank. A notice of attachment and recovery under section 226(3) of the Income-tax Act, 1961 for realisation of amounts due from the assessee, was issued to the assessee's bank. In a writ petition, the assessee sought refund of the amount paid by the bank to the Department contending that the tax recovery steps were initiated without taking into consideration the pendency of the appeal and the stay petition and without issuance of notice to the assessee. The single judge disposed of it directing the appellate authority to consider and pass orders on appeal within three months. On appeal :

Held, *(i) that on the facts, the attachment and recovery was effected in haste, without taking into consideration the parameters enshrined in decisions of the court. Further, the issue pertaining to liability of the assessee for payment of tax was settled through the decision of a Full Bench of this court in* Pr. CIT *v.* Poonjar Service Co-op. Bank Ltd. [2019] 414 ITR 67 (Ker) [FB] *wherein it was held that in terms of sub-section (4) of section 80P, the Assessing Officer had to conduct an enquiry into the factual situation with respect to the activities of the society, in order to satisfy himself as to the conclusions arrived at and also as to whether or not the benefits under section 80P could be extended. According to the assessee such verification had not been done, but the Department pointed out that, even in the original assessment, those*

aspects were considered by the appellate authority. Since such aspects were not considered by the single judge the judgment required modification.

PR. CIT *v.* POONJAR SERVICE CO-OP. BANK LTD. [2019] 414 ITR 67 (Ker) [FB] *followed*.

MOTHER INDIA EDUCATIONAL AND CULTURAL CHARITABLE TRUST *v.* DEPUTY CIT [2014] KHC 353, PURNIMA DAS *v.* UNION OF INDIA [2010] 329 ITR 278 (Cal), N. RAJAN NAIR *v.* ITO [1987] 165 ITR 650 (Ker) *and* SUNTEC BUSINESS SOLUTIONS (P.) LTD. *v.* UNION OF INDIA [2015] 4 ITR-OL 452 (Ker) *relied on*.

(ii) That the recovery from the bank had been done in a manner depriving the interest of the assessee and without following the guidelines which ought to have been followed in the matter of garnishee attachment and recovery. The recovery was effected on the same day when the notice was issued to the garnishee, that too within 2 days of the amount having become due. Mere forwarding of a copy of the notice, after effecting recovery, would not in any way serve the object underlying the legislative intent in introducing clause (iii) of section 226(3), especially because the Department ought to have considered the pendency of the appeal. However, since the amount had already been collected against the existing demand, release of the amount was not directed, unless the assessee furnished bank guarantee for the entire amount.

Cases referred to :

CIT (Pr.) *v.* Poonjar Service Co-op. Bank Ltd. [2019] 414 ITR 67 (Ker) [FB] (para 8)

Mother India Educational and Cultural Charitable Trust *v.* Deputy CIT [2014] KHC 353 (para 7)

Purnima Das *v.* Union of India [2010] 329 ITR 278 (Cal) (para 4)

Rajan Nair (N.) *v.* ITO [1987] 165 ITR 650 (Ker) (para 7)

Suntec Business Solutions (P.) Ltd. *v.* Union of India [2015] 4 ITR-OL 452 (Ker) (para 4)

Writ Appeal No. 2488 of 2019.

T. R. Harikumar and *Adithya Rajeev* for the appellant.

Christopher Abraham, Income-tax Department, for the respondents.

JUDGMENT

1 The writ petitioner-Andoorkonam Service Co-operative Bank Ltd. is the appellant herein, challenging the judgment of the single judge, dated December 3, 2019. The respondents are the respondents in the writ petition.

Exhibit P7 notice of attachment and recovery for realisation of amounts due from the appellant-bank, issued to the fourth respondent-bank as garnishee, was under challenge in the writ petition. Inter alia, the petitioner-bank sought direction for refund of the amount paid by the fourth respondent to the Income-tax Department pursuant to exhibit P7. The contention of the petitioner was mainly that, the assessment made with respect to the amount sought to be recovered through exhibit P7 was under challenge in an appeal and that the recovery steps from the garnishee was initiated without taking into consideration of pendency of the appeal and the stay petition. Further contention raised is that, the "garnishee proceedings" was initiated and the amount was recovered without issuing any notice to the appellant, as required under section 226(3) of the Income-tax Act. It is contended that, the learned single judge, without adverting to the claim for refund, had disposed of the writ petition by directing the third respondent to consider and to pass orders on exhibit P4 appeal, within three months. It is aggrieved by the said judgment, the above writ appeal is filed. **2**

Learned counsel for the appellant contended that the recovery of the amount was effected on the same day on which exhibit P7 notice was issued to the fourth respondent-bank. It is after effecting such recovery that a copy of the notice was served on the appellant. It is pleaded that the notice to the assessee is a mandate under due process of law, under section 226(3) of the Income-tax Act. Therefore the attachment and recovery of the amount is effected without compliance of such mandate. **3**

Learned counsel had drawn our attention to a judgment of a learned single judge of this court in *Suntec Business Solutions (P.) Ltd.* v. *Union of India* [2015] 4 ITR-OL 452 (Ker) ; [2014] KHC 374. It was observed therein that, the power conferred under section 226(3) has to be exercised with greatest caution and the provision has to be construed strictly. The power to attach and recover amounts from a third party has to be invoked sparingly, only in the event of the assessee having deliberately evaded recovery and indulging in activities which would eventually defeat the recovery. Even if the attachment is effected in the bank account, the Recovery Officer ought to have called for details of the amounts lying in credit of the assessee and if sufficient amounts are available in the account, attachment could have been continued, without recovery, especially when the assessee had informed that the assessment is being challenged in appeal. The recovery proceedings effected by way of garnishee proceedings under section 226 has to be notified to the assessee also, as provided under section 226(3)(iii). It was found that mandate of the provision insists that a copy of the notice **4**

issued to the garnishee should be forwarded to the assessee, by relying on a decision of the Calcutta High Court in *Purnima Das* v. *Union of India* [2010] 329 ITR 278 (Cal), wherein it was found that it was not proper on the part of the Assessing Officer to attach and debit a sum, without serving a copy of the notice of attachment on the assessee as mandated in the provision.

5 In the case at hand, respondents Nos. 1 to 3 had filed statements categorically mentioning that the demand became due on November 23, 2019. Exhibit P7 notice was issued to the fourth respondent on November 25, 2019 and an amount of Rs. 23,67,037 was collected from the fourth respondent-bank on that day itself. It is specifically stated that a copy of the notice under section 226(3) was forwarded to the appellant on November 26, 2019 itself, as required under section 226(3)(iii). Subsequently another letter was issued to the assessee on November 29, 2019 informing him about the collection made and about adjustment of the amount recovered against the demand raised.

6 Even though the provisions under section 226(3) insist only for forwarding a copy of the notice to the assessee, the circumstances of each case has to be considered. Here is a case where the recovery was effected on the same day when the notice was issued to the garnishee, that too within 2 days of the amount becoming due. Mere forwarding of a copy of the notice, after effecting recovery, will not in any way serve the object underlying the legislative intent in introducing clause (iii) of section 226(3). This is especially because respondent Nos. 1 to 3 ought to have considered the pendency of the appeal.

7 In the decision of this court in *N. Rajan Nair* v. *ITO* [1987] 165 ITR 650 (Ker) ; [1987] (1) KLT 475 it is held that, in exercising the powers of stay, the Income-tax Officer should not act as a mere tax gatherer, but as a quasi-judicial authority vested with the public duty of protecting interests of the Revenue and to mitigate the hardship to the assessee. A Division Bench of the High Court of Bombay, following the above said observations, had laid guidelines to the effect that, no recovery of tax should be made pending expiry of the time limit for filing an appeal. The said dictum was seen followed by a learned judge of this court in the decision in *Mother India Educational and Cultural Charitable Trust, Tvm* v. *Deputy CIT* [2014] KHC 353.

8 Considering the factual scenario involved in the case at hand, we have no hesitation to hold that the attachment and recovery was effected at a great haste, without taking into consideration of the parameters enshrined in all the decisions cited as above. Further, we take note of the fact that the

issue pertaining to liability of the appellant-bank for payment of income-tax, remains now settled through the decision of a Full Bench of this court in *Principal CIT* v. *Poonjar Service Co-op. Bank Ltd.* [2019] 414 ITR 67 (Ker) [FB] ; [2019] (2) KLT 597 [FB]. It is held therein that, by reason of sub-section (4) of section 80P of the Income-tax Act, the Assessing Officer has to conduct an enquiry into the factual situations with respect to the activities of the society, in order to satisfy himself to the conclusions arrived at and also as to whether the benefits under section 80P can be extended or not.

According to the learned counsel for the appellant, such a verification **9**
has not been done in the case. But the learned standing counsel appearing for respondent Nos. 1 to 3 had pointed out that, even in the original assessment itself, those aspects were considered by the appellate authority. However, as observed above, recovery from the fourth respondent garnishee bank has been done in a manner depriving the interest of the assessee and without following the guidelines which ought to have been followed in the matter of garnishee attachment and recovery. However, since the amount has already been collected against the existing demand, we are not inclined to direct release of the amount, unless the appellant-society furnishes bank guarantee for the entire amount. We take note of the fact that the above aspects were not considered by the learned single judge while disposing of the writ petition. Hence the impugned judgment requires modification.

Therefore, the above writ appeal is hereby disposed of by directing **10**
respondent Nos. 1 to 3 to make refund of the amount to the appellant-society, in case the appellant-society furnishes bank guarantee to the tune of the entire amount recovered, to the satisfaction of the first respondent. The bank guarantee is directed to be kept in tact, until disposal of the appeal filed by the appellant before the second respondent. Needless to observe that, realisation of the bank guarantee shall be made only after communicating the appellate order to the appellant-society. The refund shall be effected within a period of 2 weeks from the date of furnishing of the bank guarantee. The direction issued by the learned single judge in the impugned judgment with respect to disposal of the appeal shall survive.

[2020] 424 ITR 288 (Guj)

[IN THE GUJARAT HIGH COURT]

GAYATRI MICRONS LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

MS. HARSHA DEVANI and **MS. SANGEETA K. VISHEN** JJ.

December 24, 2019.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2012-13
HF ▸ Assessee

REASSESSMENT—NOTICE—VALIDITY—AMALGAMATION OF COMPANIES—NOTICE ISSUED AGAINST TRANSFEROR-COMPANY—AMALGAMATING ENTITY CEASES TO HAVE ITS OWN EXISTENCE AND NOT AMENABLE TO REASSESSMENT PROCEEDINGS—NOTICE AND SUBSEQUENT PROCEEDINGS UNSUSTAINABLE—INCOME-TAX ACT, 1961, SS. 147, 148.

The assessee in its return for the assessment year 2015-16 furnished information regarding amalgamation of three companies GMCL, GISL and GFL with it. In the return, under the heading "holding status", further details were provided below the column "business organisation" that is, the status of those three companies which were amalgamated with it. For the assessment year 2015-16, the Income-tax Officer called for certain information, and the assessee submitted the details categorically stating that by virtue of the order passed by the High Court dated June 18, 2015, the amalgamation had taken place amongst the three companies. The Assistant Commissioner issued a notice dated March 25, 2019 under section 148 of the Income-tax Act, 1961 for the assessment year 2012-13 to GISL on the ground that he had reason to believe that income chargeable to tax had escaped assessment within the meaning of section 147 of the Act. GISL requested the Officer to treat the original return filed for the assessment year 2012-13 as filed in response to the notice and requested for reasons recorded. The Assistant Commissioner issued notice dated August 6, 2019 against GISL calling upon it to show cause why the assessment for the year 2012-13 should not be finalised ex parte under the provisions of section 144 on the basis of the material available on record and why penalty proceedings under section 271(1)(b) should not be initiated separately for failure on its part. GISL requested for some time so as to enable it to respond to the show-cause notice. The assessee stated that on August 7, 2019 itself, the Assistant Commissioner had issued a notice under section 274 read with section 271F calling upon GISL to show cause as to

why the order imposing penalty should not be made under the provisions of section 271F since it had failed to furnish the return as required under the provisions of section 139(1). On a writ petition :

Held, *allowing the petition, that the notice issued under section 148 had been issued to GISL which had been amalgamated with the assessee by order dated June 18, 2015 passed by the court and thus, it had ceased to have its own existence so as to render it amenable to reassessment proceedings under the provisions of section 147. The amalgamation had taken place much prior to the issuance of the notice dated March 25, 2019 for reopening the assessment. Thereafter the assessee had informed the Assistant Commissioner about the amalgamation of all the three companies with it with sufficient details, viz., (i) the passing of the order dated June 18, 2015 by the court ; (ii) the communication dated September 9, 2017 addressed by the assessee to the Income-tax Officer, during the assessment proceedings for the assessment year 2015-16 containing the information of amalgamation ; and (iii) the details of amalgamation in the return for the assessment year 2015-16. Moreover, the Assistant Commissioner and the Department were duly informed by the assessee about the amalgamation and despite this, a statutory notice under section 148 had been issued to GISL for reopening the assessment on the ground that income chargeable to tax for the assessment year 2012-13 had escaped assessment within the meaning of section 147. The notice for reopening of the assessment being without jurisdiction was not sustainable. The notice and all the proceedings taken pursuant thereto, were to be quashed and set aside.*

CIT (PR.) *v.* MARUTI SUZUKI INDIA LTD. [2019] 416 ITR 613 (SC), DHARMNATH SHARES AND SERVICES (P.) LTD. *v.* ASST. CIT [2019] 410 ITR 431 (Guj) *and* KHURANA ENGINEERING LTD. *v.* DEPUTY CIT [2014] 364 ITR 600 (Guj) *applied*.

Cases referred to :

CIT (Asst.) *v.* DLF Cyber City Developers Ltd. [2014] 34 ITR (Trib) 696 (Delhi) (para 5)

CIT (Pr.) *v.* Maruti Suzuki India Ltd. [2019] 416 ITR 613 (SC) (para 5)

Dharmnath Shares and Services (P.) Ltd. *v.* Asst. CIT [2019] 410 ITR 431 (Guj) (para 5)

Khurana Engineering Ltd. *v.* Deputy CIT [2014] 364 ITR 600 (Guj) (para 5)

Rustagi Engineering Udyog (P.) Ltd. *v.* Deputy CIT [2016] 382 ITR 443 (Delhi) (para 5)

R/Special Civil Application No. 13871 of 2019.

Jaimin A. Gandhi for the petitioner.

Mrs. Mauna M. Bhatt for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 MS. SANGEETA K. VISHEN J.—By way of the present petition, the petitioner, that is, Gayatri Microns Ltd. has inter alia prayed for direction to issue a writ of prohibition or any other writ, order or direction for quashing and setting aside the notice dated March 25, 2019, issued under section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act").

2 The brief facts are as under:

2.1 The petitioner is a company registered under the Companies Act, 1956 (hereinafter referred to as "the Companies Act"). Somewhere in the year 2015, Company Petition No. 89 of 2015 in Company Application No. 24 of 2015 and other allied applications, were filed before this court by the petitioner-company as well as by the three companies, viz., Gayatri Mine-Chem Pvt. Ltd., Gayatri Integrated Services Pvt. Ltd. and Gayatri Fillers Pvt. Ltd. inter alia praying for sanction of composite scheme of arrangement in the nature of amalgamation with the petitioner-company under the provisions of the Companies Act. During the said proceedings before this court, the Regional Director, North-Western Region, Ministry of Corporate Affairs, had filed his affidavit dated May 13, 2015. In response whereof, an additional affidavit was filed inter alia providing explanation to the issues raised by the Regional Director, Ministry of Corporate Affairs. As per one of the explanations, objection was invited from the Income-tax Department; however, within the statutory period of 15 days, no objection was raised by the Income-tax Department and it was presumed that the Income-tax Department, had no objection to the proposed scheme of arrangement.

2.2 Thereafter, this court upon being satisfied that the amalgamation under the scheme was in the interest of the companies, sanctioned the composite scheme of arrangement vide order dated June 18, 2015. As a result whereof, the three companies, viz., Gayatri Mine-Chem Pvt. Ltd., Gayatri Integrated Services Pvt. Ltd. and Gayatri Fillers Pvt. Ltd. came to be amalgamated with the petitioner.

2.3 The petitioner had filed its return for the assessment year 2015-16 furnishing all the information including the information regarding amalgamation of the aforesaid three companies with the petitioner. In the return filed by the petitioner under the heading "holding status", further

details were provided below the column "business organisation" that is, the status of the aforestated three companies having been amalgamated with the petitioner.

2.4 For the assessment year 2015-16, the Income-tax Officer Ward-2(1)(1), Ahmedabad, had sought for certain information vide his letter dated September 1, 2017. Apropos which, the petitioner had submitted the details wherein it had been categorically informed that by virtue of the order passed by the High Court of Gujarat, the amalgamation has taken place amongst the three companies, viz., the petitioner-Gayatri Microns Ltd., Gayatri Mine-Chem Pvt. Ltd., Gayatri Fillers Pvt. Ltd. and Gayatri Integrated Services Pvt. Ltd. Along with the said information, the order dated June 18, 2015 passed by this court was also furnished to the Income-tax Officer, Ward-2(1)(1), Ahmedabad.

2.5 The respondent, on March 25, 2019, issued a notice under section 148 of the Act for the assessment year 2012-13 to the Gayatri Integrated Services Pvt. Ltd., indicating that the respondent has reason to believe that income chargeable to tax for the assessment year 2012-13 has escaped assessment within the meaning of section 147 of the Act. By the said notice, Gayatri Integrated Services Pvt. Ltd. was called upon to file its return in the prescribed form for the said assessment year 2012-13.

2.6 On April 1, 2019, Gayatri Integrated Services Pvt. Ltd. addressed a letter to the respondent inter alia informing that the return of income filed under section 139 of the Act be treated as return filed under section 148 of the Act for the assessment year 2012-13. In the said letter Gayatri Integrated Services Pvt. Ltd. also requested the respondent to furnish the reasons on the basis of which, the respondent had believed that income chargeable to tax for the assessment year 2012-13 has escaped assessment within the meaning of section 147 of the Act.

2.7 On August 6, 2019, the respondent issued a show-cause notice calling upon Gayatri Integrated Services Pvt. Ltd. to show cause as to why the assessment for the year 2012-13 should not be finalised ex parte under the provisions of section 144 of the Act on the basis of the material available on record. Gayatri Integrated Services Pvt. Ltd. was also informed that as to why penalty proceedings under clause (b) of sub-section (1) of section 271 of the Act should not be initiated separately for failure on its part.

2.8 It appears that Gayatri Integrated Services Pvt. Ltd. requested for some time so as to enable it to respond to the show-cause notice. It is the case of the petitioner that on August 7, 2019 itself, the respondent issued a notice under section 274 read with section 271F of the Act calling upon Gayatri Integrated Services Pvt. Ltd., to show cause as to why the order

imposing penalty should not be made under the provisions of section 271F of the Act, since it had failed to furnish the return of income as required under the provisions of sub-section (1) of section 139 of the Act.

3 Being aggrieved, the petitioner has filed the present petition with the aforementioned prayer.

4 The respondent has filed an affidavit indicating the events which took place during the proceedings for reopening of the assessment. It has been stated that the respondent has scrupulously followed the procedure for issuance of notice under section 148 of the Act and that there is no procedural irregularity as alleged by the petitioner. It has been urged that in the absence of any illegality in the proceedings, notice issued under section 148 of the Act is valid and legal.

5 Mr. Jaimin Gandhi, learned advocate for the petitioner, vehemently submitted that the action of the respondent, in issuing the notice under section 148 of the Act is illegal. It is further submitted that the respondent has proposed to reopen the proceedings against a non-existing entity, that is, Gayatri Integrated Services Private Limited inasmuch as, it has got amalgamated with the petitioner and thus, it has ceased to exist. It is thus submitted that the reopening of the assessment by issuing the impugned notice dated March 25, 2019 under section 148 of the Act, is bad in law and without jurisdiction.

5.1 Mr. Gandhi, then submitted that immediately after the passing of the order dated June 18, 2015 under the provisions of the Companies Act, the respondent was informed about the amalgamation. Thereafter, during the assessment proceedings for the year 2015-16, all the details were provided to the Income-tax Officer, Ward-2(1)(1); further followed by a communication dated June 9, 2017, bringing to his notice that the amalgamation has taken place during the year 2015-16 between the petitioner, that is, Gayatri Microns Limited and three other companies including Gayatri Integrated Services Private Limited. It is submitted that along with the said letter dated September 9, 2017, the order of the High Court sanctioning the scheme of amalgamation was supplied to him for his consideration. It is submitted that it is not that the respondent was not aware about the amalgamation, inasmuch as, the said factum was duly brought to the notice of the respondent and thus, the respondent ought not to have issued the notice dated March 25, 2019, reopening the assessment of Gayatri Integrated Services Pvt. Ltd. for the assessment year 2012-13, when the said company is no longer in existence. It is also submitted that there can be no quarrel with the proposition that once the company ceases

to exist, it is not amenable to the assessment proceedings under the provisions of the Act.

5.2 It is further submitted that the respondent though was requested to provide the copy of the reasons recorded, he had not provided the same. The respondent without providing the copy of the reasons recorded, proceeded further with the assessment proceedings by issuing a notice under section 142 of the Act. It is further submitted that the respondent ought to have provided the copy of the reasons recorded so as to enable the petitioner to file its objection. It is only after offering an opportunity to the petitioner to file its objection and rendering his decision thereon, that it was open to the respondent to proceed further with the assessment proceedings.

5.3 It is further submitted that the respondent ought not to have issued the notice dated August 7, 2019 under the provisions of section 271 of the Act inasmuch as, Gayatri Integrated Services Pvt. Ltd. had filed its return for the assessment year 2012-13 under the provisions of section 139 of the Act and thus, the respondent had no jurisdiction or authority to issue the notice under section 271 read with section 274 of the Act.

5.4 Mr. Gandhi while placing reliance on the judgment of the Supreme Court in the case of *Pr. CIT* v. *Maruti Suzuki India Ltd.* reported in [2019] 416 ITR 613 (SC) ; [2019] 107 taxmann.com 375 (SC), submitted that the apex court, in the said case has observed and held that if the Assessing Officer was informed about the factum of amalgamation of the transferor-company with the transferee-company and the transferor-company having ceased to exist as a result of the approved scheme of amalgamation; the jurisdictional notice issued would be illegal and bad. Mr. Gandhi further submitted that the apex court has categorically observed that the basis on which the jurisdiction was invoked was fundamentally at odds with the legal principle and participation in the proceedings by the party concerned cannot operate as an estoppel against the law.

5.5 Mr. Gandhi further placed reliance on the judgment of this court in the case of *Dharmnath Shares and Services (P.) Ltd.* v. *Asst. CIT* of this court reported in [2018] 94 taxmann.com 458 (Guj) ; [2019] 410 ITR 431 (Guj) and submitted that it is well settled proposition of law that if the assessee-company has amalgamated with the transferee-company, its independent existence does not survive and therefore, it would no longer be amenable to the assessment proceedings. It is submitted that in similar circumstances, this court had quashed the notice issued under section 148 of the Act to the company which had already merged with another company.

5.6 Further reliance has been placed on the judgment of this court in the case of *Khurana Engineering Ltd.* v. *Deputy CIT* reported in [2013] 34 taxmann.com 261 (Guj) ; [2014] 364 ITR 600 (Guj) to contend that this court, has held that the transferor-company would no longer be amenable to the assessment proceedings for the concerned assessment year if subsequently the said company, has amalgamated with another company. The notice under the provisions of the Act, for reassessment, would therefore be invalid.

5.7 In support of the aforesaid proposition, further reliance has been placed on the judgments in the case of (i) *Rustagi Engineering Udyog (P.) Ltd.* v. *Deputy CIT* reported in [2016] 382 ITR 443 (Delhi) ; [2016] 67 taxmann.com 284 (Delhi) and (ii) *Asst. CIT* v. *DLF Cyber City Developers Ltd.* reported in [2014] 34 ITR (Trib) 696 (Delhi) ; [2015] 53 taxmann.com 81 (Delhi-Tribunal).

6 As against this, Ms. Mauna Bhatt, learned senior standing counsel for the respondent submitted that the procedure for issuance of the notice under the provisions of section 148 of the Act has been duly complied with and that there is no procedural irregularity. In the absence of any illegality, the notice issued under section 148 of the Act is a valid and legal notice.

7 Having heard the learned counsel for the respective parties, it emerges from the record that this court, under the provisions of the Companies Act, has vide order dated June 18, 2015, sanctioned the composite scheme of arrangement in the nature of amalgamation of the three transferor companies, viz., Gayatri Mine-Chem Pvt. Ltd., Gayatri Integrated Services Pvt. Ltd. and Gayatri Fillers Pvt. Ltd. with the petitioner that is, Gayatri Microns Ltd., the transferee-company. Pertinently, amalgamation took place, much prior to the issuance of notice dated March 25, 2019 for reopening the assessment. Thereafter the petitioner informed the respondent about the said amalgamation of all the three companies with the petitioner. The record reveals that the factum of amalgamation of the Gayatri Integrated Services Pvt. Ltd. with the petitioner, was communicated to the respondent with sufficient details, viz., (i) passing of the order dated June 18, 2015 by this court ; (ii) the communication dated September 9, 2017 addressed by the petitioner to the Income-tax Officer, Ward-2(1)(1) during the assessment proceedings for the assessment year 2015-16 containing the information of amalgamation and (iii) the details of amalgamation in the return for the assessment year 2015-16.

8 Concededly, in the present case the notice under section 148 of the Act has been issued to Gayatri Integrated Services Pvt. Ltd. which, as aforesaid, had long back got amalgamated with the petitioner vide order dated June 18, 2015 passed by this court and thus, it had ceased to have its own

existence so as to render it amenable for the reassessment proceedings under the provisions of section 147 of the Act. Moreover, the respondent and the Department were duly informed by the petitioner about the amalgamation and despite the said factum having been brought to the notice of the respondent, a statutory notice under section 148 came to be issued to Gayatri Integrated Services Pvt. Ltd. for reopening the assessment on the ground that the respondent has reason to believe that income chargeable to tax for the assessment year 2012-13 has escaped assessment within the meaning of section 147 of the Act.

The controversy in the present petition, is no longer res integra. The apex court in the case of *Pr. CIT* v. *Maruti Suzuki India Limited* (supra), in paragraph 33, has categorically held that if the company has ceased to exist as a result of the approved scheme of amalgamation then in that case, the jurisdictional notice issued in its name would be fundamentally illegal and without jurisdiction. It is also held that upon the amalgamating entity ceasing to exist, it cannot be regarded as a person under sub-section (31) of section 2 of the Act against whom assessment proceedings can be initiated. The apex court has further held that participation by the amalgamated company in the proceedings would be of no effect as there is no estoppel against law. **9**

Similarly, this court, in the judgment in the case of *Dharamnath Shares and Services (P.) Ltd.* (supra) while referring to its earlier decision in the case of *Khurana Engineering Ltd.* (supra) held that once the assessee-company gets amalgamated with the transferee-company, its independent existence does not survive and therefore it would no longer be amenable to the assessment proceedings. Thus, it is well settled proposition of law that upon its amalgamation the transferor-company ceases to exist and becomes extinct, and it would no longer be amenable to the assessment proceedings considering the fact that the extinct entity would not be covered within the ambit of the provisions of the Act. **10**

Accordingly, in view of the aforesaid concluded proposition of law which applies on all fours to the facts of the present case, the notice dated March 25, 2019 issued by the respondent under the provisions of section 148 of the Act for the assessment year 2012-13, being without jurisdiction, is not sustainable. **11**

For the foregoing reasons, the petition succeeds and is accordingly so allowed. The impugned notice dated March 25, 2019 issued by the respondent under section 148 of the Act, and all the proceedings taken pursuant thereto, are hereby quashed and set aside. Rule is made absolute accordingly. No order as to costs. **12**

[2020] 424 ITR 296 (P&H)

[IN THE PUNJAB AND HARYANA HIGH COURT]

JIWAN KUMAR

v.

PRINCIPAL COMMISSIONER OF INCOME-TAX AND OTHERS

AJAY TEWARI and AVNEESH JHINGAN JJ.

January 21, 2020.

SS ▶ ITA 1961, ss 132B, 244A(1)(b) ; Constn of India, art 300A
AY ▶ 2012-13
HF ▶ Assessee

REFUND—INTEREST ON REFUND—SEIZURE OF CASH BY INVESTIGATION WING OF INCOME-TAX DEPARTMENT—RETENTION OF IMPOUNDED CASH—DELAY OF MORE THAN THREE YEARS AFTER FINALISATION OF ASSESSMENT IN REFUNDING AMOUNT SEIZED—ASSESSEE ENTITLED TO INTEREST UNDER SECTION 244A(1)(b) FROM DATE OF ORDER PASSED BY ASSESSING OFFICER TILL DATE OF PAYMENT—INCOME-TAX ACT, 1961, SS. 132B, 244A(1)(b).

RIGHT TO PROPERTY—SEIZURE OF CASH BY INCOME-TAX DEPARTMENT—ASSESSMENT FINALISED—RETENTION OF IMPOUNDED CASH WITHOUT ANY AUTHORITY OF LAW—VIOLATION OF ARTICLE 300A OF CONSTITUTION—INCOME-TAX ACT, 1961—CONSTITUTION OF INDIA, ART. 300A.

The area of operation of section 132B of the Income-tax Act, 1961 ends with completion of the assessment. Section 132B(4) provides for interest to be paid after 120 days of the date of last authorisation till the date of completion under section 153A or Chapter XIV-B. If there is any delay thereafter in the refund of the amount seized under section 132 such a case comes within the ambit of section 244A which provides for simple interest on the amount of refund due to the assessee under the Act. Clause (b) of section 244A deals with all cases other than those mentioned in clauses (a) and (aa) for giving interest from the date of payment to the date on which the refund is granted.

Sections 132B and 244A are independent provisions and do not over-lap. Section 132B(4) provides for interest for the period from seizure of the amount till finalisation of the assessment. Section 244A operates for the period after the refund has become due under the Act.

Depriving an individual of his property without authority of law violates article 300A of the Constitution of India.

On January 6, 2012 cash was seized from the assessee during his travel by the Investigation Wing of the Income-tax Department. The cash was

impounded on January 12, 2012. The assessee filed his return for the assessment year 2012-13. The Assessing Officer made addition to the declared income and passed an order dated January 21, 2014. The Commissioner (Appeals) partly allowed the appeal filed by the assessee and reduced the amount of addition. Thereafter, a revision order dated August 27, 2014 was passed under section 263. The Tribunal quashed the revision order and this was accepted by the Department. On requests, the seized amount was refunded to the assessee on July 4, 2017. Upon a direction in the writ petition filed against the Department for grant of interest on such refund, interest was granted under section 132B(4) for the period from May 5, 2012 to January 21, 2014, the date of the original assessment order. On a writ petition praying for payment of interest for the period from January 21, 2014 (date of the assessment order) to July 4, 2017 (date of refund of the seized amount) :

Held, *allowing the petition, (i) that the assessee was entitled to interest under section 244A for the period from January 22, 2014 till the date of payment. The contention of the Department that the amount was relinquished under section 132A and hence interest only according to the provision under section 132B(4) could be granted, was not tenable. Section 132B(4) provides for interest to be paid after 120 days of the date of last authorisation till the date of completion of assessment under section 153A or Chapter XIV-B. This provision could not be read in isolation in the facts of the assessee's case where in spite of completion of the assessment on January 21, 2014, the amount was not refunded till July 4, 2017. The assessee was entitled to interest under section 244A(1)(b) from the date of the assessment order passed by the Assessing Officer till the date of payment of the seized amount.*

(ii) That to deprive the assessee of his property without authority of law violated article 300A of the Constitution of India. In the absence of any legal backing non-refund of the seized amount to the assessee, the assessee was entitled to interest even under the general law.

MANOHAR LAL *v.* CIT [2001] 249 ITR 1 (MP) *distinguished*.

MANOHAR LAL *v.* CIT [2001] 249 ITR 1 (MP) (para 4) *referred to*.

C. W. P. No. 23680 of 2019.

K. L. Goyal, Senior Advocate with *Avneet Singh*, Advocate, for the petitioner.

Vivek Sethi, Senior Standing Counsel with *Varun Issar*, Junior Standing Counsel, for the respondents.

JUDGMENT

The judgment of the court was delivered by

1 AVNEESH JHINGAN J.—The writ petition has been filed seeking quashing of order dated June 12, 2019 whereby interest on the seized amount has been restricted till the date of assessment. Further prayer is for direction to the respondents to pay interest on the seized amount for the period from January 21, 2014 to July 4, 2017.

2 The facts are that cash of Rs. 15,02,530 was seized by the Investigation Wing of the Income-tax Department from the petitioner on January 6, 2012, while he was travelling from Patiala to Mansa. The cash was impounded vide intimation dated January 12, 2012. The petitioner filed return declaring total income of Rs. 2,04,330. The assessment for the year 2012-13 was framed vide order dated January 21, 2014 whereby an addition of Rs. 50,000 was made. Aggrieved by the assessment order, an appeal was filed and the addition of Rs. 50,000 was reduced to Rs. 35,000 by the first appellate authority, the appeal was partly allowed on August 27, 2014. Thereafter, proceedings under section 263 of the Income-tax Act, 1961 (for short, "the Act") were undertaken and the order dated January 21, 2014 passed by the Assessing Officer was set aside. The Assessing Officer was directed to decide the matter afresh after giving an opportunity of hearing to the assessee and examining the evidence. An appeal was preferred against the revisional order, the Tribunal allowed the appeal on August 26, 2016 and the order of revision was quashed. The order of the Tribunal was accepted by the Revenue. In spite of various requests, the amount seized was refunded to the petitioner only on July 4, 2017. As the amount was kept for almost 5 years, the petitioner approached the respondents for grant of interest. When no action was taken, CWP No. 7536 of 2019 was filed, the petition was disposed of on March 19, 2019 directing the respondents to pass a speaking order. The application was considered, order dated June 12, 2019 was passed under section 132B(4) of the Act and interest for the period from May 5, 2012 to January 21, 2014 amounting to Rs. 1,57,765 was paid after January 21, 2014.

3 The issue involved in narrow circumference is that there was no demand against the petitioner justifying retention of the seized amount, yet no interest was paid.

4 The stand taken by the respondents in the written statement is that interest as per the provisions of section 132B(4) of the Act has been paid and there is no provision for payment of interest. Reliance is placed upon the decision of the Madhya Pradesh High Court in *Manohar Lal* v. *CIT* [2001] 249 ITR 1 (MP).

It would be pertinent to note here that the respondents have not controverted the factual position that there was no demand pending against the petitioner for the said period. There is no plausible reason put forth justifying non-refund of the amount even after finalisation of the assessment and the fact that the order of the Tribunal setting aside the revisional order was accepted by the Revenue. 5

The provisions of sections 132B(4) and 244A of the Act and article 300A of the Constitution of India are quoted below : 6

"Sections 132B and 244A of the Act

132B. *Application of seized or requisitioned assets.*—(1) The assets seized under section 132 or requisitioned under section 132A may be dealt with in the following manner, namely : . . .

(4)(a) The Central Government shall pay simple interest at the rate of one-half per cent. for every month or part of a month on the amount by which the aggregate amount of money seized under section 132 or requisitioned under section 132A, as reduced by the amount of money, if any, released under the first proviso to clause (i) of sub-section (1), and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (i) of sub-section (1), exceeds the aggregate of the amount required to meet the liabilities referred to in clause (i) of sub-section (1) of this section.

(b) Such interest shall run from the date immediately following the expiry of the period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or requisition under section 132A was executed to the date of completion of the assessment under section 153A or under Chapter XIV-B.

244A. *Interest on refunds.*—(1) Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely :

(a) where the refund is out of any tax collected at source under section 206C or paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one-half per cent. for every month or part of a month comprised in the period,—

(i) from the 1st day of April of the assessment year to the date on which the refund is granted, if the return of income has been furnished on or before the due date specified under sub-section (1) of section 139 ; or

(ii) from the date of furnishing of return of income to the date on which the refund is granted, in a case not covered under sub-clause (i) ;

(aa) where the refund is out of any tax paid under section 140A, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period, from the date of furnishing of return of income or payment of tax, whichever is later, to the date on which the refund is granted :

Provided that no interest under clause (a) or clause (aa) shall be payable, if the amount of refund is less than ten per cent. of the tax as determined under sub-section (1) of section 143 or on regular assessment ;

(b) in any other case, such interest shall be calculated at the rate of one-half per cent. for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Article 300A of the Constitution

300A. *Persons not to be deprived of property save by authority of law.*—No person shall be deprived of his property save by authority of law."

7 It may be noted at this stage that clause (a) of section 244A of the Act was amended with effect from June 1, 2016 and it is the amended provision which is reproduced above, however, the same would not affect the decision in the present case as for the reasons mentioned below would be covered under clause (b) of section 244A of the Act and the same was not amended.

8 The stand of the Revenue that the amount was requisitioned under section 132A of the Act and hence interest only as per provision under section 132B(4) of the Act can be granted is not acceptable.

9 Depriving of an individual of his property without authority of law violates article 300-A of the Constitution of India. In the absence of any legal backing, not refunding the seized amount to the petitioner entitles him to interest even under general law. Be that as it may, the provision of interest on delayed refund is there in section 244A of the Act.

There is no quibble with the proposition that section 132B(4) of the Act deals with interest to be paid after 120 days of the date of last authorisation till the date of completion of assessment under section 153A or Chapter XIV-B of the Act. The said provision cannot be read in isolation especially in the facts of the present case where in spite of completion of assessment on January 21, 2014, the amount was not refunded till July 4, 2017. **10**

The area of operation of section 132B(4) of the Act ends with the completion of assessment. If there is delay thereafter in refunding the amount, section 244A of the Act takes such a case within its ambit, it deals with the payment of simple interest where refund becomes due to the assessee under the Act. Clause (b) of section 244A of the Act talks of all other cases than those mentioned in clauses (a) and (aa) for giving interest from the date of payment to the date on which the refund is granted. The refund of amount became due to the petitioner under the Act after finalisation of the assessment, i.e., January 21, 2014 and the same was refunded on July 4, 2017, in such circumstances, the case is covered under clause (b) of section 244A of the Act. **11**

Sections 132B and 244A of the Act are independent provisions and are not over-lapping. Rather, section 132B(4) of the Act deals with interest for the period from seizing of the amount till finalisation of the assessment and section 244A of the Act operates for the period after the refund has become due under the Act. **12**

The Madhya Pradesh High Court in *Manohar Lal's* case (supra) took a view that section 132B of the Act is a self contained code, the assets seized have to be dealt with under section 132(6) of the Act and payment of interest is to be made under section 132B(4) of the Act and section 244 of the Act had no application. With utmost respect, we are not in agreement with the view taken by the Madhya Pradesh High Court for the reasons mentioned above. **13**

The writ petition is allowed. The petitioner shall be entitled to interest under section 244A of the Act for the period from January 22, 2014 till the date of payment. **14**

[2020] 424 ITR 302 (SC)

[IN THE SUPREME COURT OF INDIA]

COGNIZANT TECHNOLOGY SOLUTIONS INDIA PVT. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX (LARGE TAXPAYER UNIT)

UDAY UMESH LALIT, MS. INDU MALHOTRA and HEMANT GUPTA JJ.

March 4, 2020.

SS ▸ ITA 1961, ss 2(22)(a), (d), 115-O, 115QA
HF ▸ Directions

COMPANY—TAX ON DISTRIBUTED PROFITS—REMITTANCES TO NON-RESIDENTS PURSUANT TO SCHEME FOR BUY-BACK OF SHARES SANCTIONED BY HIGH COURT—COMMUNICATION TO ASSESSEE CALLING FOR PAYMENT OF TAX—WRIT PETITION CONTENDING THAT ASSESSEE NOT PUT ON NOTICE BEFORE LIABILITY DETERMINED—SINGLE JUDGE RELEGATING ASSESSEE TO APPEAL AND GIVING INTERIM DIRECTIONS AS TO DEPOSIT OF SUMS BY ASSESSEE, BUT ON MERITS HOLDING NO SUCH NOTICE NECESSARY—APPEAL—DIVISION BENCH HOLDING ORDER UNDER CHALLENGE WAS FINAL ONE, AND QUESTION WHETHER PRINCIPLES OF NATURAL JUSTICE OR REQUISITE PROCEDURE VIOLATED WAS MATTER FOR CONSIDERATION BY APPELLATE AUTHORITY—APPEAL—SUPREME COURT—DEPARTMENT AGREEING TO TREAT COMMUNICATION AS SHOW-CAUSE NOTICE—DIRECTION TO ASSESSEE TO FILE REPLY THERETO AND FURTHER DIRECTIONS AS TO CONTINUANCE OF INTERIM ORDERS—INCOME-TAX ACT, 1961, ss. 2(22)(a), (d), 115-O, 115QA.

In the financial year 2016-17, the assessee approached and obtained sanction of the High Court to a scheme of arrangement and compromise to buy back its shares pursuant to which the assessee purchased 94,00,534 shares at a price of Rs. 20,297 per share from its four shareholders and made a total remittance of Rs. 19,080 crores approximately. The assessee filed form 15CA after obtaining the requisite certificate from a chartered accountant in form 15CB furnishing the details of the remittances made to non-residents. The assessee was under the impression that the provisions of sections 115QA, 115-O or 2(22) of the Income-tax Act, 1961 were not applicable to the scheme between the shareholders and the company. After meetings between the officials of the assessee and officers of the Department, a communication dated March 22, 2018 was received by the assessee on or about March 26, 2018

holding that the payments made to the shareholders was a dividend within the meaning of section 2(22)(d) and (a) of the Act, attracting section 115-O, deeming the assessee to be in default under section 115Q of the Act and calling for payment of taxes with interest. Soon thereafter the bank accounts of the assessee were attached by the Department. While meetings between the officials of the assessee and the officers of the Department were going on, an application had been preferred by the assessee on March 20, 2018 before the Authority for Advance Rulings under section 245Q of the Act seeking a ruling on the issue whether the assessee was liable to pay tax on buy-back of its shares under section 115QA or section 115-O or any other provision of the Act. The assessee challenged the communication dated March 22, 2018 in a writ petition, submitting, inter alia, that all the while the Department was only soliciting information which the assessee had readily furnished and at no stage had the assessee been put to notice that its liability under section 115-O of the Act would be determined in any manner. A single judge of the High Court passed an order of interim stay of the proceedings subject to the condition that the assessee paid 15 per cent. of the tax demanded and furnished a bank guarantee or security by way of fixed deposits for the remaining taxes to be paid. The court lifted the attachment of one bank account but continued the attachment of other bank accounts till compliance with the direction. Similarly, the attachment of the nine bank deposits was continued subject to lien being created for the remaining amount of taxes. The remittance of 15 per cent. of the tax demanded was to be retained in a separate account and abide by the orders to be passed in the writ petition. The single judge dismissed the writ petition as not maintainable and relegated the assessee to avail of the remedy before the appellate authority under the Act. However, during the course of his decision, the single judge concluded, inter alia, that there was no need for issuance of any notice before making a demand under section 115-O of the Act and the notice calling for details whereafter meetings were convened, was quite adequate (See Cognizant Technology Solutions India P. Ltd. *v.* Deputy CIT (LTU) [2019] 416 ITR 462 (Mad)*). The assessee filed a writ appeal whereupon the Division Bench observed that the single judge after having found the writ petition not maintainable, ought not to have gone into the merits. As regards the nature of the communication dated March 22, 2018 and maintainability of an appeal challenging it, it observed that order was a final one, and that the further question whether the order under challenge violated the principles of natural justice or requisite procedure contemplated under the Act was a matter for consideration by the appellate authority. On appeal :*

The Department having agreed before the court that the communication dated March 22, 2018 could be treated as a show-cause notice and the Department permitted to conclude the issue within a reasonable time, provided the interim order passed by the single judge of the High Court was continued, and this course having been accepted by the assessee and an appropriate affidavit of undertaking to withdraw the proceedings initiated before the Authority for Advance Rulings having been filed by the assessee, the court in the peculiar facts of the case, directed that the communication dated March 22, 2018 shall be treated as a show-cause notice calling upon the assessee to respond with regard to the aspects adverted to in the communication, that the assessee shall be entitled to put in its reply and place such material, on which it sought to place reliance, within ten days, that the assessee shall thereafter be afforded oral hearing in the matter, and that the matter shall be decided on the merits by the concerned authority within two months, and that pending such consideration, as also till the period to prefer an appeal from the decision on the merits was over, the interim order passed by the single judge of the High Court shall continue to be in operation. The court directed that the amount deposited towards payment of tax and the amounts which stood deposited and invested in the form of fixed deposit receipts shall be subject to the decision to be taken by the authority on the merits or to such directions as may be issued by the appellate authority. The court directed that the merits of the matter shall be gone into independently by the authorities without being influenced, in any way, by any of the observations made by the court.

Decision of the Madras High Court in COGNIZANT TECHNOLOGY SOLUTIONS INDIA P. LTD. *v.* DEPUTY CIT, LTU [2019] 418 ITR 576 (Mad) *modified*.

Civil Appeal No. 1992 of 2020.

Appeal from the judgment and order dated September 6, 2019 of the Madras High Court in W. A. No. 2063 of 2019. The judgment of the High Court is reported as *Cognizant Technology Solutions India P. Ltd.* v. *Deputy CIT, LTU* [2019] 418 ITR 576 (Mad).

COGNIZANT TECHNOLOGY SOLUTIONS INDIA P. LTD. *v.* DEPUTY CIT, LTU [2019] 416 ITR 462 (Mad) (para 9) *and* COGNIZANT TECHNOLOGY SOLUTIONS INDIA P. LTD. *v.* DEPUTY CIT, LTU [2019] 418 ITR 576 (Mad) (para 2) *referred to.*

Gopal Subramanium, Senior Advocate (*Tushar Jarwal, Ms. Anuradha Dutt, Ms. Fereshte D. Sethna, Ms. B. Vijayalakshmi Menon, Rahul Sateeja, Srinath Sridevan, Pawan Bhushan, Ms. Hima Lawrence,*

Vivek Raja and *Deepak Thackur*, Advocates, with him) for the appellant.

Tushar Mehta, Solicitor General (*Zoheb Hussain*, *Ms. Kanu Aggarwal*, *Vivek Gurnani*, *Ms. Mehak Sachdeva*, *Mrs. Anil Katiyar* and *E. C. Agrawala*, Advocates, with him) for the respondent.

JUDGMENT

The judgment of the court was delivered by

Uday Umesh Lalit J.—Leave granted. 1

This appeal arises out of the final judgment and order dated September 6, 2019[1] passed by the High Court[2] in Writ Appeal No. 2063 of 2019. 2

The appellant is engaged in the business of development of computer software and related services. In the financial year 2016-17, the appellant approached the High Court with a scheme of arrangement and compromise under sections 391 to 393 of the Companies Act, 1956 to buy-back its shares. The High Court sanctioned the Scheme on April 18, 2016 in Company Petition No. 102 of 2016, pursuant to which the appellant purchased 94,00,534 shares at a price of Rs. 20,297 per share from its four shareholders and made a total remittance of Rs. 19,080 crores approximately. The details in that behalf were : 3

Shareholder	*Shares purchased (No. of Shares)*	*Consideration (Amount in Rs.)*	*Tax deducted at source (Amount in Rs.)*
Cognizant Technology Solutions Corporation ("CTS USA")	37,00,747	7511,40,61,859	810,73,37,402
Market Rx Inc (USA)	2,38,521	484,12,60,737	52,33,24,388
Cognizant (Mauritius) Limited (Mauritius)	53,01,778	10761,03,91,036	0 (Treaty benefit claimed)
CSS Investments LLC, Delaware (USA)	1,59,478	323,69,24,966	34,95,01,528
Total	94,00,534	19080,26,38,598	898,01,63,318

According to the appellant, this buy-back of shares was effected in May 2016.

Thereafter, the appellant made statutory filing under Form 15CA (under rule 37BB of the Income-tax Rules, 1962) after obtaining requisite certificate 4

1. Corrected vide further order dated September 12, 2019, reported in *Cognizant Technology Solutions India P. Ltd.* v. *Deputy CIT, LTU* [2019] 418 ITR 576 (Mad).
2. The High Court of Judicature at Madras.

from a chartered accountant in Form 15CB furnishing details of remittances made to non-residents.

5 On November 21, 2017 a letter was received by the appellant from the Deputy Commissioner of Income-tax, Large Taxpayer Unit-1, Chennai in connection with non-payment of tax on the remittances made to the non-residents, in the financial years 2015-16 and 2016-17. The letter stated :

". . . . On verification of Form 15CA data available with the Department, it is noticed that your company has made the following remittances to non-residents during the financial years 2015-16 and 2016-17.

Date of remittance	*Name of the non-resident company receiving the remittance*	*Amount remitted (Rs.)*	*Tax made on remittance (Rs.)*
17-2-2016	Cognizant (Mauritius) Ltd.	335,36,38,361	Nil
19-5-2016	Cognizant (Mauritius) Ltd.	10761,03,91,036	Nil
19-5-2016	Cognizant Technology Solutions Corporation, USA	7511,40,61,859	810,73,37,402
19-5-2016	Market Rx Luc, USA	484,12,60,737	52,33,24,388
19-5-2016	CSS investment LLC, USA	323,69,24,966	34,95,01,528
	Total	19415,62,76,959	898,01,63,318

The data available with the Department shows that you have not deducted/paid any tax on the remittances made to M/s. Cognizant (Mauritius) Ltd. on February 17, 2016 and May 19, 2016 whereas in the case of remittances to the concerns in USA, you have only deducted/paid tax at 10 per cent. (plus surcharge and cess).

In this regard, I request you to kindly furnish the following information :

(a) The dates and amounts of remittances to the non-residents during the financial years 2015-16 and 2016-17, along with their residential status.

(b) The nature and purpose of the said remittances. Copies of the documents submitted to the Reserve Bank of India for obtaining the permission and remitting the amounts.

(c) Whether the above remittances are in accordance with any agreement, scheme etc. ? If so, please furnish the copies of the same.

(d) Dates and amounts of taxes deducted/paid into Government account, along with evidence, and the sections under which the said tax was deducted and/or claimed exempt, as the case may be.

(e) The rate(s) at which the above tax is deducted/paid into the Government. account, in each case ; and reasons for deviation from the statutory requirement of tax, if any, or non-deduction/non-payment, as the case may be."

The requisite details were furnished by the appellant vide letters dated December 1, 2017 and December 5, 2017 whereafter meetings were held between the officials of the appellant and the officers of the Department. Later, a communication was addressed by the Department to the appellant on March 22, 2018. After referring to the remittances made by the appellant to its four shareholders, it was stated : 6

"2. The company has not remitted any tax under section 115-O of the Act till date, even though the tax at 15 per cent. under section 115-O is to be remitted into the Central Government account within 14 days from the date of payment to the shareholders.

3. The assessee-company was under the impression that since its scheme of 'arrangement and compromise' between the shareholders and the company, was in accordance with sections 391 to 393 of the Companies Act, and approved by the court, the provisions of section 115QA, 115-O or 2(22) of the Income-tax Act are not applicable to its case. During the personal discussion between the company and the AO/JCIT/CIT(LTU), it was brought to the notice of the company that :

• Provisions of sections 115QA of the Income-tax Act, which were introduced with effect from June 1, 2013, defines the 'buyback', as the one done in accordance with section 77A of the Companies Act (valid up to June 31, 2016). With effect from June 1, 2016, any buy-back of own shares will attract section 115QA.

• Provisions of section 2(22)(d), clearly postulates that any distribution on reduction of capital, to the extent of accumulated profits will amount to dividends. The only exception to this is the buy-back under section 77A of the Companies Act. Provisions of section 2(22)(d) are :

Section 2(22)(d) : any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not :

• Even otherwise, the provisions of section 2(22)(a) of the Act, which stipulate that any distribution to the shareholders is a dividend, if it is contended that it was not a case of reduction of capital. The provisions of section 2(22)(a) are :

Section 2(22)(a) : any distribution by a company of accumulated profits whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company ;

• Once, the provisions of section 2(22)(d) or 2(22)(a) are applicable, the distributor is required to pay tax under section 115-O of the Act.

• In the present case, the assessee's purchase of its own shares, which is not in accordance with section 77A of the Companies Act, will amount to dividends within the meaning of section 2(22)(d) or 2(22)(a) of the Act, and consequently, liable for tax under section 115-O of the Act in the hands of the assessee-company.

After considering the factual aspects it was stated :

"11. This clearly shows that, to the extent of face value (issued price), the paid-up share capital will be utilized and the balance will be paid from the reserves, which are nothing but accumulated profits in the present case. Here the payment from the paid-up share capital is nothing but reduction of capital and the latter (i.e. payment from the reserves being accumulated profits) is distribution of profits.

12. When any company reduces the 'share capital' as per the provisions of the Companies Act, by way of reducing the face value of shares or by way of paying off part of the share capital, it amounts to extinguishment of the rights of the shareholder to the extent of reduction of share capital. Therefore, it is regarded as transfer under section 2(47) of the Income-tax Act and would be chargeable to tax."

Finally, it was concluded :

"18. Thus, the payments made to the shareholders, under purchase of shares through the scheme of 'arrangements and compromise', is a dividend within the meaning of section 2(22)(d)/2(22)(a) of the Act, requiring to remit the taxes into the Government account under section 115-O of the Act. Further, since the company has failed to remit the taxes within the stipulated period, the company is 'deemed to be an assessee in default', under section 115Q of the Act. Therefore the assessee-company is required to remit the taxes (calculated at 15 per cent. of the total payments of Rs. 19415,62,77,269 to the shareholders, and surcharge etc. as per the Act) along with the interest payable under section 115P of the Act, immediately, failing which the Department will proceed with the collection and recovery of the taxes, including coercive steps, as per the provisions of the Act."

The said communication dated March 22, 2018 was received by the appellant on or about March 26, 2018 and soon thereafter the bank accounts of the appellant were attached by the Department. **7**

It must be stated here that while the meetings between the officials of the appellant and the officers of the Department were going on, an application was preferred by the appellant on March 20, 2018 before the Authority for Advance Rulings (AAR) under section 245Q of the Act[1] seeking a ruling on the issue whether the appellant was liable to pay tax on buy-back of its shares under section 115QA or section 115-O or any other provision of the Act. **8**

The appellant challenged the communication dated March 22, 2018 by filing Writ Petition No. 7354 of 2018[2], in the High Court submitting inter alia that while the issue was pending before the Authority for Advance Rulings under section 245Q of the Act, in view of the bar provided under section 245RR of the Act, the matter could not have been considered. It was also submitted that the appellant was never put to notice whether it would be liable under section 115-O of the Act. It was further submitted that all the while the Department was only soliciting information which the appellant had readily furnished and at no stage the appellant was put to notice that its liability would be determined in any manner. **9**

The writ petition came up before a single judge of the High Court on April 3, 2018 when the following interim directions were issued : **10**

> "11. In my considered view the impugned proceedings has crystallized in the form of a demand for payment of tax, and if the petitioner has to be granted an interim protection till the writ petition is finally heard, the same has to be conditional and cannot be unconditional. Assuming without admitting the petitioner had to avail an appellate remedy under the Act and prays for appropriate interim orders before an appellate authority, then the appellate authority is entitled to grant an order of stay, which is invariably conditional on account of guidelines issued by the Central Board of Direct Taxes (CBDT) with a view to maintain uniformity in the matter of grant of interim orders. As per the latest guidelines prescribed by Central Board of Direct Taxes, it has recommended that 20 per cent. of the demand, which has been made shall be directed to be remitted by the assessee for grant of stay of the remaining demand. Though this cannot be a universal rule, invariably in most cases, the authorities have adopted the 20 per cent. formula. However, in certain cases, this court

1. The Income-tax Act, 1961.
2. *Cognizant Technology Solutions India P. Ltd.* v. *Deputy CIT, LTU* [2019] 416 ITR 462 (Mad).

has interfered with such orders and reduced the amounts payable by the assessee and in certain other cases, where no stay has been granted by the authority and the assessee has approached the court for grant of interim stay, the court has imposed condition by directing payment of more than 20 per cent. of the demand. Therefore, the facts of each case have to be considered while granting interim order bearing in mind the interest of the assessee as well as safeguarding the interest of the Revenue.

12. Thus, considering the facts and circumstances of the case, there will be an order of interim stay of the impugned proceedings subject to the condition that the petitioner pays 15 per cent. of the tax demanded and furnishes a bank guarantee or security by way of fixed deposits for the remaining taxes (only), to be paid. For the purpose of complying with the above condition, the attachment of the bank account in J. P. Morgan Chase Bank N.A., J. P. Morgan Tower, 8th Floor, Off C. S. T. Road, Kalina, Santacruz East, Mumbai-400 098 shall stand lifted forthwith. However, the attachment in respect of other bank accounts, viz.,

(a) State Bank of India, CAG Branch, Chennai.

(b) Deutsche Bank, Ground Floor,
Door No. 4 and 4A,
Western Tower,
Sunny Side, Shafi Mohammed Road,
Thousand Lights, Chennai-600 006.

(c) Corporation Bank, Corporate Banking Branch,
38 and 39 Whites Road, Chennai-600 014.

(d) City Bank N.A., No.163, Anna Salai,
Chennai-600 002.

(e) HDFC Bank, No. 115, Dr. Radhakrishnan Salai, 9th Floor, Mylapore, Chennai-600 004,

shall continue till the compliance of the above direction. Similarly, the attachment of the nine bank deposits, viz., (i) HDFC Limited, (ii) HDFC Limited, (iii) HDFC Limited, (iv) HDFC Limited, (v) HDFC Limited, (vi) HDFC Limited, (vii) Bajaj Finance Limited, (viii) Bajaj Finance Limited, (ix) Bajaj Finance Limited shall also continue subject to the lien being created for the remaining amount of taxes. The remittance of 15 per cent. of the tax demanded shall be retained in a

separate account and shall abide by the orders to be passed in the writ petition."

The single judge by his decision dated June 25, 2019 dismissed the writ petition as not being maintainable and relegated the appellant to avail of the remedy before the appellate authority under the Act. However, during the course of his decision, the single judge concluded that there was no need for issuance of any notice before making a demand under section 115-O of the Act and the notice issued on November 21, 2017 calling for details whereafter meetings were convened, was quite adequate. He rejected the submission that there would be a bar in terms of section 245RR of the Act. The single judge did not find any merit in the contention that the shares purchased pursuant to the order of the company court could not be treated as dividend. While relegating the appellant to avail of the remedy before the appellate authority it was observed[1] : **11**

". . . the appellate authority shall take into account the amount deposited in pursuance of the order referred supra, while entertaining the appeal. With regard to fixed deposits, the respondent shall maintain statusquo as on date for a period of two weeks. . . ."

The appellant, being aggrieved, challenged the aforesaid view by filing Writ Appeal No. 2063 of 2019. While discussing the issues that came up for consideration, the Division Bench observed that the single judge after having found the writ petition to be not maintainable, ought not to have gone into the merits. As regards the nature of the communication dated March 22, 2018 and maintainability of an appeal challenging the same, it was observed[2] : **12**

"The learned senior counsel appearing for the appellant would submit that it is not known as to whether the impugned order dated March 22, 2018 is a show-cause notice or final order. Though there appears to be some element of contradiction in the counter affidavit filed, the said order appears to be a final one. Now it is also the contention of the learned Additional Solicitor General that it is only a final order. We are also of the view that the further action taken would also indicate that the order under challenge was a final one. If it is only a show-cause notice, then there is no need to challenge it and instead the consequential freezing alone requires to be questioned. The further question as to whether the order under challenge violates the principles of natural justice or requisite procedure contemplated under the Act is a matter for consideration before the

1. Page 481 of 416 ITR.
2. Page 586 of 418 ITR.

appellate authority. The learned single judge has rightly observed that the appeal can be entertained and decided on merit as the appellant has already deposited a sum of Rs. 495 crores."

13 The view taken by the Division Bench of the High Court is presently under appeal. On October 4, 2019, an affidavit of undertaking, filed on behalf of the appellant was taken on record in which it was submitted :

"In the event this hon'ble court is gracious to pass an order that the fixed deposits over which a lien has been created, pursuant to the Interim Order passed by the learned single judge (continued by the Division Bench), is vacated as an interim measure to enable the petitioner-company to run its business and operations, the petitioner undertakes that in the event this hon'ble court is satisfied that any security must be offered by the petitioner ex debito justitiae at the time of the disposal of the special leave petition, the petitioner will unqualifiedly, without demur, furnish such security/fixed deposits to the satisfaction of the Registrar of the hon'ble court as this hon'ble court may be so pleased to direct."

However, by order dated October 14, 2019, this court observed :

"It is a matter of record that pursuant to order dated April 3, 2018 passed by the single judge of the High Court of Judicature at Madras in Writ Petition No. 7354 of 2018, a sum of Rs. 2806,40,15,294 stands deposited and invested in the form of fixed deposit receipts."

It was then directed :

"Pending further consideration, the amount which is presently lying in deposit shall be maintained in the same form."

14 We heard Mr. Gopal Subramanium, learned senior advocate for the appellant and Mr. Zoheb Hossain, learned advocate for the Department.

15 It was submitted by Mr. Subramanium, learned senior advocate that the instant transaction would not come within the scope of section 115-O of the Act. It was submitted that the appellant was never put to notice about the proposed determination in terms of section 115-O of the Act ; that the communication dated March 22, 2018 could not be said to have determined the liability of the appellant under section 115-O of the Act and consequently the appellant could not have been relegated to the appellate remedy as directed. It was submitted that the communication dated March 22, 2018 could, at best be treated as an intimation of the action proposed to be taken resort to by the Department. These submissions were countered by Mr. Zoheb Hossain, learned advocate. According to him, the matter would come within the ambit of section 115-O of the Act. He also relied

upon section 115Q of the Act to submit that in case the assessee-company had not paid tax on distributed profits in accordance with the provisions of section 115-O, the assessee-company would be deemed to be "an assessee in default" in respect of the amount of tax and all provisions relating to collection and recovery of income-tax would apply. As an extension of the concept, it was submitted that the Department was justified in issuing the communication dated March 22, 2018 followed by attachment of the accounts of the appellant.

16 On the issue whether communication dated March 22, 2018 was in the nature of determination of the liability, both the learned counsel were heard at considerable length, at the end of which it was agreed by Mr. Zoheb Hossain, learned advocate for the Department, that the communication dated March 22, 2018 could be treated as a show-cause notice and the Department be permitted to conclude the issue within a reasonable time, provided the interim order passed by the single judge of the High Court on April 3, 2018 was continued. The course suggested by the learned counsel for the Department was acceptable to the learned senior counsel for the appellant.

17 It was, therefore, suggested that the appellant may file an affidavit of undertaking to withdraw the proceedings initiated by it before the AAR and the Department may also file an appropriate affidavit stating that it was willing to treat the communication dated March 22, 2018 as a show-cause notice. An appropriate affidavit of undertaking to withdraw the proceedings initiated before the Authority for Advance Rulings has since then been filed by the appellant. An affidavit has also been filed on behalf of the Department stating :

> "The communication dated March 22, 2018 may be treated as a show-cause notice and the assessee will be given an opportunity of being heard and a fresh order will be passed within two months from the date of the judgment of this hon'ble court."

18 In the peculiar facts and circumstances of the present case, while disposing of this appeal, we direct :

(a) The communication dated March 22, 2018 shall be treated as a show-cause notice calling upon the appellant to respond with regard to the aspects adverted to in the said communication ;

(b) The appellant shall be entitled to put in its reply and place such material, on which it seeks to place reliance, within 10 days from today ;

(c) The appellant shall thereafter be afforded oral hearing in the matter ;

(d) The matter shall thereafter be decided on merits by the concerned authority within two months from today ;

(e) Pending such consideration, as also till the period to prefer an appeal from the decision on merits is not over, the interim order passed by the single judge of the High Court on April 3, 2018 and as affirmed by this court vide its order dated October 14, 2019, shall continue to be in operation ; and

(f) The amount of Rs. 495,24,73,287 deposited towards payment of tax and the amount of Rs. 2806,40,15,294 which stands deposited and invested in the form of fixed deposit receipts shall be subject to the decision to be taken by the concerned authority on merits or to such directions as may be issued by the appellate authority.

19 We have stated the facts of the present case only by way of narration of events and explaining the chronology. We shall not be taken to have dealt with the merits or demerits of the rival contentions of the parties. The merits of the matter shall be gone into independently by the concerned authorities without being influenced, in any way, by any of the observations made by the High Court and this court.

20 The appeal is disposed of in the aforesaid terms and the judgment and order presently under appeal shall stand modified accordingly. No costs.

[2020] 424 ITR 314 (SC)

[IN THE SUPREME COURT OF INDIA]

COGNIZANCE FOR EXTENSION OF LIMITATION, *In re*

S. A. BOBDE C. J. I., **L. NAGESWARA RAO** and **SURYA KANT** JJ.

March 23, 2020.

HF ▶ Directions

LIMITATION—EFFECT OF CORONA VIRUS—DIFFICULTIES LIKELY TO BE FACED BY LAWYERS AND LITIGANTS IN FILING PROCEEDINGS WITHIN PERIOD OF LIMITATION—SUPREME COURT—TAKING SUO MOTU COGNISANCE OF SITUATION—DIRECTION THAT IRRESPECTIVE OF LIMITATION PRESCRIBED UNDER GENERAL OR SPECIAL LAWS, AND WHETHER CONDONABLE OR NOT, PERIOD OF LIMITATION IN ALL SUCH PROCEEDINGS TO STAND EXTENDED WITH EFFECT FROM MARCH 15, 2020 TILL FURTHER ORDERS—ORDER OF SUPREME COURT BINDING ON ALL AUTHORITIES AND COURTS AND TRIBUNALS—CONSTITUTION OF INDIA, arts. 141, 142.

Taking suo motu notice of the situation arising out of the challenge faced by the country on account of the covid-19 virus and resultant difficulties that might be faced by litigants across the country in filing their petitions, applications, suits or appeals and all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both Central or State) and to obviate such difficulties and to ensure that lawyers and litigants do not have to come physically to file such proceedings in respective courts or Tribunals across the country including the Supreme Court, the Supreme Court, in exercise of power under article 142 read with article 141 of the Constitution of India, ordered that irrespective of the limitation prescribed under the general law or special laws, whether condonable or not, the period of limitation in all such proceedings, shall stand extended with effect from March 15, 2020 till further orders to be passed by the Supreme Court. The court declared that this order would be binding within the meaning of article 141 on all courts, Tribunals and authorities.

Suo Motu Writ Petition (Civil) No. 3 of 2020.

Counsel for the appearing parties :

Tushar Mehta, Solicitor General and *Dushyant Dave*, Senior Advocate.

Other Advocates : *Swati Ghildiyal, Ankur Talwar, G. S. Makkar, Raj Bahadur* and *B. V. Balaram Das.*

JUDGMENT

This court has taken suo motu cognizance of the situation arising out of **1**
the challenge faced by the country on account of the covid-19 virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under special laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not **2**
have to come physically to file such proceedings in respective courts/Tribunals across the country including this court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended with effect from March 15, 2020 till further order/s to be passed by this court in the present proceedings.

We are exercising this power under article 142 read with article 141 of **3**
the Constitution of India and declare that this order is a binding order within the meaning of article 141 on all courts/tribunals and authorities.

4 This order may be brought to the notice of all High Courts for being communicated to all subordinate courts/tribunals within their respective jurisdiction.

5 Issue notice to all the Registrars General of the High Courts, returnable in four weeks.

[2020] 424 ITR 316 (SC)

[IN THE SUPREME COURT OF INDIA]

COMMISSIONER OF INCOME-TAX

v.

CARPET INDIA

ROHINTON FALI NARIMAN, R. SUBHASH REDDY and **SURYA KANT** JJ.

August 27, 2019.

SS ▶ ITA 1961, s 80HHC(1), (3), (3A), *Expln (baa)*
AY ▶ 2001-02
HF ▶ Department

EXPORT—SPECIAL DEDUCTION—SUPPORTING MANUFACTURER—COMPUTATION OF DEDUCTION—DIFFERENT FROM THAT FOR EXPORTER—SUPPORTING MANUFACTURER WHO RECEIVES EXPORT INCENTIVES IN FORM OF DUTY DRAWBACK, DUTY ENTITLEMENT PASS BOOK, ETC., NOT ENTITLED TO DEDUCTION AT PAR WITH DIRECT EXPORTER—INCOME-TAX ACT, 1961, s. 80HHC(1), (1A), (3), (3A), *Expln. (baa).*

Under section 80HHC(1) of the Income-tax Act, 1961, where the assessee has engaged in the business of export out of India of any goods or merchandise to which this section applies, a deduction shall be allowed in computing the total income of the assessee, to the extent of profits, referred to in sub-section (1B), and derived by the assessee from the export of such goods or merchandise. So far as "supporting manufacturers" are concerned, under section 80HHC(1A), where any export house or trading house has issued a certificate that the supporting manufacturer has, in fact, supplied such goods or merchandise for export, they shall also be allowed a deduction to the extent of profits referred to derived by the assessee from the sale of goods or merchandise to the export house or trading house. The manner of deduction, in so far as the exporter is concerned, is laid down in sub-section (3) which when read together with its provisos, makes it clear that profits that are derived from such export shall be further increased in the manner provided by the first proviso ; and where the export turnover does not exceed Rs. 10 crores, in the manner provided by the second proviso ; and where the export turnover

exceeds Rs. 10 crores, in the manner provided by the third proviso. What are conspicuous by their absence are the provisos in sub-section (3) in so far as sub-section (3A) is concerned, which makes it clear that the profits derived by a supporting manufacturer shall be strictly in accordance with the provisions contained in section 80HHC(3A) read with the Explanation *to the section, which then defines "profits of the business" under* Explanation (baa) *to mean the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by (1) ninety per cent. of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India. Given this statutory scheme, it is clear that the exporter stands on a completely different footing from the supporting manufacturer as the parameters and scheme for claiming deduction relatable to exporters under section 80HHC(1) read with sub-section (3) is completely different from that of supporting manufacturers under section 80HHC(1A) read with sub-section (3A) thereof.*

CIT *v.* Baby Marine Exports [2007] 290 ITR 323 (SC) *deals with an entirely different question and cannot be relied upon to arrive at the conclusion that supporting manufacturers are to be treated on par with the direct exporter for the purpose of deduction under section 80HHC of the Act.*

[The court, however, held that in some of the appeals, it would be open for the assessees to show, by adducing the necessary facts, that they were direct exporters as well and could therefore avail of the deduction available under section 80HHC(1) read with sub-section (3) and that these matters would stand remanded to the Appellate Tribunal.]

Decision of the Punjab and Haryana High Court in CIT *v.* Carpet India [2008] 306 ITR 359 (P&H) *reversed.*

CIT *v.* Sushil Kumar Gupta (C. A. No. 6437 of 2012, dated 12-9-2012) *overruled.*

CIT *v.* Baby Marine Exports [2007] 290 ITR 323 (SC) *distinguished.*

Cases referred to :

CIT *v.* Baby Marine Exports [2007] 290 ITR 323 (SC) (paras 1, 5)

CIT *v.* Carpet India [2008] 306 ITR 359 (P&H) (para 1)

CIT *v.* Carpet India [2018] 405 ITR 469 (SC) (para 5)

CIT *v.* Sushil Kumar Gupta (C. A. No. 6437 of 2012, dated 12-9-2012) (paras 5, 6)

Civil Appeal Nos. 4590 to 4599 and 4603 of 2018.

Civil Appeal No. 4590 of 2018 was from the judgment and order dated May 13, 2008 of the Punjab and Haryana High Court in I. T. A. No. 544 of 2007. The judgment of the High Court is reported as *CIT* v. *Carpet India* [2008] 306 ITR 359 (P&H).

K. Radhakrishnan, Senior Advocate (*Rupesh Kumar*, *M. P Gupta*, *Umesh Kumar Saw* and *Mrs. Anil Katiyar*, Advocates, with him), for the appellant.

Dr. Rakesh Gupta, *Ambhoj Kumar Sinha*, *Ms. Monika Ghai*, *Rohit*, *Anunav Kumar*, *Jagdish Kumar Chawla*, *T. Mahipal* and *M/s. Lex-peritia and Co.*, Advocates, for the respondent.

JUDGMENT

The judgment of the court was delivered by

ROHINTON FALI NARIMAN J.—*Civil Appeal Nos. 4590, 4591, 4592 and 4603 of 2018*

1 This batch of appeals arises from a judgment passed by the High Court of Punjab and Haryana[1] at Chandigarh in which the appeals preferred by the Revenue have been dismissed relying upon *CIT* v. *Baby Marine Exports* [2007] 4 SCC 555[2] in order to arrive at a conclusion that the supporting manufacturer is at par with the actual direct exporter of goods when it comes to deductions that are available under section 80HHC of the Income-tax Act, 1961 (in short "the Act").

2 It is unnecessary to go into the facts of each of these cases as it is undisputed that the assessee in each of these cases is a supporting manufacturer. The scheme in so far as section 80HHC of the Act is concerned is crystal clear. The marginal note to section 80HHC reads :

> "80HHC. *Deduction in respect of profits retained for export business.*—(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise :

1. *CIT* v. *Carpet India* [2008] 306 ITR 359 (P&H).
2. [2007] 290 ITR 323 (SC).

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any Export House or Trading House in respect of which the Export House or Trading House has issued a certificate under the proviso to sub-section (1), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the sale of goods or merchandise to the Export House or Trading House in respect of which the certificate has been issued by the Export House or Trading House . . .

(3) For the purposes of sub-section (1),—

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee ;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export ;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,—

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee ; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme ; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business

carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme ; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, 'rate of credit allowable' means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :

Provided also that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—

(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or

(b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.—For the purposes of this sub-section,—

(a) 'adjusted export turnover' means the export turnover as reduced by the export turnover in respect of trading goods ;

(b) 'adjusted profits of the business' means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3) ;

(c) 'adjusted total turnover' means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(d) 'direct costs' means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

(e) 'indirect costs' means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(f) 'trading goods' means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,—

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business ;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee."

3 It will be noticed on an analysis of section 80HHC(1) that where the assessee has engaged in the business of export out of India of any goods or merchandise to which this section applies, what shall be allowed in computing the total income of the assessee, is a deduction to the extent of profits, referred to in sub-section (1B), and derived by the assessee from the export of such goods or merchandise. So far as "supporting manufacturers" are concerned, under section 80HHC(1A), where any export house or trading house has issued a certificate that the supporting manufacturer has, in fact, supplied such goods or merchandise for export, they shall also be allowed a deduction to the extent of profits referred to derived by the assessee from the sale of goods or merchandise to the export house or trading house. The manner of deduction, in so far as the exporter is concerned, is laid down in sub-section (3) which when read together with its provisos make it clear that profits that are derived from such export shall be further increased in the manner provided by the first proviso ; and where export turnover does not exceed rupees ten crores, in the manner provided by the second proviso ; and where the export turnover exceeds rupees ten crores, in the manner provided by the third proviso. What is conspicuous by their absence is any of the provisos in sub-section (3) in so far as sub-section (3A) is concerned, which makes it clear that the profits derived by a supporting manufacturer shall be strictly in accordance with the provisions contained in section 80HHC(3A) read with the *Explanation* to the section, which then defines "Profits of the business" under *Explanation (baa)* as follows :

"profits of business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by—

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India."

4 Given this statutory scheme, it is clear that the exporter stands on a completely different footing from the supporting manufacturer as the parameters and scheme for claiming deduction relatable to exporters under section 80HHC(1) read with sub-section (3) is completely different from that of the supporting manufacturers under section 80HHC(1A) read with sub-section (3A) thereof.

5 We may mention in passing that this matter has been placed before a Bench of three judges by the judgment in *CIT* v. *Carpet India* [2018] 6 SCC 620[1], where this court analysed the provisions of section 80HHC(3A) and thereafter adverted to the decision in *Baby Marine Exports* (supra) as follows[2] :

"In *Baby Marine Exports* (supra), the question of law involved was 'whether the export house premium received by the assessee is includible in the "profits of the business" of the assessee while computing the deduction under section 80HHC of the Income-tax Act, 1961?'. The said case mainly dealt with the issue related with the eligibility of export house premium for inclusion in the business profit for the purpose of deduction under section 80HHC of the Income-tax Act. Whereas in the instant case, the main point of consideration is whether the assessee-firm, being a supporting manufacturer, is to be treated at par with the direct exporter for the purpose of deduction of export incentives under section 80HHC of the Income-tax Act, after having regard to the peculiar facts of the instant case.

While deciding the issue in *Baby Marine Exports* (supra), a two-judge Bench of this court held as under[3] :

'On plain construction of section 80HHC(1A), the respondent is clearly entitled to claim deduction of the premium amount received

1. [2018] 405 ITR 469 (SC).
2. Page 476 of 405 ITR.
3. Page 335 of 290 ITR.

from the export house in computing the total income. The export house premium can be included in the business profit because it is an integral part of business operation of the respondent which consists of sale of goods by the respondent to the export house.'

The aforesaid decision has been followed by another Bench of two judges of this court in Special Leave to Appeal (Civil) No. 7615 of 2009, Civil Appeal No. 6437 of 2012 and others, *CIT* v. *Sushil Kumar Gupta* decided on September 12, 2012. The question considered in the aforesaid case is reproduced below :

'3. In these civil appeals the common question which arises for determination is as follows :

"Whether 90 per cent. of export benefits disclaimed in favour of a supporting manufacturer (assessee herein) have to be reduced in terms of *Explanation (baa)* of section 80HHC of the Income-tax Act, 1961, while computing deduction admissible to such supporting manufacturer under section 80HHC(3A) of the Act ?"

4. This question has been answered in favour of the assessee and against the Department in the case of *CIT* v. *Baby Marine Exports* [2007] 290 ITR 323 (SC) ; [2007] 160 Taxman 160 (SC).

5. The civil appeals filed by the Department are, accordingly, dismissed.'

Broadly speaking, we are of the view that both these cases are not identical and cannot be related with the deduction of export incentives by the supporting manufacturer under section 80HHC of the Income-tax Act.

However, we are not in agreement with these decisions and as *Explanation (baa)* of section 80HHC specifically reduces deduction of 90 per cent. of the amount referable to section 28(iiia) to (iiie) of the Income-tax Act, hence, we are of the view that these decisions require reconsideration by a larger Bench since this issue has larger implication in terms of monetary benefits for both the parties. After giving our thoughtful consideration, the following substantial question of law of general importance arises for reconsideration by this court :

'Whether in the light of peculiar facts and circumstances of the instant case, supporting manufacturer who receives export incentives in the form of duty draw back (DDB), duty entitlement pass book (DEPB), etc., is entitled for deduction under section 80HHC of the Income-tax Act, 1961'."

We agree with the reasoning and analysis of the referring judgment, namely, that *Baby Marine Exports* (supra) dealt with an issue related to the eligibility of export house premium for inclusion in business profit for the purpose of deduction under section 80HHC of the Act. Whereas in the present appeals, the point for consideration is completely different, being as to whether the assessees being supporting manufacturers, are to be treated on par with the direct exporter for the purpose of deduction of export incentives under section 80HHC of the Act. We, therefore, answer the question referred to us by stating that *Baby Marine Exports* (supra) deals with an entirely different question and cannot be relied upon to arrive at the conclusion that the supporting manufacturers are to be treated on par with the direct exporter for the purpose of deduction under section 80HHC of the Act, as has been pointed out by us hereinabove. Consequently, the decision in *CIT* v. *Sushil Kumar Gupta* (C. A. No. 6437 of 2012) decided on September 12, 2012 is overruled. 6

This being the case, we allow these appeals in favour of the Revenue and set aside the impugned judgment(s). 7

Civil Appeal Nos. 4593, 4594, 4595, 4596, 4597, 4598 and 4599 of 2018

In these appeals also the impugned judgments are set aside. However, it will be open for the respondent in the above cases to show, by adducing the necessary facts, that they are direct exporters as well and can therefore avail of the deduction available under section 80HHC(1) read with sub-section (3). For this purpose, these matters stand remanded to the Appellate Tribunal. Accordingly, these appeals stand disposed of. 8

[2020] 424 ITR 325 (Delhi)

[In the Delhi High Court]

COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

v.

INDIA HABITAT CENTRE

Vipin Sanghi and **Sanjeev Narula** JJ.

November 27, 2019.

SS ▸ ITA 1961, ss 2(15), 11, 12, 13
AY ▸ 2012-13
HF ▸ Assessee

Charitable purpose—Exemption—"Any other object of general public utility"—Denial of benefits as charitable organisation—Burden of proof—Assessing Officer accepting that assessee pro-

MOTED PUBLIC INTEREST AS PROVIDED IN PROVISO TO SECTION 2(15)—MERELY BECAUSE ASSESSEE CHARGED FOR CERTAIN GOODS AND SERVICES, ACTIVITIES NOT COMMERCIAL ACTIVITIES—ONUS ON DEPARTMENT TO PROVE ASSESSEE HAD PROFIT MOTIVE IN SUCH ACTIVITIES—PRINCIPLE OF CONSISTENCY—FINDING THAT THERE WAS NO CHANGE IN NATURE OF ACTIVITIES OF ASSESSEE FROM EARLIER YEARS—ASSESSEE CHARITABLE ORGANISATION AND ENTITLED TO BENEFIT—INCOME-TAX ACT, 1961, SS. 2(15), 11, 12, 13.

The assessee was a society registered under section 12 of the Income-tax Act, 1961 and was granted approval under section 80G(5)(vi). The primary aim and objective of the assessee according to its memorandum of association, inter alia, was to promote the habitat concept. For the assessment year 2012-13 the assessee filed a return in the status of trust and declared nil income. The Assessing Officer held that the activities of the assessee were hybrid in nature, partly covered by the provisions of section 11 read with section 2(15) and partly by the principle of mutuality and accordingly passed an order under section 143(3). He held that since the assessee did not maintain separate books of account, its income could not be bifurcated under the principle of mutuality or otherwise. The entire surplus in the income and expenditure account was treated as taxable income of the assessee. The Commissioner (Appeals) allowed the appeal of the assessee relying upon the judgment of the court in the assessee's own case for the assessment years 1988-89 to 2006-07. The Tribunal held that there was no material change in the fundamental facts for several years and the income of the assessee was to be computed under sections 11, 12 and 13 and dismissed the appeal filed by the Department. On appeal :

Held, *dismissing the appeal, that there was no ground to disentitle the assessee to the benefits of section 2(15). The Commissioner (Appeals) had found on the facts that the activities of the assessee fell within the meaning of the definition of "charitable activities" as provided under section 2(15). Applying the test of profit motive, it was held that the surpluses generated by the assessee were not being appropriated by any individual or group of individuals. Merely because the assessee charged for certain goods and services, it did not render such activities commercial activities and the Assessing Officer having accepted that the assessee promoted public interest as provided in the proviso to section 2(15) there could not be any doubt that the assessee should be regarded as charitable organisation and given the full benefit of exemption provided to such organisations under the Act. Since the assessee had not generated any surpluses from anyone, whether members or*

non-members, it was not correct to say that the assessee has claimed relief partly as charitable organisation and partly as mutual association. The principle of mutuality became superfluous in view of the fact that the activities were held to be charitable. Applying the principle of consistency, the Commissioner (Appeals) had held that there was no fundamental change in the nature of the activities of the assessee for the period prior to the assessment year 2008-09 and subsequent years. The Tribunal had confirmed the findings of the Commissioner (Appeals). Though the principles of res judicata were not applicable to income-tax proceedings, the fact was that there was no dispute with respect to the consistency in the nature of the activities of the assessee. All the authorities had held that the assessee was a charitable institution and this consistent finding of fact entitled the assessee to computation of its income under sections 11, 12 and 13. It was imperative for the Department to establish that there was an element of profit motive in the activities of the assessee, to deny the benefit. If any surpluses had been generated on account of some of the activities of the assessee, it would not ipso facto be determinative of the fact that there was an element of profit motive. No error had been pointed out by the Department with respect to such finding of fact which would disentitle the assessee the benefit under section 2(15).

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

Cases referred to :

Bangalore Club *v.* CIT [2013] 350 ITR 509 (SC) (para 11)

Carlisle and Silloth Golf Club *v.* Smith [1913] 3 KB 75 (para 11)

CIT *v.* Delhi Gymkhana Club Ltd. [2011] 339 ITR 525 (Delhi) (para 19)

CIT *v.* Excel Industries Ltd. [2013] 358 ITR 295 (SC) (para 12)

DIT *v.* All India Oriental Bank of Commerce Welfare Society [2003] 130 Taxman 575 (Delhi) (para 19)

DIT *v.* India Habitat Centre (I.T.A. No. 226 of 2015, dated 12-10-2011) (para 10)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) (paras 6, 12)

I. T. A. No. 964 of 2019.

Ajit Sharma, Senior Standing Counsel, with *Ms. Adeeba Mujahid*, Advocate, for the appellant.

P. Roychaudhuri, Advocate, for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

SANJEEV NARULA J.—*C. M. Appl. 51070 of 2019 (exemption)*

1 Exemption allowed, subject to all just exceptions.

2 The application stands disposed of.

C. M. Appl. 51069 of 2019 (delay in filing 91 days)

3 By this application the applicant seeks condonation of delay of 91 days in filing the application. For the reasons stated in the application, the delay is condoned.

4 The application stands disposed of in the aforesaid terms.

I. T. A. No. 964 of 2019

5 The present appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred as "the Act") is directed against the order passed by the Income-tax Appellate Tribunal ("ITAT"), New Delhi dated February 28, 2019 in I. T. A. No. 1847/Del/2016 for the assessment year (AY) 2012-13, whereby the Income-tax Appellate Tribunal dismissed the appeal of the Revenue, upholding the reasoning and findings of the Commissioner of Income-tax (Appeals) that the assessee is a charitable institution and its income has to be computed under sections 11, 12 and 13 of the Act.

6 Briefly the facts of the present case are that the assessee filed its return for the assessment year 2012-13 on September 28, 2012 in the status of "trust", declaring "nil income". The assessment was framed vide order dated March 30, 2015 under section 143(3), computing the total income as Rs. 5,86,85,490 and holding that the activities of the assessee are hybrid in nature ; partly covered by the provisions of section 11 read with section 2(15) and partly by the principle of mutuality. It was held that since the assessee is not maintaining separate books of account, the income cannot be bifurcated under the principle of mutuality or otherwise. The entire surplus in I and E account, amounting to Rs. 5,83,92,860 was treated as taxable income of the assessee. The Commissioner of Income-tax (Appeals) vide order dated January 28, 2016, allowed the appeal of the assessee by relying upon the judgment of this court in the assessee's own case, dated October 12, 2011 for the assessment years 1988-89 to 2006-07 and the decision of the hon'ble Supreme Court in the case of *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC).

7 The Revenue's appeal against the aforesaid order of the Commissioner of Income-tax (Appeals) was dismissed by the Income-tax Appellate

1. Oral judgment.

Tribunal vide order dated February 28, 2019, which is impugned in the present appeal.

Mr. Ajit Sharma, senior standing counsel for the Revenue argued that **8** the order of the Income-tax Appellate Tribunal is perverse. Findings of the Assessing Officer (AO) have been reversed, merely by relying upon the earlier decisions of the Income-tax Appellate Tribunal and of this court in the assessee's own case, without adverting to the merits of the present case with an independent application of mind. He submitted that the principle of res judicata does not apply to income-tax proceedings. Each assessment year being a separate unit, decisions of the earlier years are not binding, particularly when the facts have been differentiated by the Assessing Officer. He further contended that the assessee can either claim deduction under section 11 of the Act or take benefit of the principles of mutuality. The assessee claimed deduction under section 11 on part of its income and applied the principle of mutuality on the remaining income, and that is impermissible.

He further argued that the Income-tax Appellate Tribunal was not jus- **9** tified in allowing the exemption under sections 11 and 12 of the Act, without considering the new facts and findings brought on record by the Assessing Officer. The assessee earns income from cultural and intellectual activities, open to the general public and earns income from such activities. There is no common identity between the contributors and the participants. The sale of food and beverages are controlled by outsourcing agencies. Particularly, no separate books of account have been maintained for these activities. The assessee can have income from different heads or different sources but it cannot have its income and expenditure from the same source apportioned on the basis of the principles of mutuality.

Learned counsel for the Revenue also referred to the decision of this **10** court in *DIT* v. *India Habitat Centre* (I. T. A. No. 226 of 2015, decided on October 12, 2011) to urge that reliance upon the said decision by the Income-tax Appellate Tribunal was misplaced. In the said case, the court was concerned with entirely a different question, pertaining to entitlement of the assessee for exemption under section 11 of the Act in the context of contributions made by the institutional members qua the construction of superstructure on the land allotted to the assessee, below market price and the applicability of the provisions of section 13(1)(c) read with section 13(3)(b) of the Act.

Mr. Sharma also argues that the interest earned by the assessee on fixed **11** deposits from its member bank would not be exempted from tax on the basis of doctrine of mutuality. The income of Rs. 1,20,14,708 earned as

interest during the concerned year is clearly taxable in view of the decision in the case of *Bangalore Club* v. *CIT* [2013] 350 ITR 509 (SC) ; Manu/SC/0030/2013. The Income-tax Appellate Tribunal has not considered the aforesaid decision and other judgments relied upon by the Revenue in support of the aforesaid proposition. The relevant portion of *Bangalore Club* (supra) as relied upon by Mr. Sharma, reads as under (page 518 of 350 ITR) :

"On this aspect of the doctrine, especially with regard to the non-members, *Halsbury's Laws of England*, fourth edition, reissue, volume 23, paragraphs 161 and 162 (pages 130 and 132) states :

'Where the trade or activity is mutual, the fact that, as regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise . . .

Members' clubs are an example of a mutual undertaking ; but, where a club extends facilities to non-members, to that extent the element of mutuality is wanting . . .'

Simon's Taxes, volume B, third edition, paragraphs B1.218 and B1.222 (pages 159 and 167) formulate the law on the point, thus :

'. . . it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and, therefore, no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered . . .

It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a similar character for purposes of the former corporation profits tax . . .

A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members. Thus, in Carlisle and Silloth Golf Club *v.* Smith [1913] 3 KB 75, *where a members' golf club admitted non-members to play on payment of green fees it was held that it was carrying on a business which could be isolated and*

defined, and the profit of which was assessable to income-tax. But there is no liability in respect of profits made from members who avail of themselves of the facilities provided for members.' (emphasis[1] supplied)

In short, there has to be a complete identity between the class of participators and class of contributors ; the particular label or form by which the mutual association is known is of no consequence. Kanga and Palkhivala explain this concept in *The Law and Practice of Income Tax* (eighth edition volume I, 1990) at page 113 as follows :

'. . . The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid. The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves : it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects . . ."

We have given our thoughtful consideration to the submissions **12** advanced by Mr. Ajit Sharma. Before adverting to the contentions urged by Mr. Sharma, it would also be appropriate to take note of the reasoning and findings of the Commissioner of Income-tax (Appeals) which read as under :

"Findings

6.3 It is quite clear from the facts that the IHC has not generated any surplus for anyone - members or non-members. All its activities are geared towards providing services for its members with the bulk of the expenditure going towards maintaining the complex and thus providing the physical environment that it was expected to do. *It is also not correct to state that the assessee has claimed partially relief as a charitable organization and partly as a mutual association. The assessee has claimed both and therefore it is not correct that the assessee should maintain separate accounts to claim these 2 kinds of benefits. Accordingly, it is clear that the assessee is fully entitled to claim benefits on the principles of mutuality as well as the ground that its activities are charitable although the former becomes superfluous in*

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view of the latter. Never the less on the grounds of completeness it is necessary to give a specific finding on this important point.

6.4 The assessee has pointed out that the Delhi High Court vide its judgment delivered on October 12, 2011 took note of the fact that from the assessment year 1988-89 to the assessment year 2006-07, the activities of the centre stood accepted as being charitable in nature. Even for the assessment year 2007-08, the activities of the centre were held to be charitable and the benefit of section 11/12 of the Act was given to the centre. It is only from the assessment year 2008-09 that the Assessing Officer came to hold that the activities of the centre are not charitable in nature and applied the principle of mutuality. The Commissioner (Appeals) in respect of the assessment years 2008-09, 2009-10 and 2011-12 has held that the activities of the centre are charitable in nature. In respect of the assessment year 2008-09 the Income-tax Department had filed an appeal to the High Court against the order of the Income-tax Appellate Tribunal upholding the order of the Commissioner of Income-tax (Appeals). In view of this position the assessee has argued that it should be given the benefits of charitable status as well as the benefits of the principle of consistency.

7.2 While dealing with this contention it must be noted that in income-tax matters the principle of res judicata does not apply as noted in the High Court order noted above. However, it is seen that there is no fundamental change in the activities of the centre. The hon'ble Supreme Court In *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC), held as under (page 329 of 193 ITR) :

'That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee-appellant should not have been reopened.

Strictly speaking, res judicata does not apply to income-tax proceedings. Though each assessment year being a unit, what was decided in one year might not apply in the following year where a the fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.'

This principle has again been noticed and followed by the hon'ble Supreme Court in *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC).

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7.3 In the High Court judgment delivered on October 12, 2011 also the principles of consistency was applied to IHC. There is no fundamental change in the nature of the activities of IHC for the period prior to the assessment year 2008-09 and subsequent years. Accordingly based on the aforesaid High Court judgments and the fact that the Assessing Officers have consistently from the assessment year 2008-09 treated IHC as a mutual association, IHC has to be given the benefit of mutuality. Thus the grounds of appeal at numbers 1 – 10 are allowed.

8. On the issue of concealment of income/furnishing inaccurate particulars I find that the assessee's contention is premature since the penalty is not yet imposed.

9. In view of the foregoing it is not necessary to examine grounds 12-14.

10. In the result, the appeal is allowed." (emphasis[1] supplied)

13 The Income-tax Appellate Tribunal dismissed the appeal of the Revenue by holding that there has been no material change in the fundamental facts of the case for several years and the income of the assessee has to be computed under sections 11, 12 and 13 of the Act. The relevant portion of the impugned order is extracted hereinbelow :

"12. We have gone through the record. It is not the case of the Revenue that there is any change in the fundamental facts involving the assessment of India Habitat Centre for the last several years. It is not in dispute that the hon'ble High Court by order dated October 12, 2011 in I. T. A. Nos. 226, 228, 229 and 230 of 2005 and 1175, 1288 and 1177 of 2008 held that no substantial question of law arises from the order of the Tribunal wherein the Tribunal held that the assessee is a charitable institution. Similarly, there is no dispute that in the assessment years 1992-93 and 1993-94 on identical set of facts, the Tribunal accepted the contention of the assessee as to its charitable nature of activities and granted relief. So also there is no dispute that in the period from 1999-2000 to 2007-08, the learned Assessing Officer did not raise any dispute as to the charitable nature of the activities of the assessee or the applicability of the principles of mutuality. Further, as

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could be seen from the order dated February 17, 2012 and April 29, 2016 passed by the Co-ordinate Benches of the Tribunal in the assessee's own case for the assessment years 2008-09 and 2009-10, the contentions of the assessee are upheld. A Co-ordinate Bench of this Tribunal in the order for the assessment year 2008-09 had reviewed all the case law on this aspect to reach a conclusion that when the assessee is registered as charitable trust, its income cannot be computed on the principle of mutuality but required to be computed under sections 11, 12 and 13 of the Act. This decision is followed by another Co-ordinate Bench in I. T. A. No. 4212/Del/2012 for the assessment year 2009-10.

13. In view of the decision of the hon'ble apex court in the case of Radhasoami Satsang *v.* CIT (supra), *in the absence of any material change justifying the Department to take a different view from that taken in the earlier years, the question of exemption of the assessee should not have been reopened and though strictly speaking the principle of res judicata does not apply to the income-tax proceedings, each assessment year being a unit, what was decided in one year might not apply in the next year but where a fundamental aspect permeating through different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all proper to allow the position to be changed in a subsequent year.*

14. As noted above, there has never been any dispute as to the continuation of the same set of facts in all these years, right from the assessment year 1990-91 at different levels either it is at the first appellate authority stage or the Tribunal or the hon'ble High Court, the consistent view has been that the assessee is a charitable institution and its income has to be computed under sections 11, 12 and 13 of the Act. Unless and until, any change in the fundamental facts is brought on record, we find it difficult to take a different view for this assessment year. Our this view is well fortified by the decisions of the hon'ble jurisdictional High Court in the assessee's own case for the earlier assessment year so also the consistent view taken by the Tribunal for the assessment years 2008-09 and 2009-10.

15. With this view of the matter, we find no irregularity or illegality either in the reasoning or in the conclusion reached by the learned Commissioner of Income-tax (Appeals) and, therefore, accordingly find that the appeal of the Revenue is devoid of merit and as such dismissed.

16. In the result, the appeal of the Revenue is dismissed." (emphasis[1] supplied)

14 The Revenue has sought to rely upon section 2(15) of the Act to contend that the income of the assessee has to be computed as "association of persons (AOP)" and not on the basis of sections 11, 12 and 13 of the Act or on the principle of mutuality. The assessee is a society registered under the Societies Registration Act, 1860 and is registered under section 12 of the Income-tax Act, 1961 and has been granted approval under section 80G(5)(vi) of the Act vide order dated July 19, 2011. The primary aim and objective of the assessee as per the memorandum of association (MOA) inter alia is to promote the habitat concept.

15 No doubt, the Income-tax Appellate Tribunal has relied upon the decision of this court dated October 12, 2011 in *India Habitat Centre* (supra), however, at the same time, it has also examined the applicability of the principles of mutuality for the computation of income of the assessee. It is noticeable from the reading of paragraph 12 of the decision of the Income-tax Appellate Tribunal, extracted above, that the Revenue did not raise any dispute as to the charitable nature of the activities of the assessee or the applicability of the principles of mutuality for the period from 1999-2000 to 2007-08. The Tribunal has followed the decision of the Co-ordinate Bench in respect of the assessment year 2008-09, wherein it has been concluded that if the assessee is registered as a "charitable trust", its income cannot be computed on the principles of mutuality and is required to be computed under sections 11, 12 and 13 of the Act and has also given the finding of fact that the assessee has not generated any surplus for anyone – members or non-members. Its activities are geared towards providing services for its members with the bulk of the expenditure going towards maintaining the complex. The assessee has not claimed partial relief as a charitable organization and partly as a mutual association. Since the activities of the assessee were held to be charitable, the plea of mutuality was held to be superfluous.

16 The fundamental question is that if the assessee has taken the plea of mutuality, whether it could be deprived of the benefit of section 2(15) of the Act. On this aspect, the Assessing Officer has proceeded to classify the assessee's activities as "hybrid", holding that part of the activities are covered by the provisions of section 11 read with section 2(15) and partly by the principle of mutuality. The Commissioner of Income-tax (Appeals) after examining the records has given a categorical finding that the activities of the centre falls within the meaning of the definition of "charitable

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activities" as provided under section 2(15) of the Act. It has been further observed that the proviso to the definition is not applicable and the Assessing Officer has erred by relying on the same. Further, it has been held that even if the assessee's activities do not fall in the first limb, since the assessee is promoting activities of general public utility, it would be covered by the second limb of the definition.

17 Applying the test of profit motive, it was held that the surpluses generated by the assessee are not being appropriated by any individual or group of individuals. Merely because the assessee is charging for certain goods and services, it does not render such activities as commercial activities and the fact that the Assessing Officer has accepted that the assessee is promoting public interest as provided in the proviso to section 2(15), there cannot be any doubt that the assessee should be regarded as charitable organisation and given the full benefit of exemption provided to such organisations under the Act. Relying on this premise, it has been held that since the assessee has not generated any surpluses from anyone-members or non-members, it was not correct to say that the assessee has claimed relief partly as charitable organisation and partly as mutual association.

18 Further, it was rightly held that the principle of mutuality becomes superfluous in view of the fact that the activities were held to be charitable. Applying the principle of consistency, the Commissioner of Income-tax (Appeals) held that there is no fundamental change in the nature of activities of the assessee for the period prior to the assessment year 2008-09 and subsequent years. The Income-tax Appellate Tribunal has confirmed the findings of the Commissioner of Income-tax (Appeals). Though the principles of res judicata are not applicable to the income-tax proceedings, however, at the same time, one cannot ignore the fact that there is no dispute with respect to the consistency in the nature of activities of the assessee. All the income-tax authorities have held that the assessee is a charitable institution and this consistent finding of fact entitles the assessee to have its income computed under sections 11, 12 and 13 of the Act. It was imperative for the Revenue to establish that there was an element of profit motive in the activities of the assessee, to deny the benefit. If any surpluses have been generated on account of some of the activities of the assessee, it would not ipso facto be determinative of the fact that there was an element of profit motive. The contentions raised by the Revenue, do not impress this court as no error has been pointed out with respect to the aforesaid finding of fact which would disentitle the assessee the benefit of section 2(15) of the Act.

IS WRITTEN RECORD OF SATISFACTION UNDER SECTION 271(1) MANDATORY ?

Is recording of satisfaction in writing under section 271(1) of the Income-tax Act, 1961 a mandatory jurisdictional requirement ?

Sanjay Bansal[1] and Amit Parsad[2]

Exordium :

Some concepts including settled principles in the field of taxation laws are of perennial interest. When such concepts are pitted against adverse judgments of the Supreme Court of India and/or the High Court, it is always refreshing. The rule about the Assessing Officer "being satisfied during the course of any proceedings under this Act" envisaged by section 271(1) of the Income-tax Act, 1961 (hereinafter referred to as "Act") is one such concept. Is it necessary for the Assessing Officer to record reasons in writing in support of his satisfaction or would a direction by way of satisfaction be sufficient for initiating penalty proceedings ?

Relevant provision :

The relevant provisions of section 271(1) and section 271(1B) of the Act reads as under :

> "271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person— . . .
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or . . .
>
> he may direct that such person shall pay by way of penalty,— . . .
>
> [3](1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c)."

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3. Inserted by Finance Act, 2008, with retrospective effect from 1-4-1989.

Initiation of penalty proceedings thus as is clear from a bare perusal of section 271(1)(c) of the Act is subject to the fulfillment of the following conditions namely,—

The Assessing Officer should be "satisfied" that :

(a) the assessee has either concealed particulars of his income ; or

(b) furnished inaccurate particulars of his income ; or

(c) infracted both (a) and (b) above.

The "satisfaction" should be arrived at during the course of any proceedings. These could be assessment, reassessment or rectification proceedings, but not during the penalty proceedings.

By an amendment the Finance Act, 2008 inserted sub-section (1B) in section 271 of the Act and the Notes on Clauses including the Memorandum explaining the said provisions in the Finance Bill, 2008 may be read as under :

Notes on Clauses to the Finance Bill, 2008 :

"Clause 48 seeks to amend section 271 of the Income-tax Act, which relates to failure to furnish returns, comply with notices, concealment of income, etc.

Under the existing provisions contained in Chapter XXI the Assessing Officer is required to be satisfied during the course of penalty proceedings. Legislative intent was that such a satisfaction was required to be recorded only at the time of levy of penalty and not at the time of initiation of penalty. However, some of the judicial interpretations on this issue are favouring the view that satisfaction has to be recorded at the time of initiation of penalty proceedings also.

It is therefore proposed to insert a new sub-section (1B) in section 271 of the Income-tax Act so as to provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and if such order contains a direction for initiation of penalty proceedings under sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under sub-section (1).

This amendment will take effect retrospectively from April 1, 1989."

Memorandum Explaining Provisions in the Finance Bill, 2008 :

"Satisfaction for initiation of penalty under section 271(1)

Sub-section (1) of section 271 of the Income-tax Act empowers the Assessing Officer to levy penalty for certain offences listed in that sub-section. It is a requirement that the Assessing Officer is required to be satisfied before such a penalty is levied.

There is a considerable variance in the judicial opinion on the issue as to whether the Assessing Officer is required to record his satisfaction before issue of penalty notice under this sub-section. Some judicial authorities have held that such a satisfaction need not be recorded. However, the hon'ble Delhi High Court in the case of *CIT* v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568 (Delhi) has held that such a satisfaction must be recorded by the Assessing Officer.

Given the conflicting judgments on the issue and the legislative intent, it is imperative to amend the Income-tax Act to unambiguously provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment ; and such order contains a direction for initiation of penalty proceedings under sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under sub-section (1).

Similar amendment has also been proposed in the Wealth-tax Act.

These amendments will take effect retrospectively from April 1, 1989."

As a sequel to the amendment aforesaid, the Central Board of Direct Taxes issued a circular primarily containing the reasons necessary for the introduction of section 271(1B) in the Act, which reads as under :

Finance Act, 2008-Circular No. 1 of 2009, dated March 27, 2009 :

"40. Clarification regarding satisfaction for initiation of penalty under sub-section (1) of section 271

40.1 Sub-section (1) of section 271 of the Income-tax Act empowers the Assessing Officer to levy penalty for certain offences listed in that sub-section. It is a requirement that the Assessing Officer is required to be satisfied before such a penalty is levied.

40.2 In the context of levy of penalty under section 271 of the Income-tax Act, there has been an ongoing dispute between the Income-tax Department and taxpayers on whether an Assessing Officer is required to record his satisfaction before initiating penalty

proceedings. The Income-tax Department has held the view that no separate satisfaction is required to be recorded before initiating penalty proceedings. In the case of *CIT* v. *S. V. Angidi Chettiar* [1962] 44 ITR 739 (SC), the Supreme Court has, while dealing with penalty under section 28 of the Indian Income-tax Act, 1922, held that (page 745 of 44 ITR) : "satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction". The same matter came up once again before the Calcutta High Court in the case of *Becker Gray and Co. (1930) Ltd.* v. *ITO* [1978] 112 ITR 503 (Cal). Relying on the Supreme Court decision in the above case, the Calcutta High Court held that (headnote of ITR) : 'It is true that the Income-tax Officer should be prima facie satisfied before the penalty notice is issued, but it does not mean that he is required to record such satisfaction in writing in every case.' Following these decisions, wherever additions are made, the Assessing Officers have, without separately recording any satisfaction, been issuing directions for initiating penalty proceedings.

40.3 However, interpreting the aforesaid Supreme Court decision, the Delhi High Court has, in the case of *CIT* v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568 (Delhi) held that (headnote of ITR) : 'It is the assessing authority which has to form its own opinion and record its satisfaction before initiating the penalty proceedings'.

40.4 Subsequently, the Allahabad High Court went into this issue in the case of *Shyam Biri Works (P.) Ltd.* v. *CIT* [2003] 259 ITR 625 (All). After considering the above Calcutta High Court the decision and the Delhi High Court decision, it has held that : 'With profound respect to the Delhi High Court decision, we are unable to agree . . . We are, therefore, of the opinion that although the Assessing Officer must have satisfaction as required under section 273 of the Act, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act'.

40.5 In view of conflicting judicial opinion on this issue, it was necessary to make legislative intervention and settle the matter. Therefore, a new sub-section (1B) in section 271 of the Income-tax Act has been inserted. This sub-section unambiguously provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment, and such order contains a direction for initiating of penalty proceedings under sub-section (1) of section 271, such an order of assessment or

reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiating penalty proceedings under sub-section (1) of that section.

40.6 The proposed amendment has been given retrospective effect in order to protect the revenue's contention on this issue in pending cases. However, this retrospective effect will not prejudice taxpayers' right to agitate the levy of penalty on merits. Further, while no separate satisfaction is required to be recorded before initiating penalty proceedings, it is still incumbent upon the Assessing Officer to record his satisfaction before levying the penalty. Accordingly, there is neither violation of the principle of natural justice nor any prejudice caused to the taxpayer as a result of the retrospective amendment.

40.7 Similar amendment has also been carried out in the Wealth-tax Act.

40.8 Applicability : These amendments have been made applicable with retrospective effect from April 1, 1989."

Survey of case law :

It would be apposite to briefly refer to those judgments which have been noticed while inserting the provisions of section 271(1B) of the Act by curtailing the scope and ambit of the expression, "is satisfied" after the words "if the Assessing Officer or the Commissioner (Appeals) or Commissioner in the course of any proceedings under this Act".

In the case of *CIT* v. *S. V. Angidi Chettiar* [1962] 44 ITR 739 (SC) decided by the Constitutional Bench of the Supreme Court of India, the question with regard to the levy of penalty for assessment years 1949-50 imposed by the Assessing Officer by an order passed under section 28 of the 1922 Act, which was upheld by the Commissioner of Income-tax but reversed by the High Court of Madras, was considered owing to the Income-tax Officer's endorsement at the foot of the assessment order that action under section 28 of the said Act had been taken for concealment of income, which indicated clearly that the Income-tax Officer was satisfied in the course of the assessment proceedings that the firm had concealed its income. While upholding the order of penalty, Shah J., speaking for the Bench, pronounced :

"Counsel contended that in any event, penalty for the assessment year 1949-50 could not be imposed upon the assessee-firm because there was no evidence that the Income-tax Officer was satisfied in the course of any assessment proceedings under the Income-tax Act that the firm had concealed the particulars of its income or had

deliberately furnished inaccurate particulars of the income. The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act ; it cannot be exercised if he is not satisfied about the existence of conditions specified in clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceeding that the firms had concealed its income. The assessment order is dated November 10, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under section 28 had been taken for concealment of income indicating clearly that the Income-tax Officer was satisfied in the course of the assessment proceeding that the firm had concealed its income."

Thus, in the case of *S. V. Angidi Chettiar* (supra) the order of penalty was upheld primarily on the ground that the endorsement at the foot of the assessment order mentioning that action had been taken for concealment of income was based on evidence indicating that the assessee had concealed its income. There is no finding, much less any discussion, by the hon'ble Supreme Court of India that recording of satisfaction backed up by reasons howsoever brief they may be, in the assessment order are necessary so as to justify the initiation of penalty proceedings either on the ground of concealment of income and/or furnishing of inaccurate particulars. What has been laid down by the hon'ble Supreme Court of India is that there should be evidence of the Income-tax Officer's satisfaction for levy of penalty before the conclusion of assessment proceedings.

Similarly, in the case of *D. M. Manasvi* v. *CIT* [1972] 86 ITR 557 (SC), the assessee was, an individual who derived income from various sources. The Income-tax Officer, after assessment year 1959-60 had been framed under section 23(3) of the Indian Income-tax Act, 1922, found that the assessee, in his return, had neither included income from business in the name of M/s. Kohinoor Grain Mills Sales Depot nor shown any connection with the said firm (M/s. Kohinoor Grain Mills Sales Depot) or interest in the said business. The Assessing Officer was of the opinion that M/s. Kohinoor Grain Mills Sales Depot was not a genuine partnership but a sole

proprietorship concern of the assessee, the whole of the income wherefrom belonged to the assessee. The Assessing Officer thereafter re-opened the assessments for assessment years 1959-60 up to 1962-63. The order of the Income-tax Officer was upheld by the Appellate Assistant Commissioner, being the first Appellate Authority, as well as by the Income-tax Appellate Tribunal. The Income-tax Officer considered the non-disclosure of business profits from M/s. Kohinoor Grain Mills Sales Depot representing deliberate concealment of income in the hands of the assessee and initiated penalty proceedings under section 271 of the Act for the said four assessment years. The Income-tax Officer referred the matter to the Inspecting Assistant Commissioner under section 274(2) of the Act as the minimum penalty imposable under section 271(1)(c) of the Act exceeded the sum of Rs. 1,000. The Inspecting Assistant Commissioner, after providing an opportunity of hearing to the assessee, concluded that the assessee has concealed his income and deliberately furnished inaccurate particulars for all four assessment years. In appeal before the Tribunal, the assessee's contention that penalty proceedings had not been commenced in the course of proceedings under the Act was rejected by holding that levy of penalty was not invalid as the Income-tax Officer had given directions in the assessment order for the issue of a notice under section 271(1)(c) of the Act and penalty proceedings could be set to have commenced during the course of assessment proceedings. Noticeably, the Tribunal dispelled the contention of the assessee that there was no evidence to show that assessee was the owner of the business of M/s. Kohinoor Grain Mills Sales Depot and there had been concealment of income on his part. The Supreme Court held :

> "Clause (c) of sub-section (1) of section 271 shows that occasion for taking proceedings for payment of penalty arises if the Income-tax Officer or the Appellate Assistant Commissioner is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income . . . What is contemplated by clause (1) of section 271 is that the Income-tax Officer or the Appellate Assistant Commissioner should have been satisfied in the course of proceedings under the Act regarding matters mentioned in the clauses of that sub-section. It is not, however, essential that notice to the person proceeded against should have also been issued during the course of the assessment proceedings. Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the Income-tax Officer or Appellate Assistant Commissioner with the actual issue of notice. The issue of notice is a consequence of the satisfaction of the Income-tax Officer

or the Appellate Assistant Commissioner and it would, in our opinion, be sufficient compliance with the provisions of the statute if the Income-tax Officer or the Appellate Assistant Commissioner is satisfied about the matters referred to in clauses (a) to (c) of sub-section (1) of section 271 during the course of proceedings under the Act even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently . . . The proceedings for the imposition of penalty in terms of sub-section (1) of section 271 have necessarily to be initiated either by the Income-tax Officer or by the Appellate Assistant Commissioner. The fact that the Income-tax Officer has to refer the case to the Inspecting Assistant Commissioner if the minimum imposable penalty exceeds the sum of rupees one thousand in a case falling under clause (c) of sub-section (1) of section 271 would not show that the proceedings in such a case cannot be initiated by the Income-tax Officer. The Income-tax Officer in such an event can refer the case to the Inspecting Assistant Commissioner after initiating the proceedings. It would, indeed, be the satisfaction of the Income-tax Officer in the course of the assessment proceedings regarding the concealment of income which would constitute the basis and foundation of the proceedings for levy of penalty . . . the Tribunal came to the conclusion on the basis of relevant evidence that the business of Kohinoor Mills was under the control of the assessee and that there was no firm in existence as alleged. The Tribunal also found that the income of the said concern belonged to the assessee himself even though the business was run in the guise of a firm. It was held that the whole scheme was to disguise the profits of the assessee as those of the firm. It cannot, therefore, be said that there was no relevant material or evidence before the Tribunal to hold that the assessee had deliberately concealed the particulars of his income or had deliberately furnished inaccurate particulars of such income."

In the aforesaid case of *D. M. Manasvi* (supra) what emerges is that there has to be satisfaction of the Income-tax Officer during the assessment proceedings that the assessee has concealed his income and/or has furnished inaccurate particulars of his income and the Income-tax Officer if satisfied, on the basis of the evidence at the assessment stage, that the assessee has concealed his income and/or furnished inaccurate particulars of his income then notice under section 271(1)(c) of the Act for imposition of penalty would be justified inasmuch as the satisfaction of the Income-tax Officer in the course of assessment proceedings regarding concealment of income and/or furnishing of inaccurate particulars of such income

constitutes the basis and foundation of the proceedings for levy of penalty. However, following *Mansavi* and *Angidi Chettiar* case (supra), divergent views have been expressed by various High Courts on the question as to whether recording of satisfaction by the Assessing Officer in the assessment order is mandatory before issuing notice for levy of penalty and mere recording of a noting by way of observation by the Assessing Officer in the foot of the assessment order that notice be issued separately for initiation of penalty would result in valid initiation of penalty proceedings.

The Division Bench of the hon'ble High Court of Delhi in *CIT* v. *Ram Commercial Enterprises Ltd.*[1] following the law laid down in the case of *D.M. Manasvi* (supra) held :

> "The law is clear and explicit. Merely because this court while hearing this application may be inclined to form an opinion that the material available on record could have enabled the initiation of penalty proceedings that cannot be a substitute for the requisite finding which should have been recorded by the assessing authority in the order of assessment but has not been so recorded.
>
> A bare reading of the provisions of section 271 and the law laid down by the Supreme Court makes it clear that it is the assessing authority which has to form its own opinion and record its satisfaction before initiating the penalty proceedings. Merely because the penalty proceedings have been initiated, it cannot be assumed that such a satisfaction was arrived at in the absence of the same being spelt out by the order of the assessing authority. Even at the risk of repetition we would like to state that the assessment order does not record the satisfaction as warranted by section 271 for initiating the penalty proceedings . . ."

The aforesaid view expressed by the hon'ble High Court of Delhi in *Ram Commercial Enterprises Ltd.* (supra) was dissented by the hon'ble High Court of Allahabad in the case of *Nainu Mal Het Chand v. CIT*[2] wherein it has been held :

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1. [2000] 246 ITR 568 (Delhi). See also for the same view : *CIT* v. *Rampur Engg. Co. Ltd.* [2009] 309 ITR 143 (Delhi) [FB], approved *CIT* v. *Ram Commercial Enterprises Ltd.* ; *CIT* v. *Mohinder Lal* [1987] 168 ITR 101 (P&H), *Diwan Enterprises* v. *CIT* [2000] 246 ITR 571 (Delhi), *CIT* v. *Munish Iron Store* [2003] 263 ITR 484 (P&H), *CIT* v. *Super Metal Re-Rollers* [2004] 265 ITR 82 (Delhi), *CIT* v. *Vikas Promoters (P.) Ltd.* [2005] 277 ITR 337 (Delhi), *Shri Bhagwant Finance Co. Ltd.* v. *CIT* [2006] 280 ITR 412 (Delhi), *CIT* v. *Rajan and Co. (No. 1)* [2007] 291 ITR 340 (Delhi), *CIT* v. *Dajibhai Kanjibhai* [1991] 189 ITR 41 (Bom).
2. [2007] 294 ITR 185 (All). See also : *Becker Gray and Co. (1930) Ltd.* v. *ITO* [1978] 112 ITR 503 (Cal), *Shyam Biri Works (P.) Ltd.* v. *CIT* [2003] 259 ITR 625 (All), *CIT* v. *Pearey Lal and Sons (EP) Ltd.* [2009] 308 ITR 438 (P&H).

"So far as the two decisions of the Delhi High Court are concerned, we find that under the provisions of the Act, the Income-tax Officer is not required to record his satisfaction in a particular manner or reduce it in writing. It can be gathered from the assessment order itself. In *D. M. Mansavi's* case (supra), the apex court has clearly held that the Income-tax Officer should be satisfied during the course of the assessment proceedings that the assessee had concealed his particulars of income or has furnished inaccurate particulars of such income. The satisfaction can be gathered from the assessment order. In the present case, we find that the Income-tax Officer had material before him for being satisfied that the applicant has concealed the particulars of his income and, therefore, penalty proceedings have rightly been initiated. We are, therefore, with great respect unable to persuade ourselves to follow the view taken by the Delhi High Court in the aforesaid two cases."

The hon'ble High Court of Madras in the case of *M. Sajjanraj Nahar* v. *CIT* [2006] 283 ITR 230 (Mad), while dissenting from the decision rendered by the hon'ble High Court of Delhi in *Ram Commercial Enterprises Ltd.* (supra) has observed that :

". . . a mere indication as to the initiation of the penalty proceedings separately in the assessment order is tantamount to an indication as to the satisfaction of the authorities that the assessee has concealed income or furnished inaccurate particulars, had not been brought to the notice of the Delhi High Court in (a) *Ram Commercial Enterprises Ltd.'s* case (supra) ; (b) *Diwan Enterprises* case (supra) ; and (c) *Vikas Promoters (P.) Ltd.'s* case (supra). For this reason and in the light of the law enunciated various decisions of this court, referred to supra, with respect, we are unable to agree with the views expressed by the Delhi High Court in (a) *Ram Commercial Enterprises Ltd.'s* case (supra) ; (b) *Diwan Enterprises* case (supra) ; and (c) *Vikas Promoters (P.) Ltd.'s* case (supra) . . . At the stage of initiating penalty proceedings, what is required is only a subjective satisfaction and not a finding as to the satisfaction based on materials."

The hon'ble Supreme Court of India in the case of *Dilip N. Shroff* v. *Joint CIT* [2007] 291 ITR 519 (SC), with reference to the decision rendered by the hon'ble High Court of Delhi in the cases of *Ram Commercial Enterprises Ltd.* (supra) and *Diwan Enterprises* (supra) while dealing with the contention of the assessee that the order of assessment did not record satisfaction that the assessee had concealed the particulars of his income or

furnished inaccurate particulars, which were condition precedent for initiating penalty proceedings under section 271(1)(c) of the Act, observed :

> "The explanation, having regard to the decisions of this court, must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income-tax Officer must arrive at a satisfaction in this behalf. (See *CIT* v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568 (Delhi) and *Diwan Enterprises* v. *CIT* [2000] 246 ITR 571 (Delhi) . . . The primary burden of proof, therefore, is on the Revenue. The statute requires satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the Department. (See *D. M. Manasvi* v. *CIT* [1972] 86 ITR 557 (SC))."

The judgment rendered in the case of *Dilip N. Shroff* (supra) stands overruled in the case of *Union of India* v. *Dharamendra Textile Processors* [2008] 306 ITR 277 (SC) on the question of mens rea being not an essential element for imposing penalty for breach of civil obligations or liabilities and though section 271(1)(c) of the Act has been reproduced it is not a decision where the interpretation of section 271(1)(c) of the Act on the question whether satisfaction should be in writing duly recorded during the course of any proceedings which fell for consideration before the hon'ble Supreme Court of India. The hon'ble Supreme Court was considering the effect of the *Explanation* appended to section 271(1)(c) of the Act vis-à-vis the provisions of section 276C of the Act which had not been considered in *Dilip N. Shroff* case (supra) and the pertinent observations made thereto reads as under :

> "The *Explanations* appended to section 272(1)(c) of the Income-tax Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in *Dilip N. Shroff's* case (supra) has not considered the effect and relevance of section 276C of the Income-tax Act. The object behind enactment of section 271(1)(c) read with *Explanations* indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C of the Income-tax Act."

Subsequently, it stands clarified by the hon'ble Supreme Court in the case of *CIT* v. *Reliance Petroproducts (P.) Ltd.*[1] that the judgment in *Dilip N. Shroff* case (supra) was not upset in entirety and the pertinent observations in regards thereto reads as under :

> "It was only on the point of mens rea that the judgment in *Dilip N. Shroff's* case (supra) was upset. In *Dharamendra Textile Processors'* case (supra), after quoting from section 271 extensively and also considering section 271(1)(c), the court came to the conclusion that since section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The court went on to hold that the objective behind the enactment of section 271(1)(c) read with *Explanations* indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in *Dilip N. Shroff's* case (supra) was overruled by this court in *Dharamendra Textile Processors'* case (supra), was that according to this court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in case of *Dilip N. Shroff* (supra). However, it must be pointed out that in *Dharamendra Textile Processors'* case (supra), no fault was found with the reasoning in the decision in *Dilip N. Shroff's* case (supra), where the court explained the meaning of the terms 'conceal' and 'inaccurate'. It was only the ultimate inference in *Dilip N. Shroff's* case (supra) to the effect that mens rea was an essential ingredient for the penalty under section 271(1)(c) that the decision in *Dilip N. Shroff's* case (supra) was overruled."

The Constitutional validity of sub-section (1B) inserted in section 271 by the Finance Act, 2008, with retrospective effect from April 1, 1989, which provided that a direction for initiation of penalty proceedings in the order of assessment shall be deemed to constitute such satisfaction was challenged before the hon'ble High Court of Delhi in the case of *Ms. Madhushree Gupta* v. *Union of India* [2009] 317 ITR 107 (Delhi), wherein it has been held :

> "In our opinion the impugned provision only provides that an order initiating penalty cannot be declared bad in law only because it states that penalty proceedings are initiated, if otherwise it is dis-

1. [2010] 322 ITR 158 (SC). See also : *CIT* v. *Shyam Tex International Ltd.* [2011] 9 taxmann.com 268 (Delhi) ; [2011] 198 Taxman 200 (Delhi) (Mag.).

> cernible from the record, that the Assessing Officer has arrived at prima facie satisfaction for initiation of penalty proceedings. The issue is of discernibility of the 'satisfaction' arrived at by the Assessing Officer during the course of proceeding before him . . . *The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e., post-amendment* . . . If there is no material to initiate penalty proceedings, an assessee will be entitled to take recourse to a court of law. On the other hand, if the Assessing Officer's prima facie satisfaction is discernible from the record ordinarily, an assessee would be required to approach authorities under the statute . . . Furthermore, in the instant case we are dealing with a stage which relates to the initiation of penalty proceedings. The provision does not call for recording of reasons. Section 271(1)(c) of the Act requires only a manifestation and/or delineation of the Assessing Officer's prima facie satisfaction that the assessee has infracted the provisions of clause (c) of section 271(1) of the Act . . ." (emphasis[1] supplied)

Thus, in *Madhushree Gupta's* case (supra), the hon'ble High Court of Delhi held that the satisfaction should be discernible in the assessment order. Position post amendment is not much in variance with pre-amendment and the provisions will fall foul of article 14 of the Constitution, if the same is not read in the manner it has read, in fact, read down, the provisions to hold it Constitutional. Therefore, according to Delhi High Court, there is not much difference between the post-amendment and pre-amendment stage and the satisfaction is required to be arrived at in the course of assessment proceedings and should be discernible in the assessment order. Therefore, this provision makes it abundantly clear that satisfaction of the Assessing Officer before initiation of penalty proceedings is a must. The satisfaction should be that the assessee has concealed particulars of his income or furnished inaccurate particular of such income and even in the absence of those expressed words or findings recorded in the assessment proceedings, if a direction as aforesaid is mentioned, it constitutes satisfaction of the Assessing Officer. The hon'ble High Court of Delhi, after having given a categorical finding that the provision does not call for recording of reasons as section 271(1)(c) of the Act requires only a manifestation and/or delineation of the Assessing Officer's prima facie satisfaction that the assessee has infracted the provisions of clause (c) of section 271(1) of the Act, concluded that—"prima facie satisfaction of the

1. Here printed in italics.

Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings". The finding recorded by the hon'ble Delhi High Court with regard to recording of reasons not warranted by the provisions of section 271(1)(c) of the Act stands contradicted by the hon'ble High Court of Karnataka in the case of *CIT* v. *Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 (Karn) wherein it was pronounced that :

> "By the aforesaid deeming provision a legal fiction is created. When the assessment order contains a direction for initiation of penalty proceedings such order shall deem to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under clause (c) of section 271(1) of the Act. As the language of section 271 makes it clear before a direction is issued to pay penalty, the person issuing the direction must be satisfied about the condition mentioned in clause (c) of section 271(1). The question is, whether such satisfaction should be in writing. As the satisfaction has to be in the course of any proceedings and it is at the time of computation of the total income of any person and as it results in an assessment order which has to be mandatorily in writing, the satisfaction should be found in the said order. The existence of these facts is a condition precedent for initiation of penalty proceedings under section 271. This provision is attracted once in any such assessment orders, a direction for initiation of penalty proceedings under clause (c) of sub-section (1) is made. Thereby, it means even if the order does not contain a specific finding that the assessee has concealed income or he is deemed to have concealed income because of the existence of facts which are set out in *Explanation 1*, if a mere direction to initiate penalty proceedings under clause (c) of sub-section (1) is found in the said order, by legal fiction, it shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under said clause (c)."

Interestingly, a Division Bench of the Supreme Court, in *Mak Data P. Ltd.* v. *CIT* [2013] 358 ITR 593 (SC), after observing in its judgment that the Assessing Officer has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271(1)(c) read with section 274 of the Income-tax Act, 1961, observed :

> "The Assessing Officer has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the Assessing Officer is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of section

271(1)(c) has also been elaborately discussed by this court in *Union of India* v. *Dharamendra Textile Processors* [2008] 306 ITR 277 (SC) and *CIT* v. *Atul Mohan Bindal* [2009] 317 ITR 1 (SC)."

The Supreme Court's reliance on the aforesaid judgments is totally misplaced as *Dharamendra Textile Processors* (supra) and *Atul Mohan Bindal* (supra) are not the authority for the proposition that the Assessing Officer is not required to record his satisfaction during the course of assessment proceedings under section 271(1)(c) of the Act.

Judicial interpretation of the words "direction" and "satisfied" :

In the background of the entire gamut of case laws on the question as to whether satisfaction should be recorded in writing under section 271(1)(c) of the Act before initiating penalty proceedings and the amendment made by the Legislature by inserting sub-section (1B) in section 271 of the Act, two questions crop up, namely, the meaning of the word "direction" and the construction to be given to the word "satisfied" as used in section 271(1) of the Act in the absence of any amendment made in the latter provisions while introducing the deeming provision by way of the aforesaid provisions of sub-section (1B) of section 271 of the Act.

The word "satisfied" stands mentioned in various provisions of the Income-tax Act, 1961, namely, section(s) 14A(2)[1], 151[2], 153BD[3] and 153C[4], and recording of satisfaction in writing though not expressly provided for by these provisions has been held to be a condition precedent for conferring jurisdiction for initiating proceedings against an assessee under the said respective provisions. It is a settled principle of interpretation when certain words in an Act of parliament have received a judicial construction at the hands of one of the superior courts ; when the Legislature has repeated them, it should be conceived that the Legislature must be taken to have used them according to the meaning which such a superior court has

1. *Maxopp Investment Ltd.* v. *CIT* [2018] 402 ITR 640 (SC), *Godrej and Boyce Manufacturing Company Ltd.* v. *Deputy CIT* [2017] 394 ITR 449 (SC), *Eicher Motors Ltd.* v. *CIT* [2017] 398 ITR 51 (Delhi), *H. T. Media Ltd.* v. *Pr. CIT* [2017] 399 ITR 576 (Delhi).
2. *Chhugamal Rajpal* v. *S.P. Chaliha* [1971] 79 ITR 603 (SC), *Central India Electric Supply Co. Ltd.* v. ITO [2011] 333 ITR 237 (Delhi) ; *CIT* v. *S. Goyanka Lime and Chemicals Ltd.* [2015] 56 taxmann.com 390 (MP ; [2015] 231 Taxman 73 (MP), SLP dismissed by the hon'ble Supreme Court of India in *CIT* v. *S. Goyanka Lime and Chemical Ltd.* [2015] 64 taxmann.com 313 (SC) ; [2016] 237 Taxman 378 (SC) ; *Pr. CIT* v. *N. C. Cables Ltd.* [2017] 391 ITR 11 (Delhi).
3. Manish Maheshwari v. Asst. CIT [2007] 289 ITR 341 (SC).
4. *Pepsi Foods (P.) Ltd.* v. Asst. CIT [2014] 367 ITR 112 (Delhi), SLP filed by the Department/ Revenue dismissed by the Supreme Court in *Asst. CIT* v. *Pepsi Foods (P.) Ltd.* [2018] 89 taxmann.com 10 (SC) ; [2018] 252 Taxman 372 (SC) ; CIT v. *Mechmen* [2016] 380 ITR 591 (MP).

given to it and particularly when the Legislature used same word or expression in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout.[1] The word "direction" used in the provisions of sub-section (1B) of section 271 of the Act has not been defined under the Act and has received a judicial construction by the hon'ble Supreme Court in the case of *Rajinder Nath v. CIT*[2] wherein it has been held that a direction by a statutory authority is in the nature of an order requiring positive compliance and when it is left to the option and discretion of the Income-tax Officer whether or not to take action, it cannot be described as a direction. Thus, a direction is in nature of an order. Such an order which is in the nature of a direction to be passed by the Assessing Officer, being a quasi-judicial authority, is subject to the requirement of one of the facet of principles of natural justice, namely, recording of reasons in writing, in view of the expression "is satisfied" occurring in section 271(1) of the Act.

Recording of reasons :

The rule requiring reason to be recorded by quasi-judicial authorities in support of the orders by way of directions passed by them must be held to be a basic principle of natural justice which fundamentally governs the exercise of its power.[3] Recording of reasons is a soul of justice and every order, be it passed in exercise of the power which may be administrative or quasi-judicial in character, must contain reasons in support thereof. Giving of reasons in support of an order is considered to be the third principle of natural justice. An aggrieved party has a right to know the reasons in support of the decision. Speaking orders are necessary for the judicial review to be effective. This is one of the cardinal principle of natural justice.[4] If the statue requires recording of reasons, then it is the statutory requirement and, therefore, there is no scope for further inquiry. But even when the statue does not impose an obligation, it is necessary for the quasi-judicial authority to record reasons, as it is the "only visible safeguard against possible injustice and arbitrariness" and affords protection to that the person adversely affected. Reasons are the links between the materials on which

1. *Farrell* v. *Alexander* [1976] 2 All ER 721, page 736 ; *Central Bank of India* v. *Ravindra* [2001] 107 Comp Cas 416 (SC) ; *Banarasi Devi* v. *ITO,* AIR 1964 SC 1742, page 1745 ; *CIT* v. *Bansi Dhar* [1986] 1 SCC 523, page 538 ; AIR 1986 SC 421.
2. [1979] 120 ITR 14 (SC). See also : *Abdul Sattar M. Mokashi* v. CIT [1988] 174 ITR 368 (Karn), *CIT* v. *MWP Ltd.* [2014] 41 taxmann.com 496 (Karn) ; [2014] 264 CTR (Karn) 502.
3. *Siemens Engg. and Mfg. Co. of India Ltd.* v. *Union of India* [1976] 2 SCC 981 ; AIR 1976 SC 1785. See also : *Maneka Gandhi* v. *Union of India* [1978] 1 SCC 248 ; *Swadeshi Cotton Mills Co. Ltd.* v. *Union of India* [1981] 51 Comp Cas 210 (SC).
4. See : *Administrative Law,* Second Edition, 2012 by Justice C. K. Thakker at pages 394-395.

certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision, whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.[1] In *Siemens Engg. and Mfg. Co. of India Ltd.* (supra), the hon'ble Supreme Court, while holding that the rule requiring reasons to be recorded by authorities in support of the orders passed by them is a basic principle of natural justice, observed :

> "If courts of law are to be replaced by administrative authorities and Tribunals, as indeed, in some kind of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and Tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of their orders made by them. Then alone administrative authorities and Tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. *The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice* which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law." (emphasis[2] supplied)

The basic principle of law requires that every order passed by any administrative body or any quasi-judicial body and/or even by the judicial body must disclose the reasons assigned in the order so that the person concerned, who is affected thereby, may approach the higher forum and/or higher court assailing the decision thereof. Summarising the law with regard to recording of reasons, in *Kranti Associates (P.) Ltd.* v. *Masood Ahmed Khan* [2010] 9 SCC 496 ; [2010] 3 SCC (Civ) 852, it was pronounced by the hon'ble Supreme Court that :

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

1. *Union of India* v. *Mohan Lal Capoor* [1973] 2 SCC 836 ; [1974] SCC (L&S) 5 ; AIR 1974 SC 87.
2. Here printed in italics.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done, it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life-blood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process, then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.'

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See *David Shapiro in Defence of Judicial Candor* [1987] 100 Harward Law Review 731-737).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of *Strasbourg*

Jurisprudence. See [1994] 19 EHRR 553, at 562 para 29 and *Anya* v. *University of Oxford* [2001] EWCA Civ 405, wherein the court referred to article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

Thus, as rightly pointed out by the Constitutional Bench of the hon'ble Supreme Court in the case of *C. B. Gautam* v. *Union of India* [1993] 199 ITR 530 (SC) that :

> "The recording of reasons, which lead to the passing of the order is basically intended to serve a two-fold purpose : (a) that the 'party aggrieved' in the proceeding before the authority acquires knowledge of the reasons and, in a proceeding before the High Court or the Supreme Court (since there is no right of appeal or revision), it has an opportunity to demonstrate that the reasons which persuaded the authority to pass an order adverse to his interest were erroneous, irrational or irrelevant, and (b) that the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers."

Epilogue :

The amendment introduced with the insertion of the provisions of sub-section (1B) in section 271 of the Act has made the requirement of recording the satisfaction in writing explicit what was implicit. Be that as it may, the provisions of sub-section (1B) of section 271 of the Act should be harmoniously construed with the provisions of section 271(1)(c) of the Act by subjecting the power of satisfaction to be reduced in writing before notice for initiating penalty under the aforesaid provision is issued. The requirement of recording of satisfaction in writing ensures that penalty notices are not lightly issued and are not a result of any arbitrary exercise of power by the Assessing Officer, particularly when the penalty proceedings are independent and not a continuation of the assessment proceedings[1] ; as rightly pointed out by the three-judge Bench of the Supreme Court, in the case of *Hindustan Steel Ltd.* v. *State of Orissa* [1972] 83 ITR 26 (SC), "an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed

1. *Jain Bros.* v. *Union of India* [1970] 77 ITR 107 (SC).

unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute". Recording of satisfaction in writing would operate as a deterrent against possible arbitrary action by the authorities including the Assessing Officer invested with the quasi-judicial powers for initiating penalty proceedings on the grounds mentioned in section 271 of the Act and if such a requirement is not read into the said provisions, they would be violative of article 14 of the Constitution of India on account of non-compliance of one of the facet of principles of natural justice.
