Caselaw Analysis

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Doctrine of law of precedents : BPCL (2004) 8 SCC 579

- Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed
- Court's observations are not to be read as Euclid's theoems
- These observations must be read in the context in which they appear to have been stated
- Judgments of Courts are not to be construed as statutes.
- To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define.
- Judges interpret statutes, they do not interpret judgments.
- They interpret words of statutes; their words are not to be interpreted as statutes

List of cases for discussion

- **Sessa Goa Ltd. 2020-TIOL-1185-HC-MUM-IT-Goa**
- Shiv Kumar Sumitra Devi Smarak Shikshan Sansthan 422 ITR 468 All-Lucknow
- **PILCOM** **PILCOM TS-219-SC-2020**
- Gondia Beedi Leaves Contractors Association 422 ITR 404 Bby-Nagpur
- Maruti Suzuki 416 ITR 613 SC and Savita Kapila TS 343 HC 2020 Delhi
- Atul Projects India Pvt. Ltd. 422 ITR 478 Bby and Kunal Structure (India) Pvt. Ltd. 422 ITR 482 Guj
- Vedanta Ltd. 422 ITR 262 Mad.
- Mahender Pal Narang 423 ITR 23 P&H and Puneet Singh 415 ITR 215 P&H
- **Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)**
- NEW DELHI TELEVISION LTD **TS-197-SC-2020**

SESA GOA LIMITED

2020-TIOL-1185-HC-MUM-IT-Goa

Sessa Goa Ltd. 2020-TIOL-1185-HC-MUM-IT-Goa

- The question before the HC is

'w*hether Education Cess and Higher and Secondary Education Cess, collectively referred to as "cess" is allowable as a deduction in the year of its payment ?'.*

- the question which arises for determination is whether the expression "*any rate or tax levied*" as it appears in Section 40(*a*)(*ii*) of the IT Act includes *"cess*".

Section 40a(ii)

- any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains

Explanation 1.-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91

Explanation 2.-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A

High Court held

- There is no reference to any *"cess"*. Obviously therefore, there is no scope to accept the contention that *"cess"* being in the nature of a *"Tax"* is equally not deductable in computing the income chargeable under the head *"profits and gains of business or profession"*. Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(*a*)(*ii*) of the IT Act

- If the legislature intended to prohibit the deduction of amounts paid towards say, "e*ducation cess*" or any other "c*ess*", then, the legislature could have easily included reference to "c*ess*" in clause (*ii*) of Section 40(*a*) of the IT Act.

High Court held

- The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(*a*)(*ii*) which read as follows :

"(*ii*) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains"

- However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "*cess*" from the aforesaid clause from the Income-tax Bill, 1961. The effect of the omission of the word "*cess*" is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head "*profits and gains of business or profession".* Since the deletion of expression *"cess"* from the Income-tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(*a*)(*ii*) of IT Act and that too, under the guise of interpretation of taxing statute

- Circular No. F. No. 91/58/66-ITJ(19), dated 18th May, 1967 *confirmed the above position*

High Court held

- Section 10(4) of 1922 Act banned allowance of any sum paid on account of '*any cess, rate or tax levied on the profits or gains of any business or profession*'.

- In the corresponding Section 40(*a*)(*ii*) of the IT Act, 1961 the expression "*cess*" is quite conspicuous by its absence.

- In fact, legislative history bears out that this expression was in fact to be found in the Income-tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "*cess*" and consequently, this expression finds no place in the final text of the provision in Section 40(*a*)(*ii*) of the IT Act, 1961.

High Court held

- Though the claim for deduction was not raised in the original return or by filing revised return, the Appellant - Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed.

- Even if one proceeds on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, CIT(A) or TAT, before whom such deduction was specifically claimed was duty bound to consider such claim.

- Contention based upon the decision in *Goetze* is not acceptable

Anomaly

- Cess is on IT+SC
- IT is on total income
- If cess is allowed as a deduction, it will vary the total income
- If total income varies, it will vary IT, SC and again Cess
- This causes iteration or circular function

Other decisions so holding:

- Chambal Fertilisers and Chemicals Ltd. TS-489-HC-2018(RAJ)

- Reckitt Benckiser (I) Pvt. Ltd. [2020] 117 taxmann.com 519 (Kolkata - Trib.)

Nature of ‘cess’

- Section 40a(ii) uses ‘any sum paid on account of any rate or tax levied’. Tax is defined in section 2(43) to mean income tax and includes FBT.

- Section 2(3) etc., of the FA 2020 provides that ***the amount of income tax shall be increased by a surcharge,*** for the purposes of the Union

- Section 2(12) of the FA 2020 provides that the amount of income tax as increased by applicable surcharge ***shall be further increased by an additional surcharge, for the purposes of the Union, to be called as the “Health and Education Cess on income-tax”***

Nature of ‘cess’

- Surcharge is nothing but an additional tax : CCT v. Bajaj Auto 97 VST 24 SC

- As a general concept, income-tax includes surcharge : Suresh N. Gupta (SC) [2008] 297 ITR 322 (SC)

- K. Srinivasan’s case 83 ITR 346 SC : legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "income-tax" as employed in section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of article 271 of the Constitution

- Race Course Licence Fee is a fee and not a tax: Test to determine character of a levy, delineating 'tax' from 'fee' is the primary object of the levy and the essential purpose intended to be achieved. Delhi Race Club Ltd Vs UoI 2012-TIOL-51-SC-MISC

Nature of ‘cess’

- Lubrizol 187 ITR 25 Bby (delivered in the context of surtax) " ... If the word ‘tax’ is to be given the meaning assigned to it by s. 2(43), the word ‘any’ used before it will be otiose and the further qualification as to the nature of levy will also become meaningless." ;

- Approved in Smith Kline & French 219 ITR 589 SC : Section 10(4) of the 1922 Act or section 40(*a*)(*ii*) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. ….. the surtax is essentially levied on the business profits of the company computed in accordance with the provisions of the Act. Merely because certain further deductions [adjustments] are provided by the Surtax Act from the said profits, it cannot be said that the surtax is not levied upon the profits determined or computed in accordance with the provisions of the Act.

Related cases

1) Sec 40a(ii) does not apply to interest on TDS default : Selvel Advertising 59 ITR Tri SN 46 Kolk

2) Contra : CIT v Chennai Properties and Investments Ltd. (1999) 239 ITR 435 (Mad)

3) All liabilities for interest incurred under various sections of income tax are not allowed as held in the following cases

- Bharat Commerce & Industries Ltd (1998) 230 ITR 733 SC
- Usha Sales Ltd v CIT (2001) 119 Taxman 472 Del

Foreign tax

- *S. InderSingh Gillv. CIT [1963]* 47 ITR 284 (Bom.) : tax paid by the assessee on his foreign income in the foreign territory cannot be deducted while computing the total income

- Himson Textile Engineering Industries (2004) 267 ITR 612 : even tax paid by assessee on the income of the predecessor is also ineligible

- Reliance Infrastructure 2016-TIOL-3078-HC-MUM –IT : The foreign tax paid to the extent not allowed under section 91 is not barred by section 40(a)(ii) on real income theory

- **Elitecore Technologies TS-129-ITAT-2017(Ahd)] :** the 'higher wisdom' of Supreme Court which, while approving the HC ruling in Lubrizol, ruled that " "s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession...";

Shiv Kumar Sumitra Devi Smarak Shikshan Sansthan

422 ITR 468 All-Lucknow

Facts

- Assessee made an application for registration on 15.12.2014 i.e. in the assessment year 2015-16.
- The assessment in question is of the year 2011-12.
- Registration was given on 08.06.2015.
- The quantum order for AY 11-12 was pending before ITAT
- ITAT while passing order on 26.22.2018 grants the benefit of registration by relying on provisos below section 12A(2)

Section 12A(2) before amendment by FA2020

Where an application has been made on or after the 1st day of June, 2007, the provisions of sections 11 and 12 shall apply in relation to the income of such trust or institution from the assessment year immediately following the financial year in which such application is made.]:

- [Provided that where registration has been granted to the trust or institution under section 12AA, then, the provisions of sections 11 and 12 shall apply in respect of any income derived from property held under trust of any assessment year preceding the aforesaid assessment year, for which assessment proceedings are pending before the Assessing Officer as on the date of such registration and the objects and activities of such trust or institution remain the same for such preceding assessment year:
- Provided further that no action under section 147 shall be taken by the Assessing Officer in case of such trust or institution for any assessment year preceding the aforesaid assessment year only for non-registration of such trust or institution for the said assessment year:
- Provided also that provisions contained in the first and second proviso shall not apply in case of any trust or institution which was refused registration or the registration granted to it was cancelled at any time under section 12AA.

Section 12A(2) after amendment by FA2020

- Section 12A(2) is retained as it is

- A new first proviso is introduced

Provided *that the provisions of sections 11 and 12 shall apply to a trust or institution, where the application is made under*

*(a) sub-clause (*i*) of clause (*ac*) of sub-section (1), from the assessment year from which such trust or institution was earlier granted registration*

*(b) sub-clause (*iii*) of clause (*ac*) of sub-section (1), from the first of the assessment years for which it was provisionally registered:*

- Reference to section 12BA is made in addition to reference to section 12AA in the renumbered 2nd and 4th proviso

High Court held

- Interpretation of the proviso is given in ignorance of the main provision of Section 12A(2)

- It is required to make interpretation after taking into consideration the main provision along with the proviso and not by giving meaning to proviso in ignorance of substantive provision

- Benefit of Section 11 and 12 would be extended from the assessment year immediately following the financial year in which the application was given.

- In the instant case the application for registration was given on 15.12.2014 i.e. in the financial year 2014-15.

High Court held

- On registration of the Trust, benefit under Section 11 and 12 would be available to the assessee from the assessment year following the financial year in which application was given and not any previous year.

- The benefit of registration could not have been extended for the assessment year 2011-12, even if the matter was pending before the Tribunal when application for registration was submitted on 15.12.2014

- The proviso to sub-section 2 applies in a given circumstances, but cannot by making main provision of section 12 A as redundant.

High Court held

- In the instant case, the application for registration was then submitted on 15.12.2014. The registration was given on 08.06.2015.

- Since registration has been given on 08.06.2015, the benefit of Section 11 & 12 would be available for the following financial year in which application was made if the assessment proceedings for the relevant assessment year was pending till the date of registration.

- If the benefit of Section 11 and 12 is extended for the assessment year 2011-12, despite submission of the application for registration on 15.12.2014, it would be in contravention of sub-section 2 of Section 12.

- Tribunal has made the main provision redundant. The proviso has to be read along with main proviso and not in isolation and contradiction.

High Court held

- if in the proviso words "pendency of the assessment proceedings", would have been used then pendency of the appeal against the assessment could have been considered to be pendency of the assessment proceedings, but in the instant case the words used are "pendency of the assessment proceedings before the Assessing Officer".

- the instruction of the CBDT and find it to be contrary to the proviso to Section 12 A

- The Tribunal was required to make distinction between charging provision where benefit of ambiguity is given to the assessee and the exemption notification or clause where interpretation is to be given in the form of Revenue. The issue aforesaid has been recently considered and decided by the Apex Court in the Case of *Commissioner of Customs (Import)* v. *Dilip Kumar & Company* [2018] 9 SCC 1

High Court on proviso

- Interpretation of High Court on function of a proviso may not be right and contrary to decisions of SC particularly in **S. Sundaram Pillai (1985) 1 SCC 591**

To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the every concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision

High Court on proviso

- "This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146)

- CIT v. P. Krishna Warriar [1964] 53 ITR 176 SC : rejected the argument of the revenue that a proviso in a statute be always read as limitation upon the effect of the main enactment

"……..But it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision, but is in itself a substantive provision.

High Court on proviso

- In the words of Maxwell, "the true principle is that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail".

- "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails ..... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256 PC).

- Proviso should not be construed as nullifying the enactment or as taking away completely a right conferred : Casio India Co. Pvt. Ltd 91 VST 231 SC

High Court on ‘pending’

- High Court held that mere use of word ‘pending’ is different from ‘pending before the AO’.

- The aforesaid interpretation appears correct.

- However, if a matter is remanded to AO by ITAT, the matter becomes again pending before the AO and the benefit of proviso is required to be extended although in paragraph 21, the High Court considers that such remand as not eligible

High Court on 'charging v. exemption'

- High Court relied on *Commissioner of Customs (Import)* v. *Dilip Kumar & Company* [2018] 9 SCC 1

- **In Ramnath And Company Vs CIT** 2020-TIOL-100-SC-IT followed Dilip Kumar for the purpose of Income tax and held that the exemption provisions have to be interpreted on the principles mentioned in Wood Papers Ltd 83 STC 251 (SC)

Implication of not passing order within time

- In SOCIETY FOR THE PROMN.OF EDN., ALLAHABAD **[TS-85-SC-2016], SC ruled that deemed registration will be effective from expiry of six months**

- **Implication of above ruling in the context of provisos to section 12A(2)**

PILCOM

TS-219-SC-2020

Facts

- PAK-INDO-LANKA, JOINT MANAGEMENT COMMITTTEE (known in short as PILCOM) is actually a Committee formed by the Cricket Control Boards/Associations of three countries viz. Pakistan, India and Sri Lanka, for the purpose of conducting the World Cup Cricket tournament for the year 1996

- These three host countries were required to pay varying amounts to the Cricket Control Boards/Associations of different countries as well as to ICC in connection with conducting the preliminary phases of the tournament and also for the purpose of promotion of the game in their respective countries.

- For the purpose of conducting the final phase of the tournament in India, Pakistan and Sri Lanka, a Committee was formed by the three host members under the name PILCOM.

Facts

- Two Bank accounts were opened by PILCOM in London to be operated jointly by the representatives of Indian and Pakistan Cricket Boards, in which the receipt from sponsorship, T.V. rights etc. were deposited and from which the expenses were met.

- The surplus amount remaining in the said Bank account was decided to be divided equally between the Cricket Boards of Pakistan and India after paying a lump-sum amount to Sri Lanka Board as per mutual agreements amongst the three Boards.

	(i)	**Guarantee money paid to 17 countries which did not participate in the World Cup matches**	**17,00,000**
	(ii)	Amounts transferred from London to Pakistan and Sri Lanka for disbursement of prize money in those countries	1,20,000
	(iii)	Payment to ICC as per Resolution dated Feb. 2, 1993	3,75,000
	(iv)	Payment for ICC Trophy for qualifying matches between ICC Associate members held outside India	2,00,000
	(v)	Guarantee money paid to South Africa and United Arab Emirates both of which did not play any match in India	3,60,000
	(vi)	Guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom double taxation avoidance agreements exist	8,85,000
	(vii)	Guarantee money paid to Pakistan, West India,	7,10,000

ITAT and HC

- ITAT that items (i) to (v) are not taxable in India
- It was held that 17/37 of items (vi) and (v) i.e. 45.94% is chargeable to tax in India
- HC confirmed the above finding
- HC held that the source of income of the foreign Cricket Associations was not the grant of the privilege for the bid money and but has relation to the matches played in India
- HC held that in terms of section 115BBA read with section 194E, tax is deductible irrespective of whether the income is chargeable to tax or not and DTAA cannot be applied for determining TDS obligations. DTAA applies to real assessee and not the deductor

SC held as

- SC refers to sections 2(24)(ix), 5(2), 9, 115BBA and 194E

- Applying Performing Society 106 ITR 11 SC, the SC did not agree that privilege is the source of income and source of income is playing matches in India

- The expression *'in relation to'* in sec 115BBA emphasises connection between game or sport played in India on one hand and Guarantee Money paid or payable to NR Sports Association on the other. Once the connection is established, the liability under the provision must arise

- TDS u/s 194E of the Act is not affected by the DTAA and in case the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act.

Source of income

- As per ED Sasson 26 ITR 27 SC, income accrues when there is a legal right to receive

- Legal right to receive is traceable to contract and therefore, contract [i.e. grant of privilege] could be regarded as a source of income

- In Kunwar Trivikram Narain Singh (1965) 57 ITR 29 SC, it was held that in certain circumstances the contract itself can be the 'source of income'

- The observations of the Judicial Committee in Rhodesia Metals Ltd. v. CIT [1941] 9 ITR (Suppl.) 45 (PC) that source of income is not a legal concept but a common sense concept is approved by the Supreme Court in CIT v. Lady Kanchanbai [1970] 77 ITR 123 (SC)

Source of income

- SC need not have embarked on source of income concept

- As it could be income from business connection in India [matches played in India], the same could have been taxed in India under section 9(1)(i) irrespective of source of income

- If playing matches were to be regarded as a source in India, carrying out any activity outside India is to be regarded as a source outside India and this could be argued to tax payer's advantage in the context of section 9(1)(v)(b)/(vi)(b)/(vii)(b) relating to interest, royalty and FTS

DTAA and TDS

- Section 194E does not use ‘rate or rates in force’ and hence section 2(37A)(iii) which defines the said phrase as including DTAA rates where applicable, does not apply

- However, an inter-relation between section 90, sections 4&5 and Chapter XVII would still require the application of DTAA even for the purpose of TDS

- Azadi Bachao 267 ITR 706 SC says sections 4&5 are subservient to section 90

- Ily Lily 312 ITR 25 SC says Chapter VII is subservient to sections 4&5 and TDS is a vicarious liability. It is clear from sections 4(2) and 190 as well

- Thus, TDS is sub sub servient to section 90

DTAA and TDS

- Even otherwise, the ratio in PILCOM would not apply to section 195(1) which uses the phrase ‘rate or rates in force’

- Section 2(37A)(iii) which applies to section 195 provides for application of DTAA rates wherever applicable

Gondia Beedi Leaves Contractors Association

422 ITR 404 Bby-Nagpur

Facts

- question involved is whether the members of the petitioner-association, who are the contractors of Tendu leaves (a forest produce), are entitled to claim exemption under sub-section (1A) of Section 206C of the Income Tax Act, 1961 from the collection of tax at source from them by the seller, namely, the Forest Department of the State of Maharashtra?

- The members of the petitioner-association are registered Tendu contractors having separate registrations under the Maharashtra Forest Produce (Regulation of Trade) Act, 1969 as traders and not as manufacturers

- Department changed its earlier stance and advised forest department to collect tax under section 206C(1) holding that exemption under section is not available

206C(1) and (1A)

- 206C. (1) Every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income-tax

(ii)	**Tendu leaves**	**Five per cent**

- (1A) Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods referred to in column (2) of the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes.

Process carried out by the buyer

- Pruning
- Plucking, bundling and tying
- Drying and sprinkling water
- Transportation to collection centre where drying and weathering takes place
- Sprinkling of insecticides
- Rinsing, shifting and arranging bundles
- Stacking and packing

It is only after completion of this entire process in the prescribed manner the leaves are ready for sale to the manufacturer of bidi

HC held as

- As non effecting TCS would entail penalty and prosecution and as wrong effecting of TCS would not create harm, it is necessary to hold that TCS is required
- Wrongly distinguishes *Chowgule & Co. Pvt. Ltd.* v. *Union of India* [1981] 1 SCC 653 which was held in the context of section 8 of CST Act but using the same language as section 206(1A) where the SC clearly held that transportation is a process
- Wrongly enhances processing as processing resulting in manufacture
- Misconstrues the placement of the word 'processing' in between 'manufacturing' and "or producing articles or things" under sub-section (1A) is also significantly indicate such intention of the Legislature.
- As members are registered as traders under section 4(1) of the Regulation of Trade Act and not as manufacturers under section 11 of the said Act

Manufacture

- **India Cine Agencies Vs CIT 308 ITR 98 SC**

- Arihant Tiles and Marbles P. Ltd. [2010] 320 ITR 79 (SC)

- **Oracle Software 320 ITR 546 SC**

Maruti Suzuki 416 ITR 613 SC

and

Savita Kapila TS 343 HC 2020 Delhi

Maruti Suzuki India Ltd [2019] 416 ITR 613 (SC)

- AY 12-13

- On 29 January 2013, amalgamation of SPIL with MSIL was approved by the High Court with effect from 1 April 2012.

- On 2 April 2013, MSIL intimated the assessing officer of the amalgamation.

- On 26.09.2013, Scrutiny started by issuing of a notice under Section 143(2), followed by a notice under Section 142(1) to SPIL

- On 11 March 2016, a draft assessment order was passed in the name of SPIL

Maruti Suzuki India Ltd [2019] 416 ITR 613 (SC)

- MSIL participated in the assessment proceedings of the erstwhile amalgamating entity, SPIL, through its authorized representatives and officers

- On 12 April 2016, MSIL filed its appeal before the Dispute Resolution Panel[9] as successor in interest of the erstwhile SPIL, since amalgamated

- On 14 October 2016, the DRP issued its order in the name of MSIL (as successor in interest of erstwhile SPIL since amalgamated)

- The final assessment order was passed on 31 October 2016 in the name of SPIL (amalgamated with MSIL)

ITAT and HC

- ITAT quashed the assessment order being passed on non existent entity
- HC dismisses department appeal
- Department filed an appeal to SC

Revenue's arguments in SC

- The names of both the amalgamated company and the amalgamating company were mentioned in the draft and final assessment order
- Defect is technical and is curable under section 292B
- The amalgamating company was duly represented by the amalgamated company.
- No prejudice was caused to any of the parties by the assessment order

Finding of SC

- upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed

- a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL followed by a notice under section 142(1)

- prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012

Finding of SC

- notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation.

- In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was *void ab initio*.

- SC did not consider favourably the argument of revenue that both names were mentioned in the assessment order

Take away: Doctrine of merger:

- When the decision of Delhi HC in Spice Enfotainment was challenged in SC, the SLP was granted and upon same, it became Civil Appeal and the SC dismissed the CA without a speaking order.

- Dismissal of SLP without speaking order and dismissal of CA without speaking order are not one and same : *Kunhayammed* 245 ITR 360 (SC)

- Dismissal of SLP with a speaking order : Though the doctrine of merger does not apply, the law stated or declared would be binding in terms of Article 141

Spice Enfotainment v. Skylight Hospitality

- Spice is a case of dismissal of CA whereas Skylight is a case of dismissal of SLP
- Spice was a case of amalgamation whereas Skylight was a case of conversion of a company into LLP
- In Skylight, all the prior records like tax evasion petition, reasons to believe and approval of PCIT referred to successor and only the notice was issued in the name of predecessor.
- This indicated that the notice was always meant to be on the successor
- Issue of notice on predecessor therefore is a mistake curable under sec 292B

Take away: Prior intimation v. participation

- It was held that Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law

- It was also held that despite intimation to the department of the fact of amalgamation, department issued notice on SPIL

- What if there is no prior intimation : Dalmia Cement 420 ITR 339 SC

- Karnataka HC in the case of eMudra WP 56004/2018 dated 10.12.19 held that representation in amalgamation proceeding by revenue would also mean a prior knowledge

Take away: Notice or assessment on dead person

- Would this ratio apply in the case of death of a person
- Would there be a requirement of intimation in case of death
- Section 159 does not require such intimation unlike sections 176(3) & 178(1)
- In Alamelu Veerappan [2018] 95 taxmann.com 155/257 Taxman 72 (Mad.), it was observed by Madras HC that the revenue did not show any provision requiring such intimation
- SC takes note of Alamelu Veerappan

Savita Kapila : Delhi HC decision on 16.7.2020

- The case of one Mr. Mohinder Paul Kapila was selected under Section 147/148 of the Act 1961, after recording of reasons and approval of PCIT-15, Delhi on 28th March, 2019.

- However, late Shri Mohinder Paul Kapila had already expired on 21st December, 2018. The deceased assessee is survived by two sons and two daughters

- Petitioner informed the death on 15.10.2019

- A final SCN dated 25.11.19 was issued to Assessee, through legal heir, directing to file the return &produce documents by 28t.22.19, failing which Section 144 would be invoked

- Proceedings were transferred to PAN (AWZPK7699E) of one of the legal heir of the deceased assessee-Ms. Savita Kapila [Petitioner] on 27.12. 19 and on the same date the impugned assessment order was on the same day

Savita Kapila : Delhi HC decision on 16.7.2020

- Maruti Suzuki which dealt with prior intimation was distinguished

- In Alamelu Veerappan [2018] 95 taxmann.com 155/257 Taxman 72 (Mad.), and ***Rajender Kumar Sehgal v. ITO 2018 (12) TMI 697 (Delhi*** it was observed by Madras HC that the revenue did not show any provision requiring such intimation

- Alamelu Veerappan was followed

Other decisions on the identical issue

- ***Sumit Balkrishna Gupta (2019) 2 TMI 1209 – Bombay***
- ***Chandreshbhai Jayantibhai Patel 2019 (1) TMI 353 – Gujarat***
- ***Vipin Walia v. ITO 2016 (2) TMI 524 (Delhi)***
- ***Braham Prakash v. ITO 2004 (9) TMI 49 (Delhi)***
- ***Rajender Kumar Sehgal v. ITO 2018 (12) TMI 697 (Delhi***
- ***Smt. Sudha Prasad (2005) 275 ITR 135 (Jharkhand) Adverse***

Incidental issue

- Consider a case where the notice is issued after the appointed date but before the date of order of HC/NCLT approving amalgamation.

- Can the AO continue the proceedings against the successor or should a new notice be issued to the successor?

- Does the amalgamation scheme approved provide for such continuation?

- What if the order would already have been passed prior to the date of order of HC/NCLT

- Effect of Marshall Sons & Co.

Incidental issue

- In Spice Enfotainment, notice was issued after appointed date but before the date of order of court sanctioning merger

- Delhi HC had held that proper course of action is to begin the proceeding afresh by issue of notice under section 143(2) on the successor provided of course the same is within the period of limitation.

- The aforesaid decision has merged with that of SC upon dismissal of CA

Take away: Consistency

- SC reiterated the consistency principle and held that there is a significant value which must attach to observing the requirement of consistency and certainty.

- SC recognises that individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable

Seshasayee Steels Pvt Ltd

115 taxmann.com 5 (SC)

Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- On 15.05.1998, assessee land owner entered into an agreement to sell with one Vijay Santhi Builders Limited for Rs.5.5 crores

- It gave permission to the developer to start advertising, selling, construction on the land herein mentioned

- On 27.11.1998, a Power of Attorney was executed, by which, the assessee permitted the developer to execute and join in execution the necessary number of sale agreements and/or sale deeds in respect of the schedule mentioned property after developing the same into flats.

- The Power also enabled the Builder to present before all the competent authorities such documents as were necessary to enable development on the property and sale thereof to persons.

Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- On 19.07.2003, a Memo of Compromise was entered into as agreement to Sell ran into dispute.

- AO passed an order under section 147/144 treating the entire consideration as capital gain for AY 2004-05.

- ITAT agreed with the CIT(A) and found that on or about the date of the agreement to sell, the conditions mentioned in Section 2(47)(v) of the I.T. Act could not be stated to have been complied with, in that, the very fact that the compromise deed was entered into on 19.07.2003 would show that the obligations under the agreement to sell were not carried out in their true letter and spirit.

- As a result of this, Section 53A of the Transfer of Property Act, 1882, (hereinafter referred to as 'T.P. Act' for brevity) could not possibly be said to be attracted.

Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- Memo of Compromise dated 19.07.2003 stated that various amounts had to be paid by the Builder to the owner so that a complete extinguishment of the owner's rights in the property would then take place.

- The last two payments under the compromise deed were contingent upon one M/s.Pioneer Homes also being paid off, which apparently was done.

- ITAT held that *the transfer took place during the assessment year 2004-05 as the last cheque is dated 25.01.2004.*

Assessee's arguments

- The deemed transfer in fact took place during previous year 1998-99 under section 2(47)(v) as possession was handed over

- In the alternative, the deemed transfer took place during previous year 1998-99 under section 2(47)(vi) as power of attorney was executed

- Therefore, assessee is not liable to tax in AY 2004-05

SC held as follows:

- Vide the agreement only a license was given to another upon the land for the purpose of developing the land into flats and selling the same.

- Such license is not 'possession’ under Section 53A,

- Possession is a legal concept, and which denotes control over the land and not actual physical occupation of the land.

- Section 2(47)(v) is therefore not attracted.

SC held as follows:

- Reliance was placed on. *Balbir Singh Maini (2018) 12 SCC 354 = 2017-TIOL-374-SC-IT*,

- The expression "enabling the enjoyment of" in section 2(47)(vi) must take colour from the earlier expression "transferring", so that it can be stated on the facts of a case, that a de facto transfer of immovable property has, in fact, taken place making it clear that the de facto owner's rights stand extinguished.

- On the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even de facto.

- Therefore, section 2(47)(vi) is therefore not attracted.

SC held as follows:

- On the basis of facts found by the ITAT, the assessee's rights in the said immovable property were extinguished on the receipt of the last cheque, as also that the compromise deed could be stated to be a transaction which had the effect of transferring the immovable property in question.

- Countering the contention that the compromise deed may not possibly fit into any of the pigeonholes of section 2(47), the court held that the pigeonhole that would support the orders under appeal would be Section 2(47)(ii) and (vi) of the I.T. Act.

Take away : Section 2(47)(v)

- Adverting to section 2(47)(v), the most important aspect is what the court held - *a license per se cannot be said to be 'possession' within the meaning of Section 53A*.

- According to the court, possession for this purpose is a legal concept, and which denotes control over the land and not actual physical occupation of the land.

- Therefore, unless and until, the agreement transfers the legal possession either expressly or by necessary implication, section 53A of the TP Act and consequently section 2(47)(v) is not attracted.

Take away : Section 2(47)(v)

- If JDA were to expressly provide that the instant case is not covered by section 53A of the TP Act and what is conferred is only a permissive license under section 52 of the Easements Act, 1882, section 53A of the TP Act would not apply as the legal possession is not transferred.

- The aforesaid position is not affected by the mere fact that the owner has executed a power of attorney conferring power on the developer even to execute sale deeds in favour his customers.

- As this decision may itself provide for an escape route from the rigours of section 2(47)(v), there may not arise a scope to apply section 45(5A) in such cases.

Take away : Section 2(47)(vi)

- Adverting to section 2(47)(vi), the court held that while the said clause was not attracted in PY 1998-99 in the year of execution of power of attorney, the same was attracted in PY 2004-05 when the compromise deed was fully implemented.

- The court held that mere execution of power attorney would not suffice unless there is in substance a transfer viz de-facto transfer.

- According to the court, while the power of attorney did not effect a de-facto transfer, the compromise deed did.

- Interestingly, while ruling out applicability of section 2(47)(v), the court insisted on a legal possession and not physical control whereas while ruling out applicability of section 2(47)(vi), the court insisted on a de-facto transfer.

Take away

- This decision upsets various rulings which applied section 2(47)(v) despite a specific clause in the sale agreement or JDA which provided that the instant case is covered by section 52 of the Easements Act and not covered by section 53A of TP Act.

- The statement in Circular No. 495, dated September 22, 1987 that section 2(47)(vi) would apply to “power of attorney” transactions can now be applied only when there is a de-facto transfer which should go beyond mere execution of power of attorney.

- This ruling may run counter to decision in **Sh Sanjeev Lal Vs CIT** **2014-TIOL-63-SC-IT which held that** the agreement to sell executed on 27th December, 2002 can be considered as a date on which the property had been transferred.

Take away : Form v. substance

- This ruling in so far it deals with possession appears to tilt towards the form rather than the substance and to this extent overlooks ‘substance over form’.

- Whether the GAAR provisions of Chapter X-A would still apply in such case would depend on prevailing facts and circumstances of a particular case.

- Needless to say that the revenue should be able to establish that a particular case is covered by section 96 to be regarded as an impermissible avoidance arrangement and the tax benefit does not exceed the threshold applicable at the relevant point of time.

Take away : Benami Law

- Benami Property Transactions Act, 1988 has been amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (BTP Amendment Act).

- The rules and all the provisions of the BTP Amendment Act came into force on 01.11.2016.

- The courts with the exception of Chattisgarh High Court have held the 2016 amendments to be prospective.

- On the basis of per section 2(47)(v) before the aforesaid interpretation, an argument was being taken that the effective transfer took place before 01.11.2016 and hence the amended provisions are not applicable.

- Post aforesaid interpretation, it is necessary to establish transfer of legal possession before the aforesaid date to argue on non applicability of amended provisions.

Atul Projects India Pvt. Ltd. 422 ITR 478 Bby and

Kunal Structure (India) Pvt. Ltd.
422 ITR 482 Guj

Vedanta Ltd.

422 ITR 262 Mad.

Mahender Pal Narang
423 ITR 23 P&H and

Puneet Singh
415 ITR 215 P&H

NEW DELHI TELEVISION LTD

TS-197-SC-2020

NEW DELHI TELEVISION LTD TS-197-SC-2020

- AY 2008-09

- NDTV is an Indian company engaged in running television channels of various kinds.

- It has various foreign subsidiaries which inter alia includes NNPLC of UK

- Loss return filed by NDTV was picked for scrutiny and assessment order was passed on 03.08.2012 making an TP addition of Rs.18.72 Cr on an implied guarantee wrt step-up coupon bonds [redeemable after 5 years at 7.5% premium] by NNPLC worth USD 100 mn.

NEW DELHI TELEVISION LTD TS-197-SC-2020

- NNPLC had issued the aforesaid bonds which were prematurely redeemed at a discounted price of USD 74.2 mn.
- Although, NDTV had agreed to give guarantee, it finally did not do so.
- AO felt that NNPLC could not have issued bonds without an assurance from NDTV and such assurance should be treated as a guarantee
- He computed guarantee fee at 4.68% and made the addition of Rs.18.72 Cr
- NDTV challenged the said addition before CIT(A)/ITAT

NEW DELHI TELEVISION LTD TS-197-SC-2020

- On 31.03.2015, a notice u/s 148 was issued.

- Reasons are as follows;

- In AY 2009-10, DRP held that monies raised by various subsidiaries in Netherland and UK were the funds of NDTV
- NNPLC is a post box company in UK and could not have raised USD 100mn which was prematurely redeemed at discount and hence entire USD 100mn is actually the income of NDTV which has escaped assessment

- While disposing the objection, AO invokes 2nd Proviso to section 147

- Writ petition in Delhi HC met with dismissal

SC took up the following contentions:

- Is there a reason to believe

- Did the assessee make full and true disclosure

- Could the revenue have invoked 2nd proviso

SC held as follows: Change of opinion

- SC at the outset did not accept the argument that once the transaction of stepup coupon bonds has been accepted to be correct, then the revenue cannot reopen the same and doubt the genuineness of the transaction

SC held as follows: Reason to believe

- The material disclosed in the assessment proceedings for the subsequent years as well as the material placed on record by the minority shareholders form the basis for taking action under Section 147 of the Act.

- At the stage of issuance of notice, the assessing officer is to only form a prima facie view.

- In our opinion the material disclosed in assessment proceedings for subsequent years was sufficient to form such a view. We accordingly hold that there were reasons to believe that income had escaped assessment in this case.

SC held as follows: Full and True Disclosure

- Assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer.

- What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts.

- We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts.

- It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuiness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew

SC held as follows: 2nd Proviso

- The notice is conspicuously silent with regard to the second proviso.
- It does not rely upon the second proviso and basically relies on the provision of Section 148 of the Act.
- The reasons communicated to the assessee on 04.08.2015 mention 'reason to believe' and nondisclosure of material facts by the assessee.
- There is no case set up in relation to the second proviso either in the notice or even in the reasons supplied on 04.08.2015 with regard to the notice.

SC held as follows: 2nd Proviso

- It is only while rejecting the objections of the assessee that reference has been made to the second proviso in the order of disposal of objections dated 23.11.2015

- In our view this is not a fair or proper procedure.

- If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso.

- The assessee must be put to notice of all the provisions on which the revenue relies upon.

Take away: Factors not considered by SC

- SC did not consider the following contentions/potential contentions

❑Change of opinion – review v. reassess

❑Did any income ever arise for so called escapement?

❑Even if any income arose, who did it arise to?

❑Could the subsidiary structure have been ignored in the absence of GAAR

❑Is not department barred by 3rd Proviso - the income involving matters which are the subject matter of any appeal, reference or revision

Take away: Review v. Reassessment

- SC not agreeing to inability of department to review the transaction already examined by it in scrutiny is without analysis of precedent caselaw

- Change of opinion is an all time defence available irrespective of first proviso and second proviso – this is a safeguard against abuse : Kelvinator 320 ITR 561 SC [para 4]

- Merely because there is an adverse finding in the subsequent assessment years per se would not give the power to review

- Past decisions relied upon by SC only held that finding in the subsequent AY could form an information and hence a tangible evidence.

- Before DRP for AY 2009-10, revenue continued with its addition of BG commission in respect of the very same issue of USD 100 mn.

Take away: Reason to believe

- SC's line of reasoning seems to be

❑At the stage of reopening only prima facie view of escapement of income would suffice - A

❑Finding in the subsequent assessment years and tax evasion petitions filed by minority shareholders constitute tangible material – B

❑B is sufficient for A. Therefore, there is a valid reason to believe

- What was not considered is whether the above link by itself sufficient to overcome the bar on change of opinion

- SC's reliance on Phoolchand 203 ITR 456 SC on this aspect is an error

Take away: Reason to believe

- It is necessary that subsequent fact should bring about the falsity of past claim

- Having held that there is no failure to make full and true disclosure, it is not discernible how so called finding for subsequent AY would permit review of what was already considered during assessment year.

- Techspan 404 ITR 10 SC

❑Phrase ‘Reason to believe’ cannot be liberally interpreted – para 16

❑If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings – para 12

❑However, if the issue was considered during the assessment proceedings, reopening is vitiated by change of opinion – para 13

Take away: Full and true disclosure

- SC holds that assessee made full and true disclosure on the basis of communication between assessee and department during assessment proceeding

- It was held that if the revenue wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts.

- This finding supplements the understanding the scope of Explanation 1. Once assessee furnishes primary facts, if any secondary facts are needed, it is for department to ask for the same.

Take away: Full and true disclosure

- As assessee obtained exemption under company law from disclosure of details of its subsidiaries, it is not expected to furnish this information to the AO, although AO asked for the same during original proceedings

- Would this mean that exemption from disclosure would reduce the scope of Explanation 1

Take away: Revenue cannot blow hot and cold

- Revenue argued before HC not on 1st proviso but on 2nd proviso
- In fact, revenue contended that as 2nd proviso is attracted, 1st proviso need not be considered.
- However, in SC, the revenue invokes 1st proviso and argues that there is a failure to make full and true disclosure
- Revenue cannot blow hot and cold at the same time.

Take away: Revenue cannot improve reasons

- Both the notice and reasons are silent on invocation of 2nd Proviso
- Such contention is taken only in order overruling objection
- High Court's holding that reason cannot be improved by relying on Mohinder Singh Gill is not challenged by revenue before SC – however, revenue is entitled to defend the HC order on a ground which may have been decided against it by the HC [Order XLI rule 22 of the Code of Civil Procedure, 1908]
- However, the assesee should not be prejudiced or be taken by surprise
- If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso.

Take away: Second innings to Revenue?

- Having said that it would not express any opinion on foreign asset, SC says revenue may issue fresh notice in terms of second proviso and both parties may raise all contentions as regards validity of such notice

- Would this mean a finding or direction under section 150(1)?

- 2nd Proviso to section 147 - *in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year*

- Section 149(1)(c) gives a period of 16 years in such case

Take away: Second innings to Revenue?

- However, defence of ‘change of opinion ‘ is always available

- Defence of ‘change of opinion’ is a separate defence as compared to ‘Full and true disclosure’

- Before DRP for AY 2009-10, revenue continued with its addition of BG commission in respect of the very same issue of USD 100 mn.

Take away: How section 68 could be invoked?

- For AY 2009-10, department treated issue of shares of USD 150 mn by Netherland subsidiary [NS] as unexplained cash of NDTV

- NS issued shares at a price of Rs.7015 per share as against the face value of Rs.45 [totalling to Rs.642 Cr]

- The shares were bought back very next year at a Rs.634 per share leaving a huge balance with NS [Rs.7015-Rs.634], totalling to Rs.58 Cr

- This left with the investor Universal Studios BV with a loss of Rs.584 Cr and with a cash of like amount with NS

Take away: How section 68 could be invoked?

- A minority shareholder of NDTV alleged that the money introduced in NS was shifted to NDTV's another subsidiary in Mauritius, from where it was taken to NDTV's subsidiaries in Mumbai, which finally merged in NDTV.

- NS was placed under liquidation on 28.03.2011.

- ITAT on further appeal upheld that there is round tripping

Take away: How section 68 could be invoked?

- Scope of section 68 : money should be found credited in the books of the assessee

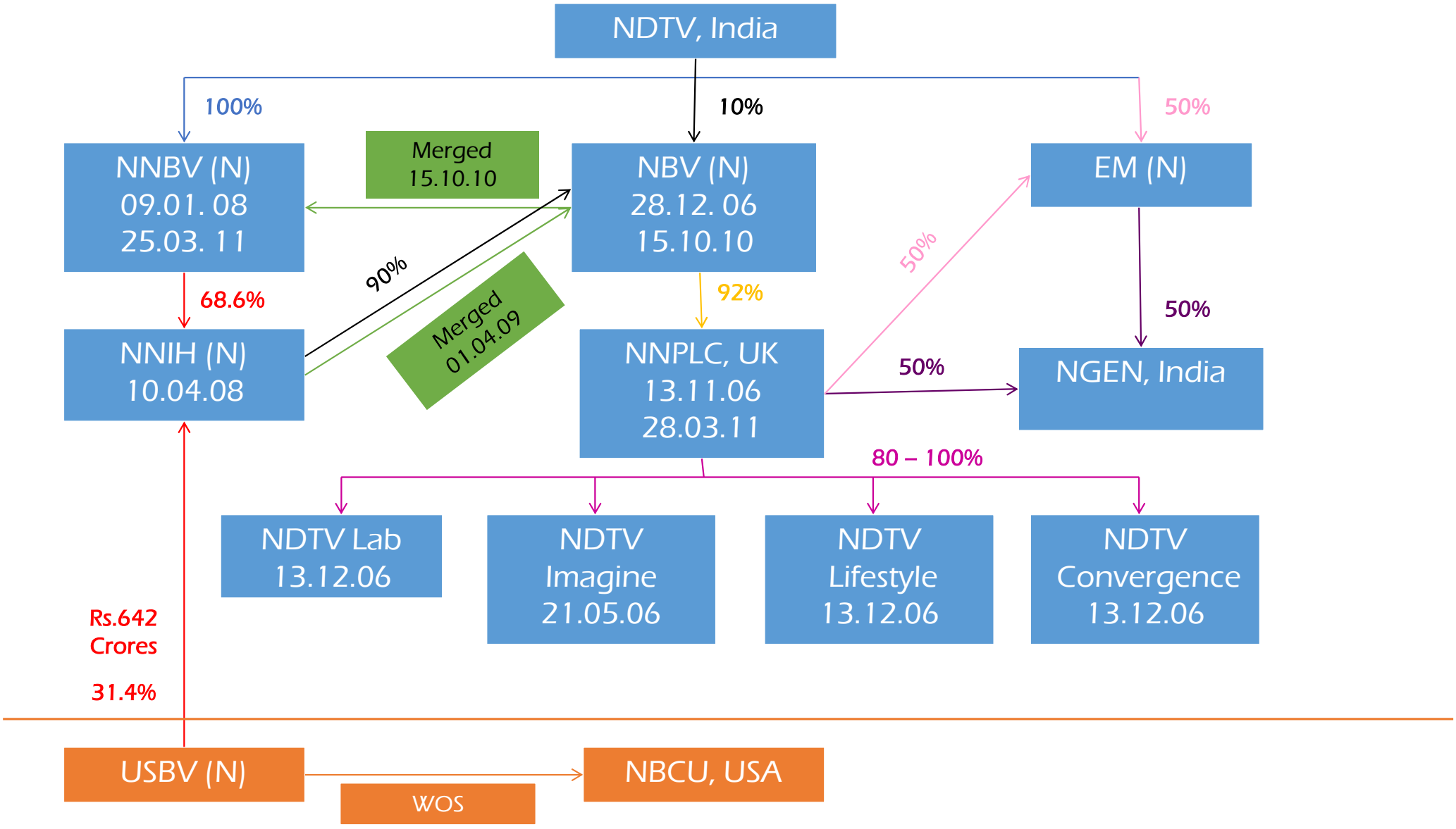
- Can money found credited in books of subsidiary be regarded as credit in NDTV's books

- Can lifting of corporate veil be invoked selectively for a particular year particularly when GAAR provisions are not applicable?

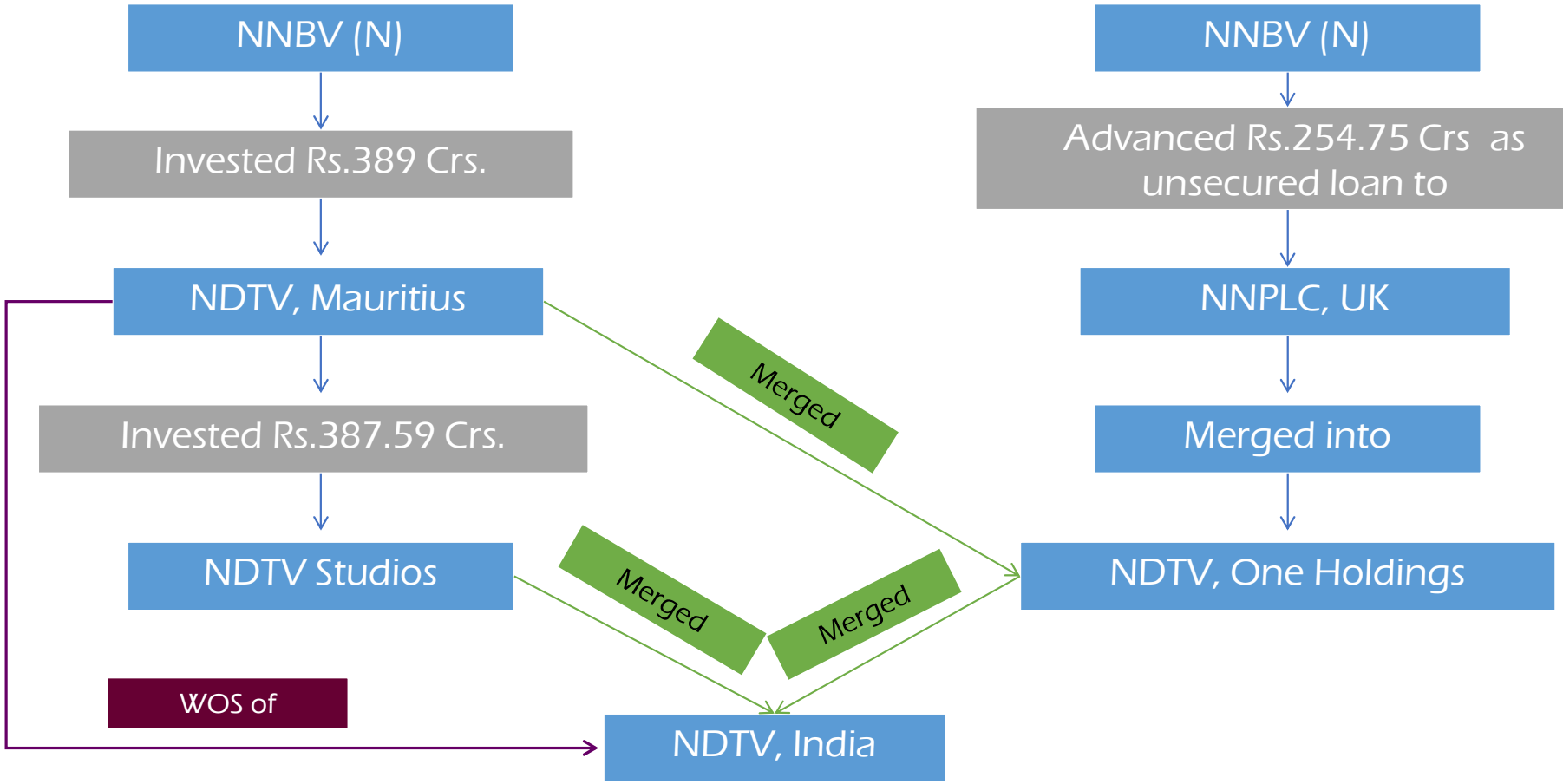
- Even otherwise, how entire USD 100 mn [Rs.400 Cr] can be taxed in the hands of NDTV when NS bought back the bonds by paying USD 72.4 mn leaving only USD 27.6 mn?

Take away: GAAR

- If GAAR provisions were to exist, what would have been the situation?
- How would Chapter X-A read with Section 144BA have been applied?
- There was an allegation of round tripping – section 97(2) defines it as transfer of funds among parties to the arrangement through a series of transactions not having any substantial commercial purpose


NDTV, India
100%
10%
50%
NNBV (N)
09.01. 08
25.03. 11
Merged
15.10.10
NBV (N)
28.12. 06
15.10.10
EM (N)
68.6%
90%
Merged
01.04.09
92%
50%
50%
NNIH (N)
10.04.08
NNPLC, UK
13.11.06
28.03.11
50%
NGEN, India
80 – 100%
NDTV Lab
13.12.06
NDTV
Imagine
21.05.06
NDTV
Lifestyle
13.12.06
NDTV
Convergence
13.12.06
Rs.642
Crores
31.4%
USBV (N)
NBCU, USA
WOS

Use of Rs.643.35 Crores by NNBV (N)



NDTV - Scheme

- Share Subscription Agreement was entered into between NNIH and USBV along with other parties viz. NNBV, NBCU, USA & NDTV, India on 23.05.2008:
  - For subscription of 91,458 shares (i.e. 31.4%) of NNIH by USBV, which is wholly owned subsidiary of NBCU for Rs.642.5 Crores (i.e. Rs.7,015.05/share)
  - Which is equivalent to 26% of effective indirect stake in NNPLC, UK
  - NBCU was granted option to acquire an additional effective indirect stake upto 24% in NNPLC, UK through NNIH in 3rd year
  - Agreement was made for 5 year Business Plan, which involved review each year. 1st Annual Review was scheduled on 31.03.2010

NDTV - Scheme

- Subsequent to share subscription agreement, the shareholding pattern of NNIH is as under:

Particulars	% of shares held
NNBV (N)	68.60%
USBV (N)	34.14

- NNIH immediately upon issue of shares to USBV, declared dividend of Rs.642.5 Crs out of security premium amount termed as ‘freely distributed reserves’ to NNBV.

- But no dividend was distributed to USBV

NDTV - Scheme

- NNIH merged with NBV on 01.04.2009.
- Agreement dated 14.10.2009 was entered to re-purchase the 31.4% of shares issued to USBV by NNBV for a consideration of Rs.58 Crs.
- This would mean that when the shares were bought back, NNIH was not in existence.
- This would further mean that NNBV held 90% of shares in NBV.
- Later NBV merged with NNBV on 15.10.2010.
- Due to the merger, NNBV held 92% shares in NNPLC

NDTV - Scheme

- Agreement dated 14.10.2009 was entered
  - For re-purchase of shares issued to USBV by NNBV
  - For a consideration of Rs.58 Crs (i.e. Rs.634.17/share)
  - Within a period of one year from the issues of shares
  - The shares were bought back even before the 1st annual review of 5 years business plan which was scheduled on 31.03.2010
- USBV, by selling shares to NNBV booked loss of Rs.584.46 Crs.

NDTV - Scheme

- NNPLC was incorporated on 30.11.2006 with a meagre capital of about Rs.40 Lakhs and was liquidated on 20.10.2011

- NNPLC did not carry any business activities except the following:

  - In FY 2007-08 it raised USD 100 Million through Step up Coupon Convertible Bonds. This was possible solely because, NDTV, India had given undertaking to provide corporate guarantee.

  - In FY 2008-09, 26% of its stake was transferred to USBV/NBCU for Rs.642.5 Crs. by way of issue of subscription equity of its parent company i.e. NNIH. Out of Rs.642.5 Crs., NNBV transferred Rs.274.5 Crs. to NNPLC as unsecured loan. NDTV, India is party to the loan agreement.

NDTV - Scheme

- In FY 2009-10:
  - NDTV, India through its subsidiary NNBV, re-purchased 26% indirect stake held by USBV/NBCU in NNPLC
  - NNPLC re-purchased US 100 Million Step up Coupon Convertible Bonds. The price of coupon bonds reflected Rs.399 Crs. as on 31.03.2008 and at Rs.509.50 Crs. as on 31.03.2009. The difference of Rs.110.50 Crs. was on account of currency fluctuation.

NDTV – Scheme

- Netherland:
  - Is a low tax jurisdiction
  - Has too generous tax exemption for dividend received
  - Has no beneficial owner test of witholding tax on dividend
  - Does not require company accounts or beneficial ownership to be publicly available
  - Does not maintain co-ownership details
  - is known for ‘virtually no substance requirement’ like a company does not require employee, it can run business through trust and management service
- Bermuda is similar to Netherland

NRA Iron & Steel

[2019] **412 ITR 161 SC**

NRA Iron & Steel [2019] 412 ITR 161 SC

- Issue is invocation of section 68 in respect of share issue in FY 2009-10
- It was a proceeding under section 147
- Assessee in its Return showed that money aggregating to Rs. 17,60,00,000/- had been received through Share Capital/Premium during the Financial Year 2009-10 from various companies situated at Mumbai, Kolkatta, and Guwahati
- Shares were issued at a premium of Rs.190 against face value of Rs.10
- Assessee submitted that the entire amount through normal banking channels by account payee cheques/demand drafts, and produced documents such as income tax return acknowledgments to establish the identity and genuineness of the transaction

AO’s findings

- None of the investor-companies which had invested amounts ranging between Rs. 90,00,000 and Rs. 95,00,000 as share capital could justify making investment at such a high premium of Rs. 190 for each share, when the face value of the shares was only Rs. 10

- Some of the investor companies were found to be non-existent

- Almost none of the companies produced the bank statements to establish the source of funds for making such a huge investment in the shares, even though they were declaring a very meagre income in their returns

- None of the investor-companies appeared before the A.O., but merely sent a written response through dak

Findings of CIT(A) and ITAT

- Respondent had filed confirmations from the investor companies,
- It filed their Income Tax Return, acknowledgments with PAN numbers,
- It filed copies of their bank account to show that the entire amount had been paid through normal banking channels,
- It thus discharged the initial onus under Section 68 of the Act, for establishing the credibility and identity of the shareholders

HC

- In revenue's further appeal where the assessee respondent did not appear, HC held that no substantial question of law arose.

Finding by the SC

- On further appeal by revenue, despite several notices, assessee did not appear
- The matter was heard ex parte
- Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions.
- The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness.

SC held as follows

- Phrase "any sum found credited in the books" in Section 68 of the Act is very wide and includes investments made by the introduction of share capital or share premium
- There was no material on record to prove share application money was received from independent legal entities.
- The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee
- Enquiries revealed that the investor companies had filed returns for a negligible taxable income, which would show they did not have capacity to invest
- There was no explanation as to why the investor companies had applied for shares at a high premium of Rs. 190 per share, when face value of the share was Rs. 10/- per share
- None of the so-called investor companies established the source of funds from which the high share premium was invested
- Mere mention of the income tax file number of an investor was not sufficient to discharge the onus

Take away

- There was a concurrent finding of fact by CIT(A) and ITAT.

- SC referred to Mohanakala 291 ITR 178 SC for its interpretation of section 68 but did not consider the other ratio of the said decision that question of fact found by ITAT should not be disturbed by HC/SC

- HC had held as follows;

This Court is of the opinion that the issues urged are on facts and the lower appellate authorities have taken sufficient care to consider the relevant circumstances including the extract of the chart with respect to the amounts received from each creditor. No substantial question of law arises

NRA Iron [2019] 418 ITR 449 (SC) –recall petition Company's arguments

- Court Notices were sent to the earlier registered office address of the Applicant – Company i.e. at 310, 3rd Floor, B-Block, International Trade Tower, Nehru Place, New Delhi. However, on 19.05.2014, the Applicant – Company changed its registered office to 211, Somdutt Chambers II, 9, Bhikaji Cama Place, New Delhi – 110066.

- Thereafter, on 23.01.2019, the registered office was again changed to 1205, Cabine No. 1, 89 Hemkunt Chambers, Nehru Place, New Delhi

- Affidavit of *dasti* service filed by the Revenue – Department on 19.12.2018, showed an acknowledgment receipt by Mr. Sanjeeva Narayan, the Chartered Accountant of the Applicant – Company on 13.12.2018

NRA Iron 418 ITR 449 (SC) –recall petition Company's arguments

- Mr. Sanjeev Narayan – Chartered Accountant, stated in the affidavit that he was the authorized representative of the Respondent – Company before the Income Tax Authorities but was not engaged before HC/SC

- He further submitted that he had received service on 13.12.2018 from one of the Inspectors of Department, but he *bona fide* believed that the documents were "some Income Tax Return documents from Income Tax Department

- He stated that he was suffering from an advanced stage of cataract, and had undergone a surgery in both the eyes on 04.01.2019 and 23.01.2019 respectively

- Company argued that he is not a principal officer and hence service is bad

NRA Iron 418 ITR 449 (SC) –recall petition Revenue's counter

- Department argued that Mr. Sanjeev Narayan was given due power of attorney

- Even though Mr. Sanjeev Narayan has stated that he underwent the cataract surgery on 04.01.2019 and 23.01.2019, this was much after the Notice had been served on 13.12.2018

- Mr. Sanjeev Narayan had appeared before the Tax Authorities after the date of service on 13.12.2018, and prior to his surgery, to represent the Applicant – Company and its sister concerns on 14.12.2018, 21.12.2018, 28.12.2018 and 29.12.2018.

SC held as follows:

- It is difficult to accept that the envelope containing the *dasti* Notice from this Court was considered to be "some Income Tax Return documents".

- The deponent does not at all disclose as to when the envelope containing the *dasti* Notice was ever opened.

- The ground urged that CA was suffering from an advanced stage of cataract, and hence was constrained from informing his clients is not worthy of credence as *dasti* Notice was served on 13.12.2018 much prior to surgery date : 04.01.2019.

- He represented the company on on 14.12.2018, 21.12.2018, 28.12.2018 and 29.12.2018

SC held as follows:

- CA being a power of attorney holder is an agent
- Section 2(35) defines principal officer as including agent
- Hence, it could be stated that CA is an agent and notice served on him was properly served

Take away

- Affidavit should not be lightly filed by CAs/lawyers
- SC could have initiated action on CA for misleading court : Like appearing in other matters post receipt of notice but before surgery
- Ground on service to principal officer ought not to have been urged without any preparation like provisions of Indian Contract Act
- No arguments were raised on the basis of applicable rule of SC Rules 2013 or any other internal SC rules on service
- A CA is not allowed to appear in SC and hence could not have been authorized to receive notices from SC

Take away

- A power of attorney : It is not a GPA but a specific power given

- Section 188 of Contract Act : An agent, having an authority to **do an act,** has authority to do every lawful thing which is necessary in order to do **such act**.

- Section 196 of Contract Act : Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or **to disown such acts.**

- Same bench in Dalmia Power 420 ITR 339 SC held procedure is a handmaid of justice

Take away

S. Nagaraj V. State of Karnataka (1993) Supp 4 SCC 595

- Justice is a virtue which transcends all barriers
- *Neither the rules of procedure nor technicalities of law can stand in its way*
- *The order of the court should not be prejudicial to anyone.*
- *Even the law bends before justice*
- *the root from which the power flows is the anxiety to avoid injustice*
- *It is either statutory or inherent. The latter is available where the mistake is of the court*
- *Technicalities apart if the court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order*

Take away

- Calling a CA/Lawyer as an agent and hence a principal officer under section 2(35) will have far reaching consequences
- Section 204 : Principal officer is a person responsible for paying
- Hence, he becomes liable to deduct tax
- Section 201 applies to the principal officer of a company
- Section 115O/R/QA etc would apply to the principal officer would apply
- Section 278B – Prosecution in the case of a company

I-Ven Interactive Ltd 418 ITR 662 SC

- AY 2006-07

- A notice under Section 143(2) was issued to assessee on 05.10.2007 at the assessee's address available as per the PAN database.

- A further opportunity was provided to the assessee vide notice under Section 143(2) of the 1961 Act on 25.07.2008 to the same address

- **CIT(A), ITAT and HC held the notice issued to wrong address is a non est notice and assessment is bad being without jurisdiction**

- **Department appeals to SC**

Revenue's arguments

- AO sent the notice under Section 143(2) to the assessee at the available address as per the PAN database.
- As such there was no intimation by the assessee to AO on change of address.
- Therefore notice was sent to the assessee on the available address as per the PAN database which is sufficient compliance
- High Court has not properly appreciated the fact that alleged communication dated 06.12.2005 from assessee to AO intimating new address of the assessee was never received by the Assessing Officer.
- Even today also assessee is not in a position to produce said communication.

Revenue's arguments

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- High Court has not properly appreciated the fact that alleged communication dated 06.12.2005 from assessee to AO intimating new address of the assessee was never received by the Assessing Officer.
- Even today also assessee is not in a position to produce said communication.

Assessee's arguments

- Change of address and change in the name of the assessee-company was intimated to the Registrar of Companies in Form-18

- Assessing Officer was in the knowledge of the new address, which is evident from the fact that the Assessment Orders for A.Y 2004-05 and A.Y. 2005-06 were sent at the new address

SC held as follows:

- The alleged communication dated 06.12.2005 is not forthcoming.
- Neither the same was produced before AO nor even before this Court.
- Filing of Form-18 with the ROC cannot be said to be an intimation to the Assessing Officer with respect to intimation of change in address
- No application was made by the assessee to change the address in the PAN data base and in the PAN database the old address continued
- Mere mentioning of the new address in the ROI without specifically intimating the AO with respect to change of address and without getting the PAN database changed, is not enough and sufficient

SC held as follows:

- Notices under Section 143(2) are issued on selection of case generated under automated system of the Department which picks up the address of the assessee from the database of the PAN.

- Therefore, the change of address in the database of PAN is must,

- In case of change in the name of the company and/or any change in the registered office or the corporate office and the same has to be intimated to the ROC in Form 18

- Thereafter, the assessee is required to approach the Department with the copy of the said document and seek for change of address in the departmental database of PAN

Take away:

- Section 139A(5)(d) requires a PAN holder to intimate AO any change in his address or in the name and nature of his business on the basis of which the PAN was allotted to him

- In the instant case, assessee failed to produce the communication dated 06.12.2005

- Prior to amendment to section 282 and notification of Rule 127, there did not appear to exist any prescribed procedure for picking the address

- When a return is picked for scrutiny, whether manually or otherwise, the address mentioned in the return should be the first criteria – It is a natural factor. Therefore, SC mentioning PAN Database may not be appropriate.

Take away:

- Caselaws on address to be picked from return:

❑CIT v. Mascomptel India Ltd. [2012] 345 ITR 58 (Delhi)

❑CIT v. Sunil Kumar Chhabra [2012] 250 CTR 195 (Punjab & Haryana)

❑Ashok Kumar Jain, New Delhi vs Ito, New Delhi on 30 August, 2017 ; I.T.A. No.3062/DEL/2014

- MOP [Manual of Office Procedure] Volume II – Technical of February 2003 appears to suggest that AIS [Assessee Information System] [i.e. PAN database] is the basis

- It also provides for updation of AIS on the basis of documentary proof. Paragraph 6.3 seems to hint that data in the return are to be uploaded in CIB system and use it as reference data for matching purpose in the same manner as PAN data

Take away:

- Section 282 deals with service of notice generally. The section was substituted by FA 2009 wef 01.10.2009

- Section 282(2) authorises the Board to make rules providing for addresses to which the communication may be delivered.

Take away:

- Rule 127(2) [Income Tax (Eighteenth amendment rules, 2015) with effect from 02.12.2015] provides for gathering the address

- In *Laxman Dass Khandelwal* [2019] 266 Taxman 171 (SC) it was held that section 292BB can cure any abnormality in the notice so issued by the department but it cannot cure complete absence of notice or it does not protect those so called actions wherein no notices were actually issued

- A notice issued to an incorrect address is as good as notice not issued

Snowtex Investment Ltd (2019) 414 ITR 227 SC

- In AY 2008-09, AO held that loss from share trading to be a speculation loss but profits from trading in derivatives is not speculative in view of Section 43(5)(d)

- AO thus did not allow loss from share trading to be set off against the profits from derivative

- ITAT held that assessee being in the business of share trading had treated the entire activity of the purchase and sale of shares which comprised both of delivery based and non-delivery based trading, as one composite business

- High Court held that profits which had arisen from trading in futures and options were not profits from a speculative business and hence set off is not allowable.

Assessee's contentions before SC

- First contention

- Explanation to section 73 as it then stood clarified that where the principal business of the company consists of the grant of loans and advances, the deeming fiction provided in the explanation would not be attracted.

- In the present case, it was urged that the principal business of the assessee for AY 2008-2009 was of granting loans and advances

- 84% of funds available were deployed for loans and advances

- Assessee is an NBFC under the provisions of the RBI Act 1934

Assessee's contentions before SC

- Second contention

- Explanation to Section 73 were amended so as to treat *trading in shares* as not speculative vide Finance (No. 2) Act 2014.

- There was an anomaly in as much as while trading in derivative [which is essentially speculative and non delivery based was removed from AY 2006-07, delivery based trading in share was inadvertently retained till AY 2014-15

- This amendment should be construed to be retrospective, though Parliament has brought it into force with effect from 1 April 2015

SC held as follows on first contention

- Assessee itself stated that share trading was its sole business during the assessment year in question i.e. A.Y. 2008-2009

- Contention of the assessee that *income alone cannot be taken into account and where the activity of granting loans and advances "is on a larger scale than the business of buying and selling shares" that would be an important indicator* was not considered necessary to be examined in the light of facts admitted by the assessee

- SC also noted that while the assessee had furnished loans and advances of Rs 11.32 crores during the assessment year, this included interest free lending to the extent of Rs 9.58 crores

Take away on first contention

- SC highlights the importance of assertion of fact before the lower authorities.

- Therefore, it is extremely important to be careful while drafting statement of facts before the AO as well as appellate authorities

- At the same time, to tie the assessee to a statement inadvertently made may not be desirable in the light of hard facts available on record.

- There cannot be assessment by concession : MR P Firm 56 ITR 67 SC

SC held as follows on second contention

- Having introduced an amendment to Section 73(4), the Parliament would have, if it intended to bring about a parity with the provisions of Section 43(5) introduced a specific amendment. Parliament, however, did not do so by the Finance Act 2005.

- It was only with effect from 1 April 2015 that an amendment was brought about to exclude trading in shares from the deeming provision contained in the *Explanation* to Section 73.

- Parliament may have had reasons to allow the situation to continue until the amendment was brought into force, including its view in regard to the stability of the stock market.

- Therefore, amendment by FA 2014 is not clarificatory

Take away on second contention

- Following Vijay Industries 412 ITR 1 SC, amendment to sec 73 was held to be prospective.
- Vijay Industries dealt with an adverse case of insertion of section 80AB and held it to be prospective on the basis of board circular explaining the insertion
- Insertion of words “suo motu” in the proviso to section 142(2C) by FA 2008 wef 1.4.2008 is retrospective though Circular 1/2009 called it prospective: Ram Kishan Das 413 ITR 37 SC
- Beneficial provision could be retro even if the FB makes it expressly prospective see para 24 and 26 : CALCUTTA EXPORT COMPANY 404 ITR 654 SC & Vatika Township **367 ITR 466 SC**
- **Relevant paragraphs 33 & 34 of Vatika was not reproduced in the judgment :** **R**etrospectively is attached to benefit of the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity

Ananda Social & Educational Trust (2020) 114 taxmann.com 693 (SC)

- The trust was formed as a society on 30-5-2008 and it applied for registration on 10-7-2008 *i.e.* within a period of about two months.

- No activities had been undertaken by the respondent Trust before the application was made.

- The Commissioner rejected the application on the sole ground that since no activities have been undertaken by the trust, it was not possible to register it, presumably because it was not possible to be satisfied about whether the activities of the trust are genuine

SC held as follows:

- Registration under section 12AA can be applied for by a trust which has been in existence for some time and also by a newly registered trust.

- There is no stipulation that the trust should have already been in existence and should have undertaken any activities before making the application for registration

- Since section 12AA pertains to the registration of the Trust and not to assess of what a trust has actually done, the term 'activities' in the provision includes 'proposed activities’.

SC held as follows:

- That is to say, a Commissioner is bound to consider whether the objects of the Trust are genuinely charitable in nature and whether the activities which the Trust proposed to carry on are genuine in the sense that they are in line with the objects of the Trust.

- In contrast, the position would be different where the Commissioner proposes to cancel the registration of a Trust under sub-section (3) of section 12AA of the Act.

- There the Commissioner would be bound to record the finding that an activity or activities actually carried on by the Trust are not genuine being not in accordance with the objects of the Trust.

- Similarly, the situation would be different where the trust has before applying for registration found to have undertaken activities contrary to the objects of the Trust

Section 32 – Explanation 1

Mother Hospital Pvt Ltd Vs CIT 2017-TIOL-120-SC-IT

11. In the instant case, records show that the construction was made by the firm. It is a different thing that the assessee had reimbursed the amount. The construction was not carried out by the assessee himself. Therefore, the explanation also would not come to the aid of the assessee.

Sections 41(1) and 28(iv)

- Mahindra and Mahindra 404 ITR 1 SC
- Its effect on section 56(2)(x) as well
- West Asia Exports [Mad. HC] 412 ITR 209

Section 40A(3)

- No disallowance if paid to agent who is required to pay in cash as per rule 6DD(k) in The Solution 382 ITR 337 Raj. It applied Attar Singh Gurmuk Singh 191 TR 667 SC even post omission of rule 6DD(j) see para 10 and para 11

- Expenditure upto the limit is allowable and only beyond the limit calls for disallowance : M G Pictures (Madras) Ltd 2015-TIOL-37-SC-IT

- Shankar S Koliwad [ITA 5040/2009] Karnataka High Court