Supreme Court

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

Dalmia Power Ltd 420 ITR 339 SC

- Assessment Year 2016-2017
- About 9 companies merged with 2 companies
- The Appointed Date of the Schemes was 01.01.2015
- The Schemes were duly approved and sanctioned by the NCLT, Guwahati *vide* Orders dated 18.05.2017 and 30.08.2017. NCLT, Chennai sanctioned the Schemes *vide* Orders dated 16.10.2017, 20.10.2017, 26.10.2017, 28.12.2017, 10.01.2018, 20.04.2018 and 01.05.2018.
- Transferee Companies manually filed revised Returns of Income on 27.11.2018

Dalmia Power Ltd 420 ITR 339 SC

- Revised Returns were filed claiming losses – beyond time limit of sec 139(5) i.e. 31.03.2018

- Department initially issued notices under sec 143(2) but later recalled notice saying returns are non est

SC noted the following:

- Scheme as sanctioned provided that transferee companies are entitled to file revised Returns of Income, after the prescribed time limit for filing or revising the returns had lapsed, without incurring any liability on account of interest, penalty or any other sum

- Sub-section (5) of section 230 requires that a notice of the meeting under sub-section (3) of Section 230 along with all the documents pertaining to the scheme, shall be sent to the Central Government, and statutory authorities such as the Income Tax Department, RBI, SEBI, ROC etc. and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement.

- The statutory authorities could raise objections within 30 days from the date of receipt of the notice, failing which, it would be presumed that they had no representation to make on the proposed schemes of compromise, arrangements and amalgamations.

SC noted the following:

- Rule 8(3) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that any representation made to the statutory authorities notified under Section 230(5), shall be sent to the NCLT within a period of thirty days from the date of receipt of such notice, and a copy of such representation shall simultaneously be sent to the concerned companies.

- In case no representation is received within thirty days, it shall be presumed that the statutory authorities have no representation to make on the proposed scheme of compromise or arrangement

- The Department did not raise any objection within the stipulated period of 30 days despite service of notice.

Findings of SC

- Schemes attained statutory force *J.K. (Bom.) (P.) Ltd.* v. *New Kaiser-I-Hind Spg. & Wvg. Co. Ltd.* [1970] 40 Comp. Cas. 689 not only *inter se* the Transferor and Transferee Companies, but also *in rem,* since there was no objection raised either by the statutory authorities, the Department, or other regulators or authorities, likely to be affected by the Schemes

- Section 139(5) which will apply in the case of omission or a wrong statement would not apply to the instant case

Take away

- Court recognises the principle – lex non cogid ad impossibilia [para 8]
- Amalgamation is covered by Section 170 [para 10]
- When the department does not object in the course of amalgamation, it is estopped from raising objection subsequently.
- Section 119(2)(b) would not to apply in such case [para 9]
- Effect of on GAAR where the scheme is blessed by courts

Take away

- Rules of procedure have been construed to be the handmaiden of justice *Kailash* v. *Nankhu* [2005] 4 SCC 480; *State of Punjab* v. *Shamlal Murari* [1976] 1 SCC 719.

- The purpose of assessment proceedings is to assess the tax liability of an assessee correctly in accordance with law *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC).

Genpact India (P.) Ltd. v. DCIT [2019] 419 ITR 440 (SC)

- There were two buybacks in PY 13-14, AY 14-15

- ❑Out of opening share capital of 25,68,700 shares held by its sole shareholder and holding company Genpact India Investment, Mauritius, the appellant bought back 2,50,000 shares in May 2013 at the rate of Rs.32,000/- per share for a total consideration of Rs.800 crores
- ❑On 10.09.2013, a scheme for arrangement was approved by the High Court of Delhi in Company Petition No.349 of 2013. Pursuant thereto, the appellant bought back another tranche of 7,50,000 shares at the rate of Rs.35,000 per share for a total consideration of Rs.2,625 crores from said Genpact India Investment, Mauritius

- Section 115QA was inserted with effect from 01.06.2013

Genpact India (P.) Ltd. v. DCIT [2019] 419 ITR 440 (SC)

- Department made 10 additions out of which one addition related to tax on second buyback under section 115QA
- Assessee appealed against 9 additions before CIT(A) and got relief.
- Department is in appeal before ITAT against the same
- Assessee filed writ petition on tax under section 115QA
- Interim orders were passed by HC on WP however, without dealing with contention of revenue on alternative contention

Genpact India (P.) Ltd. v. DCIT [2019] 419 ITR 440 (SC)

- At the time of final hearing of WP, department raised the question on admissibility on alternate remedy

- HC entertained the contention and dismissed the WP by holding that levy of tax under section 115QA is part of assessment order passed under section 143(3)

Findings of SC

- Two issues arise for consideration, one regarding availability of appellate remedy and the other concerning refusal to exercise Jurisdiction under Article 226 because of availability of an alternate efficacious remedy.

- During interim proceedings, without rejecting the preliminary objection, notice was issued in the matter by the HC

SC held as follows:

- Section 246A(1)(a) has three situations as follows;

- ❑An order against the assessee, where the assessee denies his liability to be assessed under this Act, or
- ❑An intimation under sub-section (1) or sub-section (1B) of Section 143 where the assessee objects to the making of adjustments, or
- ❑Any order of assessment under sub-section (3) of Section 143 or Section 144, where the assessee objects:— xxx

- The first situation cannot be constrained by section 143(3) and could go beyond it

- An order passed under section 115QA is covered by first situation

SC held as follows:

- *The expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances*

- High Court was justified in refusing to entertain the writ petition because of availability of adequate appellate remedy as per *CIT* v. *Chhabil Dass Agarwal* [2014] 1 SCC 603, 357 ITR 357 SC

- The submission that once the threshold was crossed despite the preliminary objection being raised, the High Court ought not to have considered the issue regarding alternate remedy, may not be correct

Take away:

- Wide meaning is given to the expression "denial of liability“
- Order of HC holding that demand under section 115QA is part of order under section 143(3) was not approved [by implication]
- However, on alternate remedy, while relying on Chhabil Das, the SC overlooked [though reproduced] the escape route provided in the decision
- 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

Take away:

- In the instant case, the buyback being in accordance with sanction of Court was not as per section 77A of the Companies Act

- The amendment by FA 2016 to section 115QA which defined buyback to include all kinds of buyback was effective 01.06.2016.

- GAAR was also not in place during the relevant assessment year

- Court did not consider a series of decisions holding alternate remedy is no bar of matter goes to the root of the issue

Take away: Where revenue went wrong

- Could it have invoked section 2(22)?

❑Section 2(22)(iv) exempted a buyback as per section 77A of Companies Act from being dividend and not the instant case.

❑Therefore, the buyback payment made in the instant case would be dividend to the extent of accumulated profits.

❑Dividend v. capital gain as per DTAA

- Could it have invoked section 46A?

❑Possible to invoke as Explanation would have limited reference to section 77A unlike section 2(22)(e)(iv)

❑If so invoked, assessee would have resorted to DTAA

Take away:

- As regards raising the contention of alternate remedy at the final hearing stage, the SC referred to *State of U.P.* v. *U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti* [2008] 12 SCC 675 SC.
- In the said case, SC held as follows;

'38. With respect to the learned Judge, it is neither the legal position nor such a proposition has been laid down in Suresh Chandra Tewari v. District Supply Officer AIR 1992 All 331 that once a petition is admitted, it cannot be dismissed on the ground of alternative remedy. It is no doubt correct that in the headnote of All India Reporter (p. 331), it is stated that "petition cannot be rejected on the ground of availability of alternative remedy of filing appeal". But it has not been so held in the actual decision of the Court. The relevant para 2 of the decision reads thus: (Suresh Chandra Tewari case (supra)

Take away:

2. At the time of hearing of this petition a threshold question, as to its maintainability was raised on the ground that the impugned order was an appealable one and, therefore, before approaching this Court the petitioner should have approached the appellate authority. Though there is much substance in the above contention, we do not feel inclined to reject this petition on the ground of alternative remedy having regard to the fact that the petition has been entertained and an interim order passed

- As could be noticed, the SC misread the above paragraph and held that question of alternate remedy could be raised at the stage of final hearing. This mistake is continued in Genpact's case.

Take away:

SC in the referred case continued to state:

Even otherwise, the learned Judge was not right in law. True it is that issuance of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ petition is not maintainable. In our judgment, however, it cannot be laid down as a *proposition of law* that once a petition is admitted, it could *never* be dismissed on the ground of alternative remedy. If such bald contention is upheld, even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once the High Court has entertained a writ petition albeit wrongly and granted the relief to the petitioner.'

Take away:

- Point for consideration is how there could be piecemeal appeal

- While 9 issues have not gone to ITAT, one issue would go to CIT(A)

Cognizant [2020] 115 taxmann.com 84 (SC)

- From the cause title, the Petitioner appears to be a private limited company
- In May 2016, the company effected buybacks to its shareholders of Mauritius and USA under a scheme of arrangement sanctioned vide court order on 18.4.2016
- While it deducted tax in respect of USA shareholders, it did not effect TDS in respect of shareholders of Mauritius.
- On 21-11-2017, department wrote a letter in connection with non-payment of tax on the remittances made to the non-residents, in Financial Years 2015-16 and 2016-17

Cognizant [2020] 115 taxmann.com 84 (SC)

- The requisite details were furnished by the appellant *vide* letters dated 1-12-2017 and 5-12-2017 whereafter meetings were held between the officials of the appellant and the officers of the Department.

- In the meanwhile, on 20.3.2018, the company filed an application with AAR

- Later, a communication was addressed by the Department to the appellant on 22-3-2018

- In the aforesaid letter, inter alia it was stated that the assessee company is required to remit the taxes (calculated @ 15% 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 u/s. 115-P of the Act, immediately, failing which the department will proceed with coercive steps

Cognizant [2020] 115 taxmann.com 84 (SC)

- Company preferred a writ petition challenging that the aforesaid letter cannot be regarded as an order and hence demand of tax is bad

- The Single Judge of Madras HC dismissed the petition by holding that aforesaid letter is an order and company has appellate remedy. On merit also, it was held that payment is dividend.

- The Division bench while upholding the order of Single Judge on alternate remedy, quashed his observations on merit

Proceedings before SC :

- Company argued that the instance case is not covered by section 115O and intimation dated 22.3.18 is at the most a SCN
- Revenue argued that case is covered by section 115O
- After lengthy argument, revenue agreed to treat the letter as SCN
- SC suggested that company 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 22-3-2018 as a show cause notice.
- An appropriate affidavit of undertaking to withdraw the proceedings initiated before the AAR has since then been filed by the appellant.
- An affidavit has also been filed on behalf of the Department

SC held as follows:

- The communication dated 22-3-2018 shall be treated as a show cause notice calling upon the appellant to respond with regard to the aspects adverted to in said communication

- 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

- 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 3-4-2018 and as affirmed by SC *vide* its order dated 14-10-2019, shall continue to be in operation

Take away

- In this case, department did not invoke section 115QA as it was a court sanctioned buyback not covered by section 77A

- This stand is in conflict with the stand taken in Genpact.

- In both cases, it was court sanctioned buyback and before 01.06.2016 i.e. amendment to section 115QA making section applicable to all types of buybacks

Take away

- Having held that the intimation dated 22.03.2018 as only a SCN, the SC continued the interim order of Single Judge which continued the attachment.

- The interim order asked for payment of 15% of demand and bank guarantee or security by way of fixed deposits for the balance and till such compliance, permitted the continued attachment of certain bank accounts.

- Once the matter is considered to be at SCN, there cannot be any recovery in the absence of demand. Section 226 does not simply apply.

- Even provisional attachment under section 281B is not permissible as there is no pendency of proceeding for assessment of income.

Take away

- Could it have invoked section 2(22)?

❑Section 2(22)(iv) exempted a buyback as per section 77A of Companies Act from being dividend and not the instant case.

❑Therefore, the buyback payment made in the instant case would be dividend to the extent of accumulated profits.

❑Dividend v. capital gain as per DTAA

- Could it have invoked section 46A?

❑Possible to invoke as Explanation would have limited reference to section 77A unlike section 2(22)(e)(iv)

❑Section 46A v. Section 56(2)(i)

❑If so invoked, assessee would have resorted to DTAA

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 on 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
- 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
- Principal officer is a person responsible for paying under section 204 [TDS]
- Hence, he becomes liable to deduct tax
- Section 201 applies to the principal officer of a company
- All other provisions of the Act which would apply to the principal officer would apply

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

- Assessee land owner entered into an agreement to sell, on 15.05.1998, with one Vijay Santhi Builders Limited for a total sale consideration of Rs.5.5 crores

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

- Pursuant to the above agreement, a Power of Attorney was executed on 27.11.1998, 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)

- The aforesaid agreement to Sell ran into dispute and subsequently, a Memo of Compromise had also been entered into between the parties dated 19.07.2003.

- 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 cannot be said to be 'possession' within the meaning of 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

- 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

- 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

- 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

- 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 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 1st November, 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.

Super Malls (P.) Ltd [2020] 115 taxmann.com 105 (SC)

- A search & seizure operation u/s 132(1) of the Act was carried out on 8/9-4-2010 at the residential/business premises of Sh. Tejwant Singh & Sh. Ved Parkash Bharti Group of cases, Karnal, Panipat & Delhi

- a survey u/s 133A of the IT. Act, 1961 was also carried out at the business premises of M/s Super Mall (P) Ltd. Karnal & New Delhi.

- During the course of search on 8/9-4-2010 at residence of Sh. Ved Parkash Bharti who is a Director in the assessee company M/s Super Mall (P) Ltd., Pen drives were found and seized as per Annexure-3 from vehicle No. HR06N-0063 parked in front of the residence of Sh. Ved Parkash Bharti.

- These documents contain the details of cash receipt on sale of shop/offices at M/s Super Mall, Karnal also beside other concerns.

Super Malls (P.) Ltd [2020] 115 taxmann.com 105 (SC)

- AO issued notice under section 153C to the assessee
- Satisfaction was recorded qua the assessee
- Assessee raised objection as regards jurisdictional condition not being satisfied.

Satisfaction note

	"Name and address of the assessee	**:**	**M/s Super Malls (P) Ltd. Sector 12, HUDA, Karnal Regd. Office at 51, Transport**
	Centre		Punjabi Bagh, New Delhi.
	PAN	:	AAICS2163F
	Status	:	Company

Reasons/Satisfaction note for taking up the case of M/s Super Malls (P) Ltd. Sector-12, HUDA, Karnal Regd. Office at 51, Transport Centre, Punjabi Bagh, New Delhi under section 153C of the Income-tax Act, 1961.

SC held as follows:

- SC in para 6 recognizes the mandatory conditions:

- ❑AO the searched person must be "satisfied" that, *inter alia*, any document seized or requisitioned "belongs to" a person other than the searched person.
- ❑AO, after recording such satisfaction by the Assessing Officer of the searched person, may transmit the records/documents/things/papers etc. to the Assessing Officer having jurisdiction over such other person.
- ❑After receipt of the aforesaid satisfaction and upon examination of such other documents relating to such other person, the jurisdictional Assessing Officer may proceed to issue a notice for the purpose of completion of the assessment

However, in para 6.1, the following is held:

- There can be two eventualities. In one case, AO of the searched person is different from AO of the other person and in another case, the AO of the searched person and the other person is the same.

- Where AO of the searched person is different from AO of the other person, there shall be a satisfaction note by AO of the searched person and as observed hereinabove that thereafter AO of the searched person is required to transmit the documents so seized to AO of the other person.

- AO of the searched person simultaneously while transmitting the documents shall forward his satisfaction note to AO of the other person and is also required to make a note in the file of a searched person that he has done so.

- However, the same is for the administrative convenience and the failure by AO of the searched person, after preparing and dispatching the satisfaction note and the documents to the AO of the other person, to make a note in the file of a searched person, will not vitiate the entire proceedings under section 153C of the Act against the other person.

However, in para 6.1, the following is held:

- Likewise, the satisfaction note by AO of the searched person that the documents etc. so seized during the search and seizure from the searched person belonged to the other person and transmitting such material to AO of the other person is mandatory.

- However, in the case where AOs of both persons is the same, it is sufficient by AO to note in the satisfaction note that the documents seized from the searched person belonged to the other person.

- Once the note says so, then the requirement of Section 153C of the Act is fulfilled.

- There can be one satisfaction note prepared by AO, that the documents seized/recovered from the searched person belonged to the other person.

- In such a situation, the satisfaction note would be *qua* the other person.

- The second requirement of transmitting the documents so seized from the searched person would not apply

Take away:

- SC completely endorses and reiterates verbatim what Ganapati Fincap in 395 ITR 692 Del

- Having recognized that the satisfaction and handing over and making a note in the file of the searched person are mandatory conditions, SC holds that the same is for the administrative convenience and the failure by AO to make a note in the file of a searched person, will not vitiate the entire proceedings under section 153C of the Act against the other person

- Where the AO is same, SC holds that one satisfaction note would suffice

- SC holds that such satisfaction note is qua the other person.

Take away:

- In Calcutta Knitware 362 ITR 673 SC [para 44], clearly held as follows;

❑For the purpose of Section 158BD of the Act a satisfaction note is *sine qua non* and must be prepared by the assessing officer before he transmits the records to the other assessing officer who has jurisdiction over such other person.

❑The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person

Take away:

- If both the AOs are same, there is no question of handing over.

- This proposition does not seem right as cash seized has to move from PD account of searched person to the PD account of the other person.

Maruti Suzuki India Ltd. [2020] 421 ITR 510 (SC)

- Assessee was following net basis of accounting

- At the end of the Assessment year 1999-2000 an amount of Rs. 69,93,00,428/- was left as unutilised MODVAT credit. In the return it was claimed that the Company was eligible for deduction under section 43B of the Income-tax Act as an allowable deduction.

- Similarly, the Company claimed deduction under section 43B of an amount of Rs. 3,08,88,171/-in respect of Sales Tax Recoverable Account.

- The Assessing Officer disallowed the claim of deduction of Rs. 69,93,00,428/- as well as Rs. 3,08,99,171/-.

SC held as follows : status of MODVAT credit

- Crucial words in section 43B(*a*) are "any sum payable by the assessee by way of tax, duty, cess or fee...".

- Unutilised credit under MODVAT scheme is not sum payable by the assessee by way of tax, duty, cess.

- The scheme under section 43B is to allow deduction when a sum is payable by assessee by way of tax, duty and cess and had been actually paid by him.

SC held as follows : status of MODVAT credit

- The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the appellant.

- When the assessee pays the cost of raw materials where the duty is embedded, it does not *ipso facto* mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs.

- It is merely the incident of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to the same.

- Therefore unutilised credit under MODVAT scheme does not qualify for deductions under section 43B of the Income-tax Act

SC held as follows : Subsequent utilisation

- SC rejected the contention that since the unutilised credit was utilised for payment of Excise Duty on the manufactured vehicles by April of AY, the said amount ought to have been allowed as permissible deduction under section 43B in terms of the first Proviso.
- The crucial words in the proviso to Section 43B are "in respect of the previous year in which the liability to pay such sum was incurred". The proviso takes care of the situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in the next financial year before the date of submission of the Return.
- In the present case, there was no liability to adjust the unutilised MODVAT credit in the year in question
- Had there been liability to pay Excise Duty by the appellant on manufacture of vehicles, the unutilised MODVAT credit could have been adjusted against the payment of such Excise Duty.

SC held as follows : Subsequent utilisation

- In the present case, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year *i.e.* year beginning from 1-4-1999

- What we are concerned with is unutilised MODVAT Credit as on 31-3-1999 on which date the assessee was not liable to pay any more Excise Duty.

Take away

- Technically, the decision is correct as section 43B starts with the words "Notwithstanding anything contained in any other provision of this Act, a ***deduction otherwise allowable*** under this Act….

- However, the decision of SC in **CIT Vs Modipon Ltd 400 ITR 1 SC was not brought to the notice of the Court**

Modipon Ltd 400 ITR 1 SC para 9

- Deposit of Excise Duty in PLA is a statutory requirement designed to bring in orderly conduct in the matter of levy & collection of duty when both manufacture and clearances are a continuous process.

- Debits against the advance deposit in the PLA have to be made of amounts of excise duty payable on excisable goods cleared during the previous fortnight.

- Deposit once made is adjusted against the duty payable on removal and the balance is kept in the account for future clearances/removal.

- No withdrawal from the account is permissible except on an application to be filed before the Commissioner who is required to record reasons for permitting an assessee to withdraw any amount from the PLA.

Modipon Ltd 400 ITR 1 SC para 9

- The self removal scheme and payment of duty under the Act and the Rules clearly shows that upon deposit in the PLA the amount of such deposit stands credited to the Revenue with the assessee having no domain over the amount(s) deposited

- Having regard to the object behind the enactment of Section 43B and the preceding discussions, it would be consistent to hold that the legislative intent would be achieved by giving benefit of deduction to an assessee upon advance deposit of central excise duty notwithstanding the fact that adjustments from such deposit are made on subsequent clearances/removal effected from time to time.

Take away: GST Regime

- Electronic cash ledger and Electronic credit ledger

- **Refex Industries Ltd Vs Assistant Commissioner of CGST & CE** 2020-TIOL-382-HC-MAD-GST : No interest is leviable in respect of belated adjustment of ITC

Take away:

- Gross method v. net method
- Section 145A implications
- In Indo Nippon 261 ITR 275 SC, it was held that whichever method is followed, it is revenue neutral

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

- AY 12-13

- On 29 January 2013, a scheme for 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.

- The case was selected for scrutiny by the issuance of a notice under Section 143(2) on 26 September 2013, 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* v. *State of Kerala* 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:

- 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
- Prior intimation v. participation
- What would have been the position if there is no prior intimation
- 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

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

Take away:

- 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

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: 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.

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

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

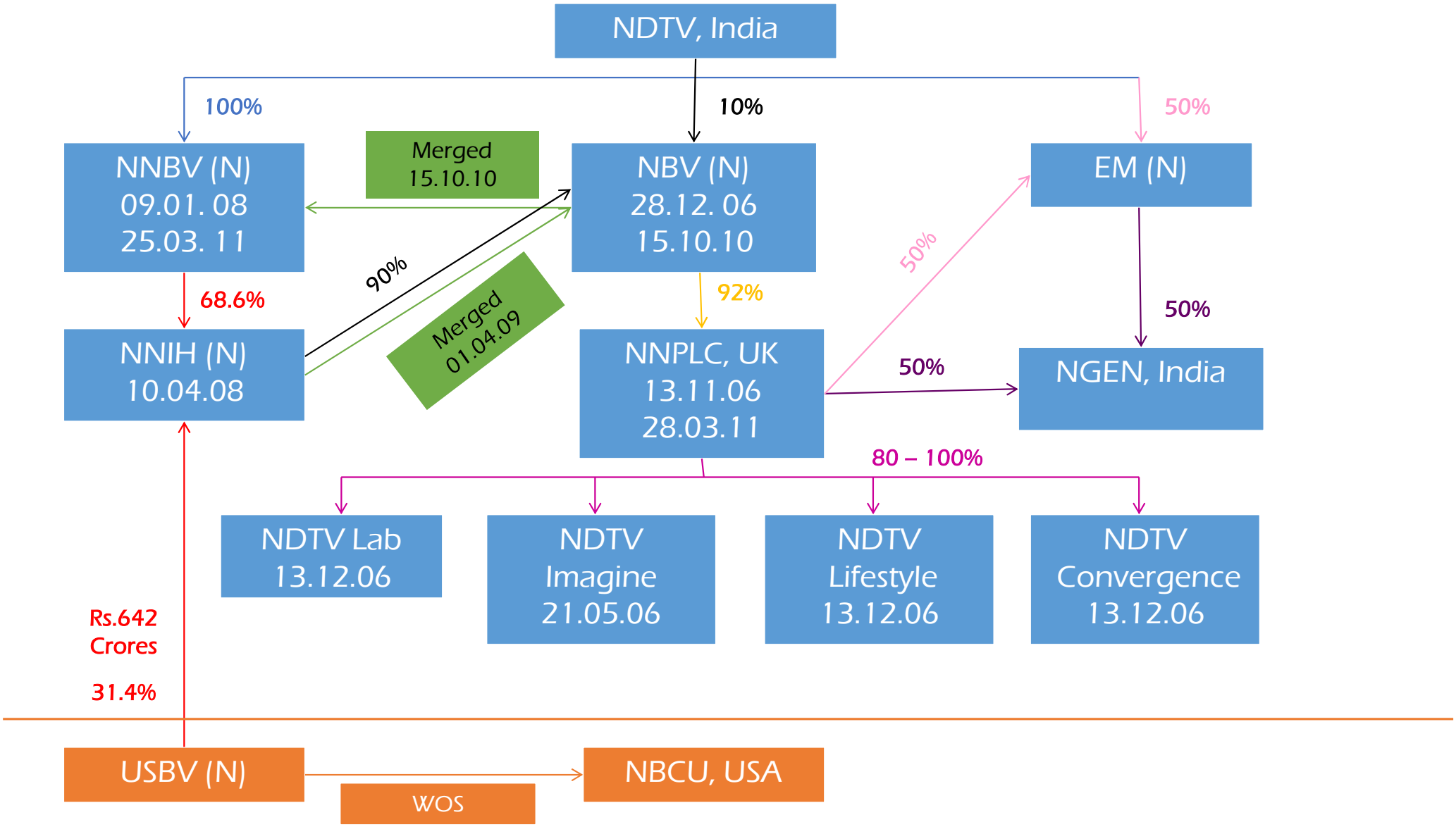
- Can money found credited in books of subsidiary be regarded as credit in NDTV's books

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

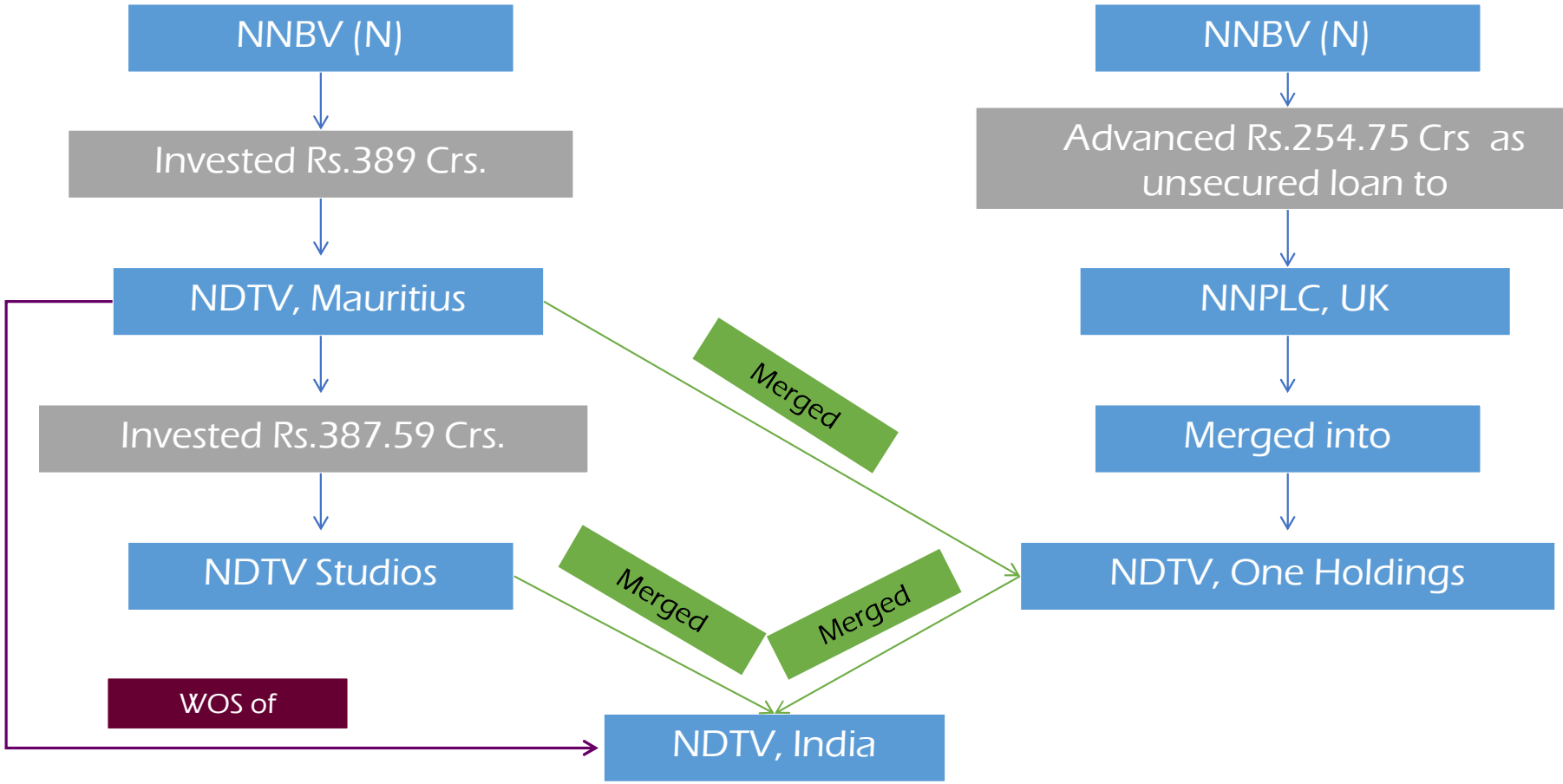
- Even otherwise, how entire USD 100 mn [Rs.400 Cr] can be taxed in the hands of NDTV when NS bought back the bonds by paying USD 72.4 mn leaving only USD 27.6 mn?

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

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.

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- 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

Gautam Khaitan [2020] 420 ITR 140 (SC)

- The Black Money Act, was passed by the Parliament on 11.05.2015 and it has received Presidential assent on 26.05.2015.

- Sub-section (3) of Section 1 provides, that save as otherwise provided in the said Act, it shall come into force on the 1st day of April, 2016.

- However, by the notification/ order notified on 01.07.2015, it has been provided, that the Black Money Act, shall come into force on 01.07.2015, *i.e.*, the date on which the order is issued under the provisions of sub-section (1) of Section 86 of the Black Money Act.

- Whether the High Court was right in observing that while exercising powers under the provisions of sections 85 and 86 of the Black Money Act, the Central Government could not have made the said Act, retrospectively applicable from 01.07.2015

Section 86 of BM Act

(*1*) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty :

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Act come into force.

(*2*) Every order made under this section shall be laid before each House of Parliament.

SC held as follows:

- Section 59 of the Black Money Act, provided that such a declaration was to be made on or after the date of commencement of the Black Money Act, but on or before a date notified by the Central Government in the Official Gazette.

- The date so notified for making a declaration is 30.09.2015, whereas, the date for payment of tax and penalty was notified to be 31.12.2015.

- As such, an anomalous situation was arising if the date under sub-section (3) of Section 1 of the Black Money Act, was to be retained as 01.04.2016, then the period for making a declaration would have been lapsed by 30.09.2015, and the date for payment of tax and penalty would have also been lapsed by 31.12.2015.

SC held as follows:

- However, in view of the date originally prescribed by sub-section (3) of Section 1 of the Black Money Act, such a declaration could have been made only after 01.04.2016.

- Therefore, in order to give the benefit to the assessee(s) and to remove the anomalies the date 01.07.2015, has been substituted in sub-section (3) of section 1 of the Black Money Act, in place of 01.04.2016.

- This is done, so as to enable the assessee desiring to take benefit of section 59 of the Black Money Act. By doing so, the assessees, who desired to take the benefit of one-time opportunity, could have made declaration prior to 30th September, 2015 and paid the tax and penalty prior to 31st December, 2015.

SC held as follows:

- It would further be relevant to note that sub-section (3) of Section 1 of the Black Money Act, itself provides that save as otherwise provided in this Act, it shall come into force on 1st day of July, 2015.

- A conjoint reading of the various provisions would reveal, that the Assessing Officer can charge the taxes only from the assessment year commencing on or after 01.04.2016.

- The date has been changed only for the purpose of enabling the assessee(s) to take benefit of Section 59 of the Black Money Act.

- The power has been exercised only in order to remove difficulties.

Take away

- Power to remove difficulty is not the same as power to advance date of the Act
- The very power under section 86 can be exercised after the Act comes into force.
- When very section 86 comes into force on 1.4.2016, the power thereunder cannot be used to make the BM Act applicable ahead of 1.4.2016.
- Proper course of action is to issue an order under section 86 by allowing extended time for compliance under section 59
- Else, issue notification extending the date of compliance under section 59 beyond 01.04.2016

Take away

- The date so notified for making a declaration i.e. 30.09.2015 and the date for payment of tax and penalty was notified i.e. 31.12.2015 could have been amended to put the same beyond 1.4.2016

- Alternatively, the Parliament could have always amended section 1(3) to have effect earlier than 1.4. 2016.

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